Effective Mediation in Wage and Hour Litigation

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I. Introduction

With the growth of mediation as a means to resolve wage and hour litigation, developing effective mediation strategies has become an essential tool for practitioners. Mediation offers parties the ability to make hands-on decisions concerning the outcome of their dispute at virtually any stage in the process. As one mediator aptly stated, “Mediation holds that the parties, who must live with the outcome, who know the landscape best, and who care most about the outcome, should be the decision-makers.”

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1 Joseph Tilson and Jeremy Glenn represent and counsel management clients in connection with all types of labor and employment matters arising under federal and state law. Mr. Tilson concentrates on representing employers in complex class and collective actions involving overtime and other wage-related claims under the Fair Labor Standards Act (FLSA) and state laws around the country.

2 Michael J. Leech, How Did You Do That? Trade Secrets of a Mediator, CBA RECORD (June/July 2004).
Indeed, many courts now routinely require some form of alternative dispute resolution proceeding, including mediation, early in the litigation or at some point before trial.

With mediation, however, one size does not fit all. Mediation of large collective or class actions in the wage and hour context raises a distinct set of options and opportunities, many of which are not implicated in other types of employment litigation. This paper discusses mediation strategy from the authors’ perspective, which is that of management attorneys, and includes an in-depth look at what makes an effective advocate in the particular context of wage and hour mediations. This paper begins with a discussion of the factors that should be considered in deciding when and with whom to mediate. Then, this paper discusses the pre-mediation steps that can be taken to maximize the productivity of the mediation and steps that can be taken during the mediation to increase the likelihood of reaching a resolution. Finally, this paper outlines a few key considerations in documenting settlement.

II. Mediation Strategy

To take full advantage of the benefits of mediation, the effective advocate must develop a mediation strategy. Among the myriad of elements to consider, a mediation strategy should consider the timing of the mediation, mediator selection, the content of written submissions to the mediator, the negotiating approach to be utilized, and the presence of clients or other interested persons.

A. Timing

As an initial consideration, the advocate must consider when is the best time to mediate a case. Many lawyers believe that the best time to mediate is after the close of
discovery. At that point in the dispute, both sides have had the opportunity to become informed as to the strengths and weaknesses of their case, and as a result, may be more likely to reach an agreement. Additionally, following discovery, the parties tend to be personally and financially invested in the dispute, perhaps even to the point of figurative exhaustion, and therefore more interested in finding a way to end the litigation.

Others assert that mediating a case as early as possible is ideal, as it limits the expense and time drain of discovery. At this point, the defendant has likely conducted an investigation in response to the complaint, and has the best opportunity to present the strengths of its case while minimizing the risk that negative information will be discovered. Even so, the defense should expect a request for pre-mediation discovery from the plaintiffs’ counsel. Often a sampling of time records, job duties and payroll records from the relevant statute of limitations period can be an effective way to educate both sides without the burden and expense of full fact discovery. This enables both sides to have an informed basis from which to make decisions at mediation.

By mediating early in the litigation, the parties usually have fewer costs sunk into the dispute, and with the prospect of significant costs yet to come, the parties may be more willing to settle. Another reason to mediate early is the likelihood that the judge or decision-maker has yet to make any definitive rulings especially with regard to FLSA conditional certification or a Rule 23 class certification. Often, an important procedural

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or substantive ruling can greatly increase or decrease the bargaining power of one side. On the contrary, when both sides face uncertainty with regard to the potential outcome of an important ruling, the bargaining power tends to be more evenly distributed.

The above viewpoints represent, perhaps, the extreme positions of when to mediate a wage hour lawsuit – very early in the case or after discovery is complete. The authors’ experience in mediation suggests that the best time to mediate a case is following some preliminary discovery. Unless and until the parties have conducted some discovery, mediation is often frustrating and ultimately ineffective because the parties approach the mediation with widely divergent views of the facts in dispute. Parties are not likely to reach an agreement before attaining a realistic sense of the strengths and weaknesses of their opponent. The effective advocate will develop a litigation plan that enables both clients and their legal counsel to attain this information sooner rather than later.

The use of sampling as described above can be an efficient tool. In addition, it may be necessary in some cases to conduct depositions of the named plaintiffs and perhaps representative management witnesses to focus the dispute and narrow the gap between understanding between the claims in the litigation and the practices in the workplace. Another type of limited pre-mediation discovery may include giving the plaintiffs’ lawyers access to the workplace. Especially when the lawsuit involves allegations that employees performed off-the-clock work, a limited tour of the worksite for plaintiffs’ counsel can have a significant impact. Of course, the parties must agree

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5 The adage that “a picture is worth a thousand words” rings true in wage and hour mediation if the plaintiffs’ lawyers actually observe in the workplace activity such as donning and doffing that corroborates the defense lawyers’ description. In the right case,
on a protocol that protects the interest of both sides in the event mediation is not successful. With some or all of these steps taken, the parties can engage in an informed settlement dialogue at a relatively early stage in the process.

