STRATEGIES FOR A SUCCESSFUL EMPLOYMENT MEDIATION

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Most employment disputes, whether suit is filed or not, are resolved through some form of alternative dispute resolution . The Equal Employment Opportunities Commission , the California Fair Employment and Housing Commission as well as state and federal courts are offering, if not mandating, that the parties attempt formalized settlement prior to either charge processing or trial. Many lawyers now recognize that a dispute they cannot settle themselves may well be resolvable with the assistance of a third-party who is neutral in the particular dispute. The overwhelming choice among the variety of ADR processes is mediation. Although mediation is always non-binding, it comes in differing flavors.

There are three principal approaches to mediation, which have been dubbed facilitative, evaluative and transformative. Briefly, in the pure facilitative approach the mediator is never willing to offer an opinion of any kind. The evaluative mediator will freely offer his or her opinion about problems in your case, value of evidence, likelihood of success, reasonable settlement terms and the like. In transformative mediation, the goal is to alter the parties' relationship by increasing understanding of the other party's position and introducing improved communication between the parties, as well, of course, as resolving the specific dispute between the parties. In the employment law context, the majority of mediators likely will employ techniques somewhere between purely facilitative and totally evaluative (as some settlement conferences are) when the parties have no continuing relationship (e.g. the claimant/charging party/ complainant/plaintiff is no longer employed by that employer). If, as in many EEOC and FEHC mediations, the charging party is still employed by the employer in the dispute, the mediator is much more likely to try a transformative approach. In these agency cases the charging party is likely to be unrepresented and the employer is more likely to have counsel coaching from afar than present at the mediation.

The strategies suggested below work equally well in any of these three models with a single or a relative small group on each side. With larger groups or class actions, different strategies may be appropriate.

BEFORE THE MEDIATION

I. Take advantage of any opportunity to settle whenever you end up in mediation, even if the "choice" to try was the result of an agency requirement, court rule, judicial order or a pre-dispute mediation agreement, rather than by the post-dispute decision of the parties. Delay in the litigation process is more than justified by the very high success rate of mediation.

   A. If mandated, negotiate timing with other side and get the court's approval if necessary
   B. Demand that the mediator have substantive knowledge of the subject matter of your dispute (i.e. Title VII, FMLA etc.) to increase the efficiency of the mediation
   C. If you're uncertain of the experience or competency of the court's or the agency's panel of mediators, or if a mediator with employment law knowledge is not available, seriously consider locating -and paying for - a non-panel mediator

II. Evaluate both your case and your client to decide when it's most fruitful to mediate. If you guess wrong and settlement is not achieved, think about why impasse occurred and consider another attempt at a more opportune time and/or with a different mediator

A. Before suit is filed (or much money spent) if:
   1. You have enough information to evaluate the fairness of a settlement (some "premature" discovery may occur. So what? The same information will be discovered anyway if the matter proceeds at a small incremental cost.)
      a. Consider agreeing to cross-declarations of the parties under penalty of perjury to establish enough facts for settlement purposes
      b. Agree to some document exchange, such as at least part of the sexual harassment investigation report, letters, e-mails etc. sent by the alleged harasser, analysis of the RIF even in non-ADEA cases and the like, and
   2. Your client is ready to make at least some reasonable compromises. Plaintiffs are probably not ready when they're absolutely certain their case is every bit as good as, or better than, the one reported in the newspaper with a jury verdict in the zillions. Defendants are probably not ready when their mind-set is still "millions for defense, but not one penny of tribute".

B. After suit is filed:
   1. After 1 or 2 depositions of principals
   2. A Motion to Dismiss or for Summary Judgement is pending
   3. Motions in limine are pending
   4. Trial is imminent
   5. Trial isn't clearly going well
   6. Post-trial motions are pending
   7. It's been sent back for retrial

III. Select an appropriate and trained mediator. Effective mediators come in wide variety of legitimate styles.

A. Evaluate if either party has special needs:
   1. Emotionally fragile plaintiff
      a. an especially compassionate mediator
      b. a mediator who co-mediates with a psychologically trained person
      c. same sex, similar condition (i.e. has AIDS, has a disability, etc.)
   2. "Hard-headed" defendant
      a. a current or recently practicing defense-side lawyer/mediator
      b. retired judge

