

AMERICAN BAR ASSOCIATION  
SECTION OF LABOR & EMPLOYMENT LAW

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**ADR UPDATE: MEDIATION ADVOCACY -**  
Tips for Handling the Tough Clients, Opponents - and Mediators

Scenarios for Discussion

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*Panelists:*

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*Mediation is now an essential litigation process, routinely required by courts, the EEOC, and other state and federal agencies. These scenarios are designed to present issues that confront advocates during the mediation of an employment dispute.*

## I. Getting to the table:

John Doe is a car salesman who claims that he was terminated by Small Car Dealership Company in violation of the Americans with Disabilities Act. The termination occurred when he attempted to return to work from leave taken after neurosurgery, with a 10-pound lifting restriction. John Doe has a reasonably strong case, at least on a “regarded as” theory. Management of this small business was relatively unsophisticated, and there is a serious question whether Doe was merely placed on leave, as management contends, or fired, as Doe insists (and as the COBRA forms filled out by management state). He was a good salesman with a proven track record with his former employer, but had only been with this dealership for 9 months.

Doe’s lawyer, Smith, writes aggressive and insulting letters to the Dealership president and its outside counsel, who refers the matter to an employment lawyer, Jones. Jones reviews the file, contacts Smith, and also finds the attorney angry and provocative in tone. Doe’s attorney threatens to file a charge with the EEOC, and to bring suit for a variety of employment torts. Jones invites Doe’s attorney to make a demand. The demand letter, hostile, insulting and personal in tone, demands \$600,000, a “discount” from the \$ 2 million valuation asserted by plaintiff’s counsel.

Jones decides to try to mediate the case immediately, even before a charge has been filed.

***Does it make sense for either side to mediate the case this quickly, with no discovery, and without even a charge on file? Why or why not?***

***What should Jones do to induce Smith and her client to mediate at this stage?***

***What should a mediator’s role be in getting the parties to the table at this point?***

After some discussion, Smith announces that in agreeing to mediate, she and her client expects that the dealership recognizes that there is no point mediating unless they are prepared to pay agree to a six-figure settlement. Jones says, “I understand,” and the mediation is scheduled.

***What are the pros and cons of the plaintiff setting a floor (or defendant setting a ceiling, perhaps by insisting on an initial demand before agreeing to mediate) as a condition precedent to mediating?***

***Suppose Jones knows that the employer has no intention of settling for six figures, and that he does not believe a six-figure settlement is warranted. Must Jones forego mediation, being unable to meet plaintiff’s condition?***

Once they get to mediation, Smith discovers that defendant refuses to consider a settlement in the six figures.

***What should Smith do? What should the parties expect the mediator to do? Is there any point in mediating?***

## II. The Impaired Client

George Blair is 53 years old and has worked for 33 years for ABC Trucking Company. He has only a high school education, but had worked his way up to a middle-level supervisory position, making a far higher annual salary, with far better health, welfare and retirement benefits than he would be able to find in his community today. He was laid off by a much younger and less experienced his manager, who was promoted over him one year before the layoff. Although Blair had never received a job evaluation lower than “excellent,” the younger manager criticized him for being slow, “stuck in the mud” and “unwilling to come into the 21<sup>st</sup> century.” Blair was his oldest, most experienced, and highest-paid subordinate.

Blair made no effort to find another job. Instead, he plunged into a profound depression. He was hospitalized for 30 days, and nine months after his layoff, is still on high doses of psychotropic medications that leave him sedated, impair his concentration and prevent him from driving a car.

Blair’s wife got him to an attorney who filed a charge of age discrimination with the EEOC. He also has invoked mediation under the Company’s ADR program. George’s wife, Kathy, expects to attend the mediation. She is distraught and angry over the change in her husband and over the financial peril they find themselves facing - she has only a high school education and has never worked.

***Should Blair’s attorney permit him to participate in mediation under these circumstances? What should the mediator be told about Blair’s condition? What should the company representatives be told? What accommodations, if any, should be made to Blair’s condition?***

After an initial joint session, the mediator separates the parties, and commences “shuttle mediation.” However, from the behavior of Blair during the joint session, the Company’s attorney has serious doubts that Blair was able to follow much of the discussion, and believes that Blair’s wife is the one making the decisions.

