Breakout Sessions – Series 5

DEVELOPING AND IMPLEMENTING EFFECTIVE FORUM-SPECIFIC MEDIATION STRATEGIES

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I. Introduction

When utilized correctly mediation can be an important tool in an employer's arsenal. Mediation can result in early and cost-effective settlements, can provide important informal discovery that hones defense strategies, and can narrow the litigation even when settlement is not obtained. Accordingly, this paper provides an outline of strategic and practical considerations that can assist your organization in maximizing the benefits of mediation.

II. Preliminary Considerations

A. To Mediate or Not to Mediate

As the Great Sun Tzu has noted: “There is no instance of a country having benefited from prolonged warfare.” Similarly, President Abraham Lincoln advised: “Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good [human. There will still be business enough.]”

That said, mediation is not right for every case. There are certain situations when informal negotiations may be preferable including because the plaintiff has not (yet) filed a complaint, the opposition has a tracked record of resolving matters through informal discussions, costs are an issue, or an expedient resolution is imperative. In these situations, at least attempting to resolve the claims without the assistance of a mediator is a good first step. In some cases, it may also be appropriate for an employer to engage in direct settlement discussions with the opposing party, provided those discussions do not violate applicable ethical rules.

On the other hand, utilizing a mediator may be more productive when, for example: (1) one side is locked into its position on the claims, damages, and/or settlement value; (2) one of the parties needs to feel it had its “day in court”; (3) opposing counsel is not giving settlement negotiations enough attention; (4) opposing counsel lacks client control; and/or (5) the parties would benefit from a perspective other than their respective counsels.

B. Determining the Right Forum

Once a determination has been made that mediation should be attempted, consideration should be given to the appropriate forum for the mediation. There are both private and public options for mediation. For example, federal and state agencies (e.g., the Equal Employment Opportunity Commission (“EEOC”) and Federal Mediation and Conciliation Service (“FMCS”) have mediation resources available. Federal and state courts are also frequently willing to provide judges to conduct settlement conferences. Of course, the parties can always select a private mediator to conduct the mediation. In determining the appropriate forum, the following factors should be considered.

Available Damages: In selecting a forum, it is important to determine whether it will impact the terms of the settlement. Take the situation where an employer is faced with an employee who has filed both an EEOC Charge and a Charge with the National Labor Relations Board (“NLRB”) and is seeking an inordinate amount of emotional distress and punitive damages that are supported by some bad facts. Under the National Labor Relations Act, these damages are not available and pecuniary recovery is limited to back pay and front pay in lieu of
reinstatement. Thus, an employer could resolve the actual damages issues without the “distraction” of punitive and emotional distress damages by settling the NLRB Charge first and take the proverbial wind out of the charging party’s sails by starting an EEOC mediation with a pronouncement that the charging party has already received a settlement payment for lost wages.

**Control over Mediator Selection:** Utilizing agency or court personnel for mediations generally limits the parties’ ability to directly select their mediator. Accordingly, bench-depth is an important consideration in determining whether to use these resources. The characteristics of an effective mediator are discussed more thoroughly in the next section but if a particular characteristic is vital to resolving a matter, then the parties may want to select a specific private mediator.

**Effectiveness:** When it comes to effectiveness, mediators and settlement conference judges both have an incentive to achieve settlement. Mediation is a business, and a mediator who successfully facilitates settlement strengthens his or her reputation within the legal community. A settlement conference judge also has an incentive to resolve matters and lighten the court’s caseload. At the same time, some judges simply “go through the motions” and avoid the extra efforts a mediator might undertake to settle a case.

**Scrutiny of Settlement Terms:** Most private mediators do not examine the settlement documents or take any interest in the ancillary terms. Federal and state agencies, however, often request to review the settlement agreement and take umbrage with important terms such as no-rehire, confidentiality, and non-disparagement terms.