B. Mediator Selection

Selecting the right mediator depends on a number of factors, including, location, availability, cost, mediator style, mediator experience, and mediator reputation. As an initial matter, the mediator should have a proven track record as a neutral and be willing to provide references from attorneys who engaged the mediator even if their particular case or cases did not settle.

Mediators fall into two broad categories – evaluative and facilitative. Evaluative mediators are known for offering their opinion on how the parties should settle the case.\(^6\) On the other hand, facilitative mediators are known for allowing the parties to come to their own conclusion as to how to settle the case.\(^7\) In wage and hour cases, the parties are generally best served by selecting a mediator with evaluative tendencies, which means that the mediator has substantive knowledge and experience with wage and hour law litigation. With substantive knowledge of the federal and state wage and hour laws at the center of the dispute, the mediator will be able to better understand the issues and communicate with counsel and the parties in a common language unique to wage and 


\(^7\) Id.
hour disputes. This knowledge, in turn, will be valuable help to the parties in exploring a settlement.

Selecting a mediator with extensive experience in wage and hour matters also will increase the likelihood that both sides will respect and value the mediator’s evaluation of the respective positions of the parties. A mediator with knowledge of wage and hour laws can act as a “reality check” for the parties by providing each with a credible assessment of the weaknesses of their respective cases -- a task that is often difficult to accomplish by the client’s attorney because of pressure to focus on the positive aspects of the client’s case. Although it is rare to find a mediator with a background of both employee representation and company representation, substantive experience gained from litigating FLSA cases and knowledge of the law adds value regardless of which side their the prior advocacy supported. The key is that both sides to the mediation respect the substantive expertise of the mediator even if they do not ultimately agree with his or her evaluation of the likely outcome of the particular dispute.

C. Pre-Mediation Communication and Written Submissions

Once the mediator is selected, initial progress can be made through telephone calls between the mediator and the parties’ lawyers as well as by exchanging pre-mediation written submissions. Nearly all mediators require a statement from each side summarizing the pertinent facts, the issues, and the positions of the parties. Mediators differ in whether they require the parties to exchange the pre-mediation memorandum but we have found it almost universally advisable to share the pre-mediation memoranda with both the client and opposing counsel. Exchanging the written submission in
advance of the in-person mediation should be viewed as a further step in educating the other side about the company’s view of the facts and the law.

D. Preliminary Issues to Address Before the Scheduled Mediation

The following can and should be addressed before the parties to a wage and hour case begin the mediation: (1) the description and size of the class from each party’s perspective; (2) the specific factual and legal issues on the merits and the corresponding dollar calculations; (3) categorization of claimants into distinct groups for purposes of settlement; (4) class certification issues, including whether the class is F.R.C.P. 23 or FLSA class; (5) class notice and claims administration process; (6) expected participation rates; (7) disposition of unclaimed funds; (8) treatment of class representatives and any premium payments contemplated; (9) scope of release; (10) settlement proposals to date and the reasoning behind such proposals; (11) defendant’s ability to pay; (12) anticipated judicial stance on the case; and (13) attorneys’ fees.

Some of these issues are more critical to resolve early on than others. First, the parties should be on the same page about who is in and who is not in the class. Contrary to the initial reaction of some defendants, it is not unusual for both sides to desire class certification in the context of a negotiated settlement. The reason is that an expansion of the class definition may benefit the defendant as the defendant can negotiate for a release of liability from more potential claimants.

In wage and hour cases, it is particularly important to include a discussion of the framework for potential damages in the written submission. Each party should include a damages model in their written submission. Preferably, both models will use the same elements to calculate the damages—i.e., such as number of putative class members,
average rate of pay, number of days or hours worked, scope of potential penalties, etc.—so that the source of any discrepancy is easy to pin-point. Since agreeing to the calculation of damages is crucial to settling a wage and hour case, catching these discrepancies early on by breaking down damages into component parts and using the same spreadsheet format helps the parties facilitate a workable agreement in a timely fashion.

The parties also should seek to resolve differences over attorneys’ fees before the mediation. Often, plaintiffs’ attorneys assume that fees are a given and not worth discussing until the conclusion of the mediation. This belief is mistaken, as plaintiffs’ attorneys’ fees are often contested and require detailed work on the part of the mediator to review plaintiffs’ time records and test how efficient counsel has been. Thus, it is best to address attorneys’ fees before the mediation. Plaintiffs’ attorneys should consider providing their time records to the mediator before the mediation if there is any issue with the total amount of fees demanded.

In addition to a general memorandum outlining each party’s take on the dispute, the mediator may request a confidential document from each side. This document should identify all motivators for and impediments to settlement. The effective advocate uses the document to candidly communicate with the mediator so that the mediator can better assist the parties in reaching a settlement.

Apart from written submissions, pre-mediation telephone calls can facilitate the exchange of information without the need for travel or coordinating the schedules of all attorneys and clients. A joint conference call should be used to set the ground rules for the mediation, identify the necessary attendees, and discuss the information that has been
or will be exchanged between the parties prior to the in-person mediation. Unlike civil litigation, private mediation rules do not bar *ex parte* communications between the mediator and either of the parties and their lawyers. Candid pre-mediation discussions with the mediator are an effective way to communicate information to the mediator without risk of alienating the other side or prematurely revealing vulnerable information to the other side. The confidentiality inherent with out-of-court mediation presents lawyers with an opportunity to educate and attempt to persuade the mediator in confidence and in advance of the parties’ in-person mediation.