B. Consider letting the other side select the mediator, subject to your veto. Ask around about the proposed mediator or ask the mediator for references

C. Jointly create a shortlist of mutually acceptable mediators -- take the one with the best dates available

It's OK to talk privately to mediators about anything - unlike judges or arbitrators. Since the mediator cannot impose a resolution, there are simply no prohibited communications, but be sure to let the mediator know you are exploring settlement and expect any discussions of nonprocedural matters to remain confidential from the get-go. Check the Evidence Code and other applicable statutes and local federal and state court rules to see exactly what confidentiality is imposed. Additional confidentiality can be agreed to by the parties or may be required by the mediator.

The new, first ever, Uniform Mediation Act has been finalized so

keep an eye on the legislature's response as it may change the way confidentiality and other issues are approached.

IV. Agree on ground-rules:

A. Who pays -- Conventional wisdom is that the Plaintiff should have some financial stake in the process. Most private mediators require a deposit of a partial to the full fee prior to the mediation. An agreement as to initial payment of the mediator's fees is subject to revision as part of the final settlement.

1. Both sides equally
2. Both sides a portion
3. Company advances full fee contingent on settlement being reached
4. Employer’s ADR Plan sets out the payment obligation -- often the Employer
5. The court may pay its normal fee to the mediator even if not on the court's own panel
6. Recognize mediation costs are likely to be figured into settlement figure if not separately paid by employer.

It probably doesn't make any practical difference in seriousness with which the parties participate or in the outcome, although it may effect the comfort level of the parties.

B. When and where

1. Ideally everyone should have 1 long day available for at least the first day of mediation (although sometimes having an honest deadline gets everyone to focus more quickly)
2. The where is truly unimportant if there are totally separate spaces available for each party/counsel unless:
   a. Plaintiff has a psychological problem being on premises with a defendant
   b. The separate spaces are not private and reasonably soundproof
3. If a party or counsel has a disability which needs to be accommodated to make the mediation accessible the mediator or the administering body (EEOC, AAA etc.) should be told as early as possible. Under the provisions of the ADA it is the mediator's responsibility to make sure that any needed accommodation for accessibility is available (parking, ramps, wheelchair accessible rooms and bathrooms and sign language translators are the most common needs)

C. Mediation briefs - probably not required for a case which falls within the parameters of "typical" for the subject/law of the dispute with an experienced employment mediator although they may be useful to counsel if the matter is in an early stage and are always useful in more unusual or complex cases

1. Both sides may agree to submit or agree either side may submit
2. Pre-existing documents, such as Complaints, Motions, Briefs, etc. might well suffice
3. Not common in EEOC or other agency cases, but it may be a good idea to chat with the mediator ahead of time about any really special or peculiar aspects of your case/party
4. Exchange with other party or confidential (but be sure to let the mediator know which) depending on how much the other side knows about your case and how much you want them to know. This can be a valuable tool in making the other side reevaluate their position even before initial offers are exchanged.
5. Exchange portions of your briefs, with other portions provided confidentially to the mediator

D. Discuss with mediator his/her mediation agreement, if any or look at the court/agency governing rules

E. Agree on any confidentiality you want beyond statutory for your

state, agency, etc. -- the mediator should keep information shared in the caucus confidential (to be shared with the other side only with permission) to the extent permitted by law.

1. There may be exceptions to what is "expected" in California under some agency rules, especially with federal agencies
2. The mediator may require some additional confidentiality agreement
3. This may be a bargaining chip you don't want to give up too early -- if at all.
4. Some mediators operate by requiring the parties to identify confidential information as it's disclosed to the mediator. Others check before leaving the caucus if information they may want to disclose to the opposing party is confidential. Check at the beginning of the first caucus to be sure you know which pattern your particular mediator has adopted.

F. Standard provisions of a settlement agreement which your side will require:
   1. Share with opposing counsel before mediation
   2. Invite opposing counsel to offer modifications
   3. See if opposing counsel has own required clauses
   4. Agree to bring (preferably on laptop or disk) a draft settlement agreement to the mediation
   5. In some cases both sides can work from a previously agreed settlement document and essentially work to "fill in the blanks" during the mediation or use a checklist of common terms with spaces to individualize the settlement
   6. Governmental agencies may have their own form settlement documents which typically cover the statute(s) they are responsible for enforcing which may need to be supplemented with another agreement is there is a more global settlement being entered into.