**Deference:** In terms of deference, the parties may defer to a settlement conference judge more than a mediator, unless the mediator is a former judge. This is a particularly important consideration if the opposing party is a pro-se litigant or opposing counsel is having a particularly difficult time controlling his or her client.

**Formalness:** Participating in a mediation in the formal trappings of a courthouse may provide the feeling that the parties have had their day in court. On the other hand, the parties may feel more comfortable in a mediator’s office which could result in them being more candid and less formal.

**Cost:** Private mediation is more expensive because the parties pay the mediator an hourly or daily fee. In most cases, the employer assumes this expense, at least for the first day of mediation. Judges and state agencies typically do not charge the parties for participating in mediation.

**Security:** Unfortunately, volatile or outright violent litigants have become a reality. Utilizing a courthouse provides the assurance that everyone in attendance has gone through a security screening and comes with the protection of the court’s security personnel. Of course, arrangements can always be made to have private security present at a mediator’s office.

**C. Choosing a Mediator**

Although some characteristics may be more important for certain matters than others, the following is a non-exhaustive list of characteristics you should generally look for when selecting a mediator.
Experienced: Does the mediator have meaningful experience serving as a neutral (e.g., several years as a mediator, significant number of mediations)? Does the mediator have a busy calendar and regularly mediate disputes, or does he or she only periodically mediate?

Knowledgeable: Is the mediator knowledgeable on the relevant area of law, particularly the legal claims at issue? Is the mediator familiar with the jurisdiction, presiding judge, and opposing counsel?

Impartial: Does the mediator remain neutral and avoid the appearance of bias in favor of one side? Does the mediator avoid leaping to conclusions?

Realistic: Does the mediator level with the parties about the strengths and weaknesses of their respective claims, defenses, and settlement positions?

Flexible: Does the mediator adapt to the unique circumstances of a particular dispute and facilitate creative solutions, where necessary, to resolve the matter?

Committed: Does the mediator devote the time necessary to understand the law, facts, and circumstances, work closely with the parties during the mediation process, and follow up with the parties to “close the deal” if mediation is initially unsuccessful?

Effective: Is the mediator known for bringing parties to resolution, including favorably settling disputes with bad facts, difficult parties, and/or challenging counsel? Is the mediator’s approach suited for your particular matter: facilitative (assists the parties in reaching their own conclusions) versus evaluative (makes suggestions on the merits, settlement terms, etc.)?

Appropriate for the Parties: Does the mediator have a personality that will work well with the parties? With the plaintiff? For example, if you have a plaintiff who is shy or reserved, would that plaintiff do well with an aggressive, bombastic mediator? Or, should you consider a mediator who takes a softer, more laid-back approach?

Reasonably Priced: Rates vary from mediator to mediator. Although some charge a relatively modest rate ($400-$500/hour) others charge significantly more. For example, in some jurisdictions mediators may have daily rates that exceed $10,000. In determining whether a mediator’s rate is reasonable, you should consider, for example, whether the factual and legal issues in dispute are complex, whether the dispute requires a mediator with specialized expertise, and whether the employer faces significant exposure. If so, a more expensive mediator may be worthwhile. If not, a less expensive, but quality, mediator is likely the better choice.

D. Choosing a Client Representative

The mediator will often ask, and settlement judges almost always require, that a client representative attend the mediation or settlement conference in addition to outside counsel. Accordingly, identifying the best person for this role is important to positioning the parties for success.

It is critical to consider the characteristics of the ideal client representative. The representative is the face of the employer and should be professional, knowledgeable, and committed to the process. The representative should also have sufficient stature to send the message that the employer takes the process seriously. Avoiding abrasive, timid, or overly
defensive personalities is also advisable, as is considering whether utilizing a particular corporate representative may provide an advantage based on his or her familiarity to the opposing party.