***What should the Company attorney do about this? What should the Company expect the mediator to do about Blair’s apparent impairment? Is there a point at which the mediation cannot ethically proceed?***

As it turns out, while Blair appears to think more slowly than usual, he is able to participate in the mediation. However, after a couple of hours of shuttle mediation, he becomes very emotional, announces that he cannot take it any longer, and tells his attorney, his wife, and the mediator that he just wants to end the pain, accept the Company’s low-ball offer financial offer, and go home. Blair’s wife is very angry.

***What should Blair’s attorney do? What should the mediator do? Suppose Blair remains adamant on accepting an offer that his wife believes is too low?***

### **III. Multiple plaintiffs**

Three women in their early thirties have filed EEOC charges against a Fortune 500 company, alleging sex discrimination and hostile environment harassment. Two also allege national origin discrimination (Mexican).

The charging parties were the only women working at a small branch office with a male manager. The Caucasian woman resigned without explanation. The following week, one Mexican woman went on short term disability, allegedly due to job stress caused by her manager's actions, and never returned to work. Three days later, the other Mexican woman called in sick but attended a seminar for another employer. The manager fired her the next day, allegedly for violating the company's rule against moonlighting. In the interim, the manager himself has been fired.

However, there are significant differences in the strength and value of each woman's case:

The Caucasian woman's claims of hostile environment, unequal sales support, and constructive discharge are not convincing. She did not file a charge until after she learned of the Mexican women's charges, and only after she learned that she would not receive commissions to which she believed she was entitled. Within 2 weeks after quitting, she began a new job, with greater responsibility and a higher salary, so her wage losses are at most minimal. She did seek medical treatment after she filed her EEOC charge, and took an anti-depressant briefly. She is the most sophisticated and educated of the plaintiffs, but is not a very appealing personality. It is unclear whether she would be convincing in deposition or at trial.

The Mexican women have much stronger cases. They were the only non-Caucasians at the branch. They complain that the manager made crude sexual remarks to them, screamed at them, and engaged in loud offensive sexual and anti-Hispanic joking with male employees, even after being asked not to do so. During the Company's own investigation, the manager's description of their misdeeds proved largely untrue. One of the Mexicans has been unable to find other employment, despite reasonable efforts. The other had better job performance and greater skills and experience, but she has been psychologically devastated by the manager's actions, went on disability in large measure due to the job stress, and is now under medical orders not to work. She is now seriously depressed, a condition exacerbated by her increasingly pressing financial situation. Her asthma has also become worse. She has substantial medical bills as a result of the discrimination. At this point, neither side is interested in reinstatement.

At the mediation, the Company's counsel insists that she will not make individualized offers. She will make "total package" offers, and the plaintiffs can decide the allocation among themselves.

***What are the pros and cons of this approach, for plaintiffs and the Company? How***

***should plaintiffs' counsel respond?***

The parties engage in many hours of negotiation on the “lump sum” basis, with neither the mediator nor the Company informed of the plaintiffs’ agreement on allocation. Late in the day, when the mediator is caucusing with the Company in an effort to get a final or next-to-last increase, plaintiffs’ counsel burst in – after a furious argument with her co-plaintiffs, the Caucasian plaintiff is packing up to leave. Having agreed all day to take 20% in a 20-35-45 split, she is now insisting on at least a third, and the other plaintiffs have dug in their heels and refused.

***What should plaintiffs' counsel do? What should Company counsel do? What should the mediator do? Can this mediation be saved? Could this have been avoided?***

**IV. Who should be at the table?**

***Which of the following scenarios makes the most sense for each side, and when?***

Compare and contrast:

Situation 1:

Mediator introduces himself to plaintiff in a sexual harassment case and her attorney.

Counsel: Can I talk to you privately for a moment?

[Mediator and plaintiff’s counsel step out of the room]

Counsel: No way will I have my client sit across the table from that supervisor who has made a wreck of her life! If he’s going to be here, we’re going to conduct this mediation in separate rooms.

Situation 2:

Mediator introduces himself to plaintiff in a sexual harassment case and her attorney.

Counsel: If my client’s harasser is not here for my client to confront across the table, there’s no point in proceeding. Their bad faith is plain from their unwillingness to have the guy here to face the music.

***Suppose plaintiff and defendant disagree about whether the accused harasser or discriminator should attend the mediation. How should that dispute be resolved?***

***What if the mediator suggests an attendance list with which you, on behalf of your client, disagree? What should you do?***