V. Prepare your client(s):
   A. Explain the process -- agree if client(s) will speak at opening session
      1. Can be effective if they are appealing and present themselves as likely good witnesses, especially if their depositions have not been taken
      2. Clients can often convey serious intent to settle better than the attorney can
   B. Explore your client(s)' interests
      1. If multiple plaintiffs, determine
         a. if settlements will be separate
         b. dependant on all settling
         c. a pool to be divided between plaintiffs
      2. If multiple defendants, can one override others?, are separate settlements acceptable?
   C. Explore your opponent(s)' known and suspected interests
   D. Consider ways to meet both side's needs - and remember, most mediations actually end with "can live with/can live with" rather than "win/win" settlements
   E. Decide who should be present at the mediation. The attorneys should recognize the difficulties of being both the strong advocate who has invested psychologically in the case and the clear-sighted evaluative attorney with a lesser stake in the outcome. If the defense concludes the plaintiff's attorney is standing in the way of a reasonable settlement because they have over-valued the case, the defense might consider paying for plaintiff's attorney to consult with another plaintiff's attorney with experience in the jurisdiction to verify his or her evaluation of the value of plaintiff's case.
      1. Plaintiff

a. co-decisionmaker such as a spouse, child, parent
b. support person - psychologist, friend
c. a non-lead litigation attorney - might be someone you share the bigger cases with
d. occasionally having one or two current employees present for at least a while will prove that they're actually going to be willing to testify at trial if necessary, although they probably should not be actively involved in the mediation

2. Defendant
   a. Decision-maker(s) with realistic authority and ready access to person who can grant still higher authority
   b. Insurance representative - perhaps keep in the background - possibly not at the joint session and only strategically involved in caucus The availability and ownership of EPLI is relatively new and the coverage varies so widely that it's not clear what effect, if any, having the insurance adjuster around may have. If plaintiff hasn't been told about the existence of insurance coverage, consider carefully the effect of having an adjuster present -- but be sure he or she is available by phone. If the insurance company representative is THE decision-maker' he/she should be involved totally. Lloyds of London or another off-shore company may be the re-insurer or an excess carrier. If so, make certain there is a U.S.-based contact available.
   c. In-house attorney and/or non-lead litigating attorney
3. If a crucial person can't be present, make sure they're available by telephone and get a phone number for non-work hours wherever they are likely to be after factoring in time differences. Let the mediator and opposing counsel know your arrangements ahead of time, if possible.
4. Non-party witnesses are not usually participants in mediation

F. Explain about lengthy caucuses and have client(s) bring work or some reading material
G. Explain the bargaining process
H. Explain that the mediator may occasionally need to talk to either the lawyer or the client privately (with lawyer to check ways to constructively present a particular proposal and the like and with the client usually when the mediator senses there's something the client knows or feels that the client is unwilling or unable to express in front of the lawyer, although there may be other reasons)
I. If client declines to be in room with other side, discuss this with opposing counsel and the mediator -- well before the mediation, if possible.
J. Parties can and do successfully reach agreements in mediation with one or more necessary participants being "present" only by telephone, but it's a lot harder. In a few years this outline might include tips for mediations on the internet, but that's even more difficult and those who have tried it in employment cases to date have generally said, "never again" with the possible exception of where a party is deaf (this is an accessibility issue) and the issues are simple

BEGINNING THE MEDIATION

VI. Joint Sessions
A. Typically, the mediation commences with a joint session at which everyone is present
   1. The mediator will explain his or her view of the process, what the parties can expect from each other and the mediator, the mediator's need to take notes, reminder that this is a semi-to-fully confidential environment (depending on your agreements, etc.) re the larger world although there is absolute caucus confidentiality (even in federal

cases) and respond to any questions or concerns about the process
2. Then the advocates briefly lay out the facts and legal theories for the mediator and the opposing party, usually absent any specific demand for remedies
3. The parties may also add whatever they personally want to convey about the facts and their feelings to the other side
4. If the case is far enough along to have them, an advocate may want to use helpful, effective visuals, such as a timeline
5. Some mediators will keep the parties at the joint session to further explore their positions. Others will break for separate caucuses at this point
6. If one party is unrepresented, most of the mediation may be in the form of joint sessions

