

**STRATEGIES FOR A SUCCESSFUL MEDIATION**

**SARA ADLER, ESQ., MEDIATOR**

**LOS ANGELES, CA**

PREFACE

In October 1998, President Clinton signed the Dispute Resolution Act of 1998 mandating all federal courts to develop an ADR program. For most, as for many state courts, this will principally be a mediation program. It's well to keep in mind the following:

20% of the federal civil caseload is made up of employment cases. 50% of those are resolved on Motions for Summary Judgment. Two-thirds of the cases which go to trial are won by plaintiffs. If the jury verdict is \$1 Million or more, 80% are reduced or eliminated on remittitur or appeal (and a lower % with lower verdicts).

THINGS TO CONSIDER ALONG THE WAY

- 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 or counsel.
  - A. If mandated, negotiate timing with other side and get the court's approval if necessary
  - B. If you're uncertain of the experience or competency of the court'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.
- A. Before suit is filed (or much money spent) if:
1. You have enough information to evaluate the fairness of a settlement,
    - 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. Plaintiff's 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 paper with a jury verdict in the multi-millions. Defendant's 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-mediate 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.

IV. Agree on ground-rules:

A. Who pays -- Conventional wisdom is that the Plaintiff should have some financial stake in the process. Most mediators require a deposit prior to the mediation.

## Strategies for a Successful Mediation

1. Both sides equally
2. Both sides a portion
3. Company advances full fee contingent on settlement being reached
4. Recognize mediation costs are likely to be figured into settlement figure if not separately agreed paid by employer.

It probably doesn't make any practical difference 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 a 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.

### C. Mediation briefs - probably not required for a case which falls within the parameters of "typical" for the subject/law of the dispute.

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 really needed if mediator has substantive knowledge of the law

## Strategies for a Successful Mediation

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 before initial offers are exchanged.
  5. Exchange portions of your briefs, with other portions sent confidentially to the mediator
- D. Discuss with mediator his/her mediation agreement, if any.
- 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 unusual exceptions under some agency rules, especially with the federal governmental 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.
- 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.

//

//

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

## Strategies for a Successful Mediation

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

### 2. Defendant

- a. Decisionmaker(s) with realistic authority and ready access to person who can grant still higher authority
  - b. Insurance representative-perhaps keep in the background - probably not at the joint session and only strategically involved in caucus (NOTE: The availability of EPLI is relatively new and the coverage varies so widely that it's not clear what effect, if any, having the insurance representative around may have. If the insurance company representative is THE decisionmaker perhaps he/she should be involved totally. It's at least something which needs to be carefully thought through.)
  - c. In-house attorney and/or non-lead litigating attorney
- 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

## Strategies for a Successful Mediation

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)

- H. If client declines to be in room with other side, discuss this with opposing counsel and the mediator - well before the mediation, if possible.
- I. 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 to date have generally said, "never again".

### VI. Joint Sessions

- A. Typically, the mediation commences with a joint session at which everyone is present.
  - 1. The mediator will explain their 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 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.

## Strategies for a Successful Mediation

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. Sometimes subsequent joint sessions appear valuable and will be called by the mediator, 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.
6. 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.
7. The majority of mediations conclude with a joint session to sign the settlement documents and, at least partially, restore the parties' relationship.

### 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

## Strategies for a Successful Mediation

- 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 later caucuses the mediator may want to talk privately to counsel and/or the party, which should be done only with agreement and often is very help in minimizing what otherwise may be damaging. The mediator is NOT trying to ace the lawyer out, but simply to improve communication with one or the other.

### VIII. When mediator is ready to take first offer to other side:

- A. It's more effective to make one in the ballpark, but any offer is better than none
- 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 rarely 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

## Strategies for a Successful Mediation

- 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
  - 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
  - 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

## Strategies for a Successful Mediation

- 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 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 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
  - N. Be realistic about what employment can be prohibited.
- X. If settlement is reached (have the mediator stay until it's signed):

## Strategies for a Successful Mediation

- 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 person, and perhaps others as parties agree upon
  - 2. Defendant's CEO?, Board of Directors? head of HR? Needs to be discussed and agreed depending on nature of 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 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 probably 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,

## Strategies for a Successful Mediation

if the parties wish. Consider what, if anything, should be included regarding a potential, but as yet unfiled, workers comp claim.

- H. Mutual? releases - global settlement excluding? including? workers comp
  - I. Enforcement through arbitration? confidential? by mediator as arbitrator? under rules of AAA? JAMS/Endispute? CPR?, through state? federal? court
  - J. Be sure time schedule for preparing final settlement documents, dismissing suit, paying money and fulfilling other terms are agreed upon
  - 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. Make certain that the **client(s)** sign all settlement documents
- XI. If settlement is not reached:
- A. Seriously consider the mediator's proposal if one is made, or ask the mediator to make one
  - B. Consider a baseball-type (e.g. best offer or high/low) decision by the mediator
  - C. Flip a coin between the offers if the gap isn't too great
  - D. If mediator assessment is that progress is being made, agree to another session, or

## Strategies for a Successful Mediation

- E. 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

//

//

### 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 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
- E. Plaintiff's lawyers get paid -- and get paid with after-tax dollars

## Strategies for a Successful Mediation

- 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 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
- I. Extreme care must be taken when the other party is not represented by counsel
- 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 that it is the client's settlement and if the 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

## Strategies for a Successful Mediation

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.