Ensuring that the client representative has necessary settlement authority is a must. Mediators usually ask that the client representative have full authority to settle the dispute, or if additional authority becomes necessary, that the individual with such authority be available by telephone. Although mediators cannot sanction non-compliant parties, it is best practice to bring a representative with permission to settle the matter up to the agreed-upon settlement authority.

Settlement conference judges, on the other hand, typically require that the client representative have authority up to the plaintiff’s last demand. The requirement of authority up to the last demand becomes problematic if the plaintiff makes an unrealistic, stratospheric demand (e.g., $100M on a garden-variety discrimination claim). If this situation arises, you should promptly bring the issue to the judge’s attention, ensuring the other side is part of all communications, and seek resolution before the conference. Please note that it may also be necessary to involve an insurance representative.

As a word of caution, settlement conference judges have been known to sanction parties and counsel for non-compliance.

E. Preparing an Effective Settlement Conference Memorandum or Opening Statement

Most private mediators and settlement judges will require the parties to submit a settlement conference statement prior to the mediation. It is also possible that the mediator will ask the parties to make an opening statement or address the opposing party in a joint session at the beginning of the mediation.

Effective statements provide a solid factual and legal foundation so the mediator can understand the issues. In most cases, written statements should not only provide the necessary background information but also provide the mediator a sufficient description of the pertinent legal principles to avoid having to utilize time at the mediation educating the mediator.

Effective opening or preliminary statements should also contain a summary description of the pertinent facts and law as well as express a commitment to and respect for the mediation process. To that end, consideration should be given to whether a particular fact will inflame the opposing party or otherwise impede the mediation process. While facts that may increase the opposing party’s willingness to settle (e.g., embarrassing information that will come out in discovery) should be used, the opening statement is normally not the place to do so.

III. Effective Mediation Strategies

A. Utilize Information to Your Advantage

“Diplomacy is the art of letting someone else have your way.” – Sir David Frost

Being able to demonstrate a mastery of the facts and applicable law is the basis upon which aggressive negotiating stances are based. Not only does this signal to the opposition that you are prepared to litigate if the mediation is not successful, it provides you a meaningful basis for your offers and allows you to take full advantage of the mediation process. Although
mediation/settlement conference statements usually provide a good foundation for the issues, the mediator may still not have enough background on the law, the facts, or the surrounding circumstances to persuade the other side, including opposing counsel. Accordingly, it is important to consider if there have been any recent developments in the facts or law that could assist in this regard. If you are mediating before a settlement judge, determine if there are any decisions by him or her, even if not directly on point, that can be used to persuade the judge to adopt the arguments you are advancing.

It is also important to determine the appropriate method for providing information to the mediator and opposition. For example, disclosing a particularly damaging or embarrassing fact at the beginning of a mediation could lead to prompt resolution with one opponent and scuttle the mediation before it gets started with another. It is important to be clear with how the information provided to the mediator can be used. Any information that is not to be shared with the opposition should be labeled confidential, if in writing, or expressly designated as such during conversations with the mediator.

Finally, while the primary goal of any mediation is to settle, the process itself can be valuable by providing an opportunity to obtain “free” or informal discovery. For example, information about the evidence the opposition has (e.g., the existence of recordings), whether the opposing party has found subsequent employment, how soon the opposition intends to move forward with litigation, and the seriousness of any alleged emotional distress are often readily obtainable at mediation. To take advantage of this opportunity, however, requires a firm grasp of the evidence the employer has and the information the employer still needs.

B. Making an Effective Opening Counter-Offer

“When the final result is expected to be a compromise, it is often prudent to start from an extreme position.” – John Maynard Keynes

In some disputes, including wage-and-hour matters, settlement numbers are closely tied to particular facts and assumptions. In other matters, settlement numbers are more challenging given the difficulty in assessing mitigation efforts, emotional distress, punitive damages, etc., with mathematical certainty. Nevertheless, in many cases a good approach is to tie the counter-offer to the facts and law, or your reasonable interpretations if either is unsettled (e.g., based on discovery to date and applicable law, the plaintiff is not entitled to emotional distress damages, has at best $10,000 in lost wages and benefits, and is limited to 1x this amount for alleged punitive damages).