B. Sometimes subsequent joint sessions appear valuable and will be called by the mediator:
1. usually to deal with factual discrepancies best discussed or investigated as a joint effort. This may involve having a witness testify to a limited area in dispute, some probing of a doctor's view of what work an employee can do safely or any other type of factual material which both sides need to have unfiltered by the mediator's interpretation of information
2. More rarely, information is received in a caucus indicating an unrelated health and safety problem in the workplace. It should not be ignored and a joint session might be used to clearly communicate the situation, usually from plaintiff to the company representative.

C. The majority of mediations conclude with a joint session to sign the settlement documents and, at least partially, restore the parties' relationship but a settlement can be concluded without the parties ever seeing each other

VII. First caucuses:
A. Let the mediator structure it -- advocates shouldn't try to control the process
B. Recognize this is largely a client-centered process and let the client speak -- without interruption
C. Don't get anxious if the mediator uses this only to gather more facts and begins to explore interests (rather than positions)
D. In this (or in later caucuses) the mediator may want to talk privately to counsel or the party, which should be done only with agreement and often is very helpful in minimizing what otherwise may be damaging. The mediator is NOT trying to ace out the lawyer, but simply to improve communication with one or the other.

DURING THE MEDIATION

VIII. When mediator is ready to take first offer to other side:
A. It's more effective to make one in or near the ballpark, but any offer is better than none
1. Usually the plaintiff makes the first offer
2. If you believes an offer is too far out of settlement range respond with a very small offer, but don’t ask the other side merely to bid against itself

B. Include some noneconomic items you're willing to give up later, such as a demand for or an offer of a return to employment (of course, this may be a genuine position, but it rarely is in an actual or constructive discharge matter)
C. With multiple plaintiffs or defendants, start with separate offers
D. If the parties and/or counsel have had prior settlement discussions and you're not starting where those left off, let

the mediator know about it and explain a change of position -- more time in the case, new facts, whatever

IX. Subsequent offers:
- A. Share your side's thinking and strategizing with the mediator
- B. Ask the mediator's advice about timing and structure of offer
- C. Be creative in achieving interests, such as:
  1. Recognition of dignity, self-respect needs such as a period of consultancy with the company
  2. Money can be paid over time and/or annuity
  3. If self-insured, medical insurance coverage or pay for some medical care received and/or anticipated
  4. A factually accurate recommendation letter
  5. A commendation letter for a project done well or for any aspect of job performance
  6. Help in getting another job, which could be outplacement services or using your, or your company's, own contacts or even just making office space and a telephone available
  7. Training or retraining opportunities
  8. Apology
  9. Sensitivity training
  10. If appropriate, an increased workers comp settlement -- but get your workers comp attorneys involved
  11. Agree to buy back company stock
  12. Alter date of termination to allow for stock option vesting or exercise of options or, alternatively, extend dates or amend conditions for vesting, etc.
  13. Make a charitable contribution to the charity of plaintiff's choice in honor of the plaintiff
  14. Establish a scholarship in the plaintiff's name
- D. Support mediator's reality testing of factual and legal case, financial and human costs of proceeding with the litigation, effectiveness of opposing counsel, availability and effectiveness of potential witnesses, uncertainty of judicial/jury decisions, possible time to final resolution if no settlement -- and then reassure your client that the mediator is putting just as much pressure on the opposing side
- E. Complete a decision-tree if your client is still unconvinced about reality
- F. Use jury award statistics, if appropriate
- G. Consider sharing an undisclosed "smoking gun" with the other side
- H. Give the mediator arguments to use with the other side and reasons for the demand/offer
- I. With multiple plaintiffs, consider an incentive for all plaintiffs to settle
- J. With multiple defendants, consider making settlement with one conditional on settlement with all
- K. Make some movement in some area
- L. Don't make a "final offer" unless you REALLY mean it -- say instead this is final as we see the case at the moment and invite new evidence or information to justify a change in position, now or later
- M. Reserve demand employee not apply to work for the employer again until settlement appears likely. Be realistic about what employment can be prohibited.
- N. If confidentiality of settlement is desired:
  1. script permitted statements
  2. spell out who can be told terms and that they must be told the information is confidential (spouse, accountant, etc)
  3. Recognize that liquidated damages are a realistic position for defendant, but are mostly for in terrorum effect
  4. An alternative is an incentive payment to be made a year out