E. **Presence of Clients at the Mediation**

Should clients attend the mediation? From the defense standpoint, the answer is a resounding “yes” at least in terms of having a company representative on hand to participate and listen to the presentation by the plaintiffs and their attorneys. The company’s initial positions in the dispute often change as the mediation progresses and it hears the plaintiffs’ perspective on the mediation unvarnished. The need to re-evaluate is common, and counsel cannot do so effectively if the decision-maker is not present and keenly aware of the dynamics at play in the mediation. In addition, it can be beneficial to have a company representative who is intimately familiar with the plaintiffs’ work activities. Such an individual may be able to assist counsel in readily responding to the plaintiffs’ attorneys’ contentions and “keep the opposition honest.”

It is less common that named or representative plaintiffs attend mediation sessions in a class or collective wage and hour action. In our experience, the presence of plaintiffs

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at the actual mediation is less important than the plaintiffs’ attorneys being able to speak on behalf of their clients and the putative class.

F. The Mediation Day

At the in-person mediation session, parties should have with them copies of the relevant documents from the litigation as well as the information exchanged in anticipation of mediation. If the case is mediated early in the litigation, having copies of relevant case law, administrative opinions or key statistics is valuable to the extent such information is needed to support or justify a parties’ litigation or settlement position. Where discrete legal issues could impact the scope of the litigation, or perhaps resolve the case altogether, defense counsel must be prepared to argue the supporting case law and plant the seed of doubt in the mind of the plaintiffs’ counsel.

Although opening statements have historically been used to open an in-person mediation session, not every case benefits from an opening presentation where the attorneys merely re-state the viewpoint expressed in their written submission or where it is clear that factual disputes are well-known and all parties acknowledge that factual disagreements will not be resolved at mediation. In such a case, the mediation may progress faster once the parties are separated into different rooms and the mediator engages in shuttle diplomacy while the parties focus on the financial implications of a deal.

If the parties agree that opening statements will be made, it is important for defense counsel in a wage and hour case to disavow the plaintiffs’ counsel of any notions that litigating the case on a class-wide basis will be straightforward or will follow the pattern of any prior cases in which the plaintiffs’ may have been involved. Careful
thought should be given to the structure of an opening offer so that it honors the company’s stated position of compliance with the law and yet acknowledges that settlement will involve a reasonable payment in exchange for a release of claims. In advance of the mediation, defense counsel should create electronic spreadsheets containing the monetary components of an opening offer and which can be modified as necessary throughout the mediation.

After the in-person mediation ends, keeping the mediator engaged beyond the scheduled mediation session can be valuable in resolving an impasse. Experienced wage and hour mediators often schedule a second mediation session, to occur some days or weeks after the first, to allow the parties time to process and evaluate the information learned. Mediators also frequently offer to continue _ex parte_ or joint conference calls if the dispute appears to be hung up on a particular contested fact or legal issue, or appears to be headed in the direction of resolution. Regardless of the forum, though, counsel should take advantage of the additional communication to communicate a steadfast desire to settle only on reasonable terms. Continued discussions offer yet another opportunity for counsel to present targeted factual or legal arguments in response to questions or obstacles raised at the mediation.

**III. Utilizing a Settlement Memorandum at the Mediation**

Counsel should come to the mediation with a checklist of important settlement terms and the range of options that may be available as a compromise. If a deal is struck, counsel should normally memorialize the terms of the settlement before leaving the mediation even if all parties agree that the memorandum will be replaced with a formal settlement agreement to be completed by counsel and presented to the court.
Normally, the Memorandum of Understanding (MOU) should be signed by a representative for all parties and should set forth the essential terms of the parties’ settlement. Simultaneous execution provides certainty as to the terms of the agreement. In particular, the MOU should define the putative class to which the settlement applies, the claims that will be resolved by means of the settlement and the scope of the release by which settlement participants will be bound. The MOU should, of course, state the Settlement Amount, its component parts and the method by which each settlement participant’s individual share will be calculated. The MOU should describe the tax characterization of any settlement payment. The MOU should also address attorneys’ fees and costs and the costs of administering the settlement and whether there will be a claims administrator. The MOU should also describe what steps the parties will take to receive court approval of the settlement and obtain a dismissal of the litigation. Finally, the MOU should recite that the parties will prepare and execute a formal Settlement Agreement and Release of all claims.

IV. Conclusion

The potential benefits of a successful mediation are great for both parties to a wage and hour litigation. To take full advantage of these benefits, counsel should enter mediations with a clear strategy and be well prepared to maximize the benefits of mediation at all stages of the process. The best mediators address the threshold procedural and substantive issues early and often – before, during, and after the end of an in-person mediation session. By raising and considering with your clients the issues and strategies discussed above, counsel will be better able to serve their clients and will increase the chance of a favorable settlement.