This approach serves two purposes. First, it provides a persuasive, defensible basis for the counter-offer and a point of reference for later movement. Without it, the counter-offer is arbitrary, which impacts the control an employer can assert over the negotiation process. Second, it often times forces the plaintiff to explain his or her settlement demand. In turn, the mediator or settlement conference judge can better challenge the weaknesses of the plaintiff’s position and steer the plaintiff to a more realistic number.

C. Proceeding After the Initial Offer and Counter-Offer

“Let us never negotiate out of fear. But let us never fear to negotiate.” – John F. Kennedy

Normally, the opposing party’s reply to the first counter-offer provides meaningful information as to whether there is a willingness to make significant movements or a desire to dig
in his or her heels, at least in the short term. If that offer does the latter, the other side may perceive the counter-offer to which they were responding as “not serious” or in bad faith. The opposing party could, however, be testing the employer to see how committed it is to the counter-offer. In other words, the opposing party wants to see if it can force the employer to bid against itself.

At this stage, a determination should be made of as to whether additional movement will draw the opposing party toward the desired settlement range. For example, if the plaintiff perceives lack of good faith, consideration of a reasonable increase in the next counter-offer, with a renewed emphasis on the legal and factual bases for the amount could be appropriate. If, however, the plaintiff is testing the employer, or otherwise being unreasonable, the better approach is to push back by offering an even more modest increase combined with a reiteration of the strengths of the employer’s case and corresponding weaknesses of the employee’s case.

**D. Alternative Negotiation Strategies**

“A negotiator should observe everything. You must be part Sherlock Holmes, part Sigmund Freud.” – Victor Kiam

1. **Propose a Reasonable Bracket (or Counter-Bracket)**

A bracket may facilitate settlement if there is a significant difference between the plaintiff’s offer and an employer’s counter-offer. For example, if the plaintiff opens at $1,000,000, the employer counters at $10,000, and then the plaintiff responds with $975,000, additional back-and-forth is likely a waste of time. On the other hand, if a bracket of $100,000 (low end) and $300,000 (high end) is proposed and agreed to, the difference is reduced substantially, bringing the parties closer together and improving the likelihood of resolution. In some cases, the parties will need to go through a series of brackets and counter-brackets, but this can work to facilitate a significant move by the other side.

2. **Mediator’s Proposal**

If the parties are unwilling to move off their settlement offers, the mediator may suggest (or one party may request) a “mediator’s proposal.” A mediator’s proposal is a number the mediator believes the defendant is willing to pay and the plaintiff is willing to accept. Although it should not reflect the mediator’s assessment of the merits, the proposal – offered by a neutral detached from the dispute – could have a persuasive effect on the parties. The parties are not required to consider a mediator’s proposal. Rather, both parties must consent.

If the parties consent, the mediator will separately propose a settlement number to each party. If both parties accept the number, settlement is reached. If either party rejects the number, no settlement is reached. Unless unanimity is reached, the mediator should not share the parties’ responses (e.g., if one party agrees to the number, but the other party does not, the latter will not know the former agreed).

If a mediator is known for using such proposals, it is especially important to angle for an advantageous impasse, which in turn leads to a proposal that, if accepted by both parties, results in a more favorable settlement amount.
3. Creative Settlement Terms

If the parties are struggling to reach agreement on the monetary amount, they might consider negotiating other aspects of the settlement in the meantime. Doing so continues the momentum of negotiation and could encourage the plaintiff to accept a reduced monetary amount. However, this strategy is more likely to succeed if the disagreement over the monetary payment is relatively small.