in addition to the settlement amount
5. Establish a mechanism for resolving disputes about alleged disclosures
6. Consider asking plaintiff's attorney to sign, but both sides need to be realistic about attorney's situation with other clients who are or were employees of the same employer

Occasionally, significant mediator time and effort needs to be expended "mediating" between conflicting views held by one party's participants (i.e. lawyer/client, co-decision-makers, corporate and individual defendants, etc.) This is necessary time and should not be confused with the mediation reaching impasse, although it may require the inter-party mediation being continued to another day, after the intra-party disputes have been resolved.

X. If impasse occurs:
- A. Seriously consider a "mediator's proposal" if one is offered, or ask the mediator to make one
- B. Consider a partial settlement if one is reachable -- be sure to document those items upon which tentative or final agreement has been reached
- C. Schedule another session and prepare a draft settlement including all issues upon which agreement was reached and leave blanks to be filled in during the current session -- but be prepared to scrap this draft if the parties seem able to resolve things by moving in another direction
- D. Flip a coin between the offers if the gap isn't too great. (Any number of alternatives to this exist, such as drawing cards from a deck with the party holding the high card being the "winner", winning 2 out of 3 hands of gin rummy and anything else your sense of humor and competitive needs permit or require
- E. If mediator assessment is that progress can be made, agree to another session and set date/time and any other appropriate conditions, such as additional fact-finding in the interim
- F. When the mediator was retained by the parties (although possibly not in court-annexed or agency-sponsored situations) expect the mediator to follow-up by telephone over days, weeks or months as needed
- G. If your side's circumstances change, try again to settle, or let the mediator know there's a new opportunity for settlement and he/she can contact other side to begin further dialogue -- which can be by phone - or further in-person session(s) -- or --
- H. Try again with a different mediator, perhaps someone with a different style
- I. Agree to arbitrate a central issue or the whole dispute:
  1. Select a new neutral for either a final and binding award or one subject to a trial de novo under your court's rules and procedures -- maybe the arbitration needs to cover only a key factual dispute or liability issue which can be done during a "pause" in the mediation process
  2. Consider making the impasse positions the "high" and "low" possible outcome (regardless of the actual arbitration award)
  3. If you use the mediator as arbitrator (which I think is a bad idea), make the decision to arbitrate only after real impasse is reached and only with a full exploration of the fact that the mediator has learned things which will not be part of the arbitration record. ALWAYS sign a separate agreement arbitrate which acknowledges that the parties understand the mediator has information which may not be part of the arbitral record and not necessarily known to both parties to be known by the neutral

THE END GAME

XI. If settlement is reached (have the mediator stay until it's signed):
    A. ALWAYS write down essential terms, even if a final settlement document can't be completed at the time (be sure to date and have client(s) sign)
    B. Provide that this document can be enforced (and in subsequent document provide that this one has been superceded)
    C. If partial settlement is reached, be clear what issues have NOT been settled
    D. If appropriate because of a confidentiality agreement, write a script for what parties can say about the settlement -- be clear about who may be told the whole settlement
        1. Plaintiff's spouse, attorney and tax advisor, and perhaps others as the parties agree upon
        2. Defendant's CEO?, Board of Directors? head of HR? Needs to be discussed and agreed depending on the confidentiality provision and terms of the settlement
    E. Liquidated damages for breach of confidentiality? May have some psychological effect, but difficult to prove for enforcement
    F. Agree on what happens to employee's file, who says what when employer is called for a reference
    G. What allocation, if any, of settlement amounts will be made for tax purposes -- wages are taxed higher than other damages such as medical costs, emotional distress or punitive damages -- pretty much the only tax-free alternative is through workers comp (not always available or appropriate)

    Note: An existing workers comp claim cannot be settled in a global settlement, but commitments toward settling that claim, set-offs and other associated issues probably can be part of the global settlement, if the parties wish. Consider what, if anything, should be included regarding a potential, but not yet filed, workers comp claim.

    H. Mutual? releases - global settlement excluding? including? workers comp? fraud? or other criminal conduct?
    I. Enforcement through arbitration? confidential? by mediator as arbitrator? under rules of AAA? JAMS? CPR?, through state? federal? court -- remember that in California it is necessary to explicitly state that the settlement agreement is enforceable
    J. Time schedule for preparing/signing the final settlement documents, dismissing suit, paying money and fulfilling other terms agreed on
    K. If settlement is conditional (i.e. city council must approve, plaintiff needs to provide tax return, etc.), be clear when conditions must be met and what may follow (i.e. filing lawsuit, proceeding with arbitration) if conditions aren't met; agree if there are penalties if time schedule isn't kept
    L. If the Older Worker Benefit Protection Act is applicable, include the necessary provisions. Some defendants choose to risk non-enforceability in order to secure a final agreement at the mediation -- but it should be a conscious choice.
    M. Make certain that the client(s) sign all settlement documents

GENERAL CONSIDERATIONS

XII. Some additional factors to keep in mind:
    A. Mediation is a very flexible process and can be structured to meet parties' needs, including:
        1. Fact-finding or expert evidence within the mediation bubble
        2. Within required time limits (someone has to leave by 4 p.m.) -- which can be extended in some fashion if necessary, but may do wonders for concentrating the parties on settlement more rapidly and with less venting and demonizing of the other side.
    B. If the mediator does something which concerns you, raise the issue

ASAP

1. Some mediators favor lengthy opening sessions -- if you perceive it's doing more harm than good, ask for a break and tell the mediator your perception
2. If you have any doubt at all the mediator is breaching caucus confidentiality, raise the issue, party confidence in control of what's going to the other side is crucial

C. In virtually all cases which settle, plaintiff gets something
D. Plaintiffs probably pay taxes on entire settlement including:
   1. Any emotional distress damages in the absence of a separate physical injury and
   2. Even when attorney's fees are paid directly to the attorney
   3. Back wages are attributed to the time actually paid for tax purposes

   It has happened that settlements have actually cost the plaintiff money.
E. Plaintiff's lawyers get paid -- and get paid mostly with after-tax dollars
F. Backtracking on offers without a VERY good reason will probably prevent settlement
G. Don't threaten to walk out -- and don't walk out -- until the mediator determines no further progress can be made during that session -- recognize that the mediation process can be very frustrating (One very pro-mediation plaintiff-side lawyer says he's learned employers don't get serious until the sun goes down.)
H. Don't express anger by taking wholly unreasonable positions -- but it's OK to articulate anger directly to (but not at) the mediator. Don't ask the mediator to take specific venting statements to the other side, let the mediator decide how to express your frustration without blowing up the progress toward settlement.
I. Extreme care must be taken when the other party is not represented by counsel -- the mediator cannot give any kind of legal advice
J. Using the mediator merely as a messenger is a waste of money and time
K. Resist or reject the mediator's attempts to use hunger and/or fatigue to get the parties to settle -- your client has to live with the agreement made -- but some wearing down may be salutary
L. Recognize that the mediator needs food and some quiet time to think creatively, so help make that possible
M. Remember -- it’s the client's settlement and if your client is satisfied, it doesn't matter (except to you) that you believe you almost certainly could have done better by litigating the case to conclusion

Although there are general patterns and processes employed by each mediator, every mediation is unique and will proceed at least slightly differently depending on the particular needs of the particular parties and counsel. Even if you've mediated with a mediator before, be flexible about any alternative means and methods the mediator wants to employ for this dispute. Mediators are extremely motivated to help the parties settle, and to settle as quickly as possible (which is rarely very quick) regardless of their compensation arrangements. If you are concerned about this issue and believe the mediator you want needs additional motivation to move the process along, suggest a per diem or per case payment instead of an hourly rate -- but recognize that it's entirely for counsel's peace of mind.