Creative settlement terms are designed to “sweeten the pot” for the parties, bring them closer to resolution, and/or assuage concerns either has about the agreement. Creative solutions sometimes involve the form or timing of monetary payments. For example, a retail employer might offer to pay the employee using a gift card to its own business, providing meaningful consideration to the plaintiff at a reduced net expense to the employer. Or, if an employer is concerned that the plaintiff will breach a confidentiality clause, it could stagger the payment over time to incentivize compliance, particularly with a larger monetary payout.

Other creative solutions might cost an employer very little, but have a significant value to the plaintiff. For instance, an employer could agree to extend the payment of certain benefits, like health insurance, or it could agree to not contest unemployment benefits. Alternatively, if the plaintiff is a former employee (or soon to be former employee because of a resignation/no-hire provision), an employer could offer to provide a neutral job reference, designate the separation as a resignation, or pay for outplacement services.

IV. Conclusion

As the Prussian military officer Helmuth von Moltke observed: “No battle plan ever survives first contact with the enemy.” While mediation is no different, proper preparation and the ability to rely on a variety of negotiating tactics will best position you for a successful mediation.
Developing and Implementing Effective Forum-Specific Mediation Strategies

Presenters
D. Michael Henthorne (Columbia)
Christopher J. Meister (Phoenix)

Moderator
Daniel P. O’Meara (Philadelphia)

Your Moderator

Dan O’Meara
Agenda

- Issues for in-house counsel in mediation
  - Timing
  - Forum selection and location
  - Mediator selection
  - Effective preparation
  - Managing pro se litigants
- Forum-specific negotiation strategies
- Real-world scenarios

About Our Speakers

Chris Meister
Michael Henthorne
“There is no instance of a country having benefited from prolonged warfare.”
-Sun Tzu

The Phone Call [Dan]
The Scenario

- Difficult pro se litigant
- EEOC charge with bad facts
- NLRB ULP charge filed by a plaintiff’s-side personal injury lawyer
  - Almost no labor experience
  - Unrealistic expectations
  - Implies a separate state court action for defamation is “being drafted”

- Multi-forum case, multi-plaintiff – dual filed charge with Board and EEOC
- Case calling for private mediation, but with each party paying out-of-pocket (and subject to attorneys’ fees and costs to prevailing party)
- Out-of-town mediation
The Goal

“Find the best mediation forum – and best mediation strategy – for each the cases on my desk.”

Threshold Considerations
Key Considerations in Every Mediation

What would make this mediation successful?

- Why are we here?
- What is our goal?

Key Considerations in Every Mediation

When should we mediate?

- Timing
- Pre- vs. post-discovery
Considerations Regarding EPLI or Other Insurance Coverage

- Are the claims covered by insurance?
- Has the carrier been put on notice in writing?
- Has outside counsel been approved by the carrier?

Considerations Regarding EPLI or Other Insurance Coverage

- Is the carrier’s representative required to attend mediation in person?
- What does “full settlement authority” mean?
Considerations in Selecting a Mediator

- Magistrate judge versus private mediator
- Plaintiff’s preferred mediator versus your preferred mediator

Considerations in Selecting a Mediator

- Subject matter expertise
- Mediation experience
- The “retired judge”
Considerations Before Scheduling Mediation

- Have you gathered sufficient information to assess settlement value?
- What impact does your judicial draw have on assessing settlement value?

Considerations Before Scheduling Mediation

- What impact does your opposing counsel have on assessing settlement value?
- What impact does your claimant have on assessing settlement value?
- Have you completed MMSEA due diligence?
Vexatious Pro Se Litigant

EEOC Charge with “Bad Facts”
NLRB ULP Charge – Inexperienced PI Counsel

Multi-Forum Case, Dual Filed with NLRB and EEOC
“Private Mediation” Case

Out-of-Town Mediation

- Witnesses in different locations, multiple states
- Increased expenses
Concluding Thoughts – Traditional Labor Cases

Concluding Thoughts – Employment Law Cases
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