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Employment Law Mediations:

With apologies to Captain James Kirk and the crew of the USS Enterprise, it should be easy to boldly go where many have gone before. But that rarely seems the case when companies mediate employment law disputes during the course of litigation or an administrative charge. The reason may be as simple as the fundamental hurdle often encountered when two opposing worlds collide. In the galaxy of employment lawsuits and administrative charges, one world is that of intent: Did you really mean to discriminate, retaliate or harass? Assuming the answer is no, the other world is that of settlement: Why pay anything to resolve something you didn't do?

Boldly Going Where Many Have Gone Before



BY J. MICHAEL GAITHER AND KENNETH P. CARLSON, JR.

Even if employers and their managers may have been inconsistent in their actions, sloppy in their record-keeping or mistaken in their decisions, they virtually never “intend” for unlawful discrimination, harassment, retaliation or wrongful discharge to occur. (If they do, then the case should be quickly settled and the right thing done to correct the actions!) Given that successful mediations normally involve a monetary payment of some amount to the individual bringing the claim, along with occasional rehire or noneconomic considerations such as a neutral reference or negotiated letter of reference, what is the incentive to consider settlement? And should that incentive be anything more than the cost-benefit analysis of avoiding the time, expense and risk of actual or potential litigation?¹

Perhaps the most important initial step when considering mediation is to recognize what it is and what it isn't. Simply stated, mediation is a process in which opposing parties meet with a neutral facilitator to try to resolve their dispute. For jurisdictions that require mediation during active litigation, the court-ordered mandate is only that the parties meet. There is no requirement to actually settle, and the mediator does not sit as a judge, jury or a party's lawyer. This fundamental concept can be quite critical in answering the initial concern that some companies and their managers have, i.e., “Why are we being forced to settle this case?” Contrary to that notion, no one is being “forced” to settle. Rather, a proper understanding of mediation within the context of active litigation is that the process provides opportunity.

The primary opportunity is to step above the fray — not away from — and assess your strengths, weaknesses, risks and rewards in continuing to litigate, with as objective an eye as possible. If that leads to settlement, then great; the case is over on terms the parties themselves determine without the inherent risks of having a judge or jury decide those terms and conditions. If settlement doesn't occur, then the parties are no worse off, and the litigation continues. Either way, it is a classic “win-win” situation that also helps protect those in charge of litigation from the critical eye of hindsight after costs escalate more than expected, or especially after a disappointing verdict: “You mean, we could have settled for less six months ago?” Yes, you could have, but for whatever reason, you didn't. That decision can range from having strongly believed in your case and



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wanting to fight on principle, to unreasonable or seemingly unreasonable demands by opponents that appeared to outweigh the risk of moving forward.²

By using the mediator not only as a facilitator, but also a sounding board or devil's advocate, companies can also use the mediation process to test their legal theories and how certain facts might play at hearing or trial. Although the advantages of doing so may greatly depend on when mediation takes place during the course of litigation, a catharsis usually occurs. Usually, it is positive; occasionally, it is negative. But it is always educational, as companies leave mediation knowing more about their case and their opponent than they did before.

Select the right mediator

Assuming you want to increase your chance of settlement, select a mediator who is at least familiar with the area of law at issue. This is especially true in employment cases, where the emotions and legal nuances that are so often present frequently require an understanding neutral person to listen and help the parties think through their positions. Whether you want a mediator who will simply convey settlement offers, versus one who will also act as a sounding board, is a matter of personal preference. As a general rule, the more active the mediator is in helping the parties evaluate

their case — while maintaining strict neutrality and honoring the distinction between mediating a dispute and giving legal advice — the more likely a settlement will be reached.

Have appropriate representatives present

It goes without saying that the appropriate parties, attorneys and other participants must be at the mediation to increase its chance of success. Their participation is also normally required by applicable court rules when mediating during active litigation. If not physically present, then the person with ultimate settlement authority must be promptly available by telephone or another means of reliable communication. If employment practices liability insurance or some other insurance coverage applies, then under most court rules, the carrier's representative must also be at the mediation, whether in person or by telephone. The only exception to these mandatory participation rules is usually when all the parties and the mediator agree that someone does not have to be physically present, or upon a party's motion and subsequent court order. And

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although these rules generally do not apply to mediations outside the court system, they are still recommended to increase the chance of success.

Another interesting dynamic for companies is in selecting which corporate representative(s) should attend the mediation. If the primary decision maker at issue in the litigation is also the company's sole representative, there can be a degree of emotion and inflexibility on both sides of the dispute that becomes counterproductive. This is not to say that decision makers should not attend. Rather, they usually should — but to improve the chance of settlement, a company should also have other, and preferably higher, members of management present. This will help offset any tendency to negotiate more from self-righteous indignation than an objective assessment of merits and risks, as well as the inevitable cost-benefit analysis involving both.

When to mediate

There is no magic time to mediate. As a general rule, courts in mandatory mediation jurisdictions establish a deadline for conducting mediations, and leave it to the parties and the mediator to schedule a conference within that time period. Mediation usually occurs at one of numerous stages in a dispute, any of which can be the appropriate time for a particular matter, and all of which have unique dynamics that may increase the chance of settlement.

Early mediations

Early mediations are those that occur before or immediately after an action is filed, and prior to any formal discovery. They can be an extremely effective form of dispute resolution for a number of reasons. By mediating a conflict early, settlements can often occur before feelings and positions harden. This especially enables employees or former employees to begin the necessary emotional journey of separating “personal” feelings from a situation, so objective discussions can occur. Such a process can sometimes require more than one session, with the intervals between those sessions being valuable opportunities for all parties to reassess their positions in light of additional facts or other realities.

In addition, the money that would probably have been spent in defending a case can arguably be more effectively applied toward an actual resolution, with any concern for adverse publicity also being avoided through tight confidentiality obligations in a mediated settlement agreement. (Assuming, of course, you have reconciled any philosophical conflict over paying any consideration to settle the matter.) Further, during early mediations, companies often learn facts they don't already know, even if they have already investigated the alleged actions. This learning experience usually proves quite valuable in moving forward, regardless

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of whether the dispute is actually settled in the mediation.

But mediating at an early stage also has challenges. In particular, being early in a dispute usually means that both sides do not fully understand their strengths or weaknesses, and may have difficulty moving beyond their own understanding of the facts and their own initial case theories. Given that companies tend to have most of the documents and the best access to witnesses and facts in an employment dispute, this can especially affect the individual or her attorney, who may have unreasonable demands based on limited knowledge. This can lead to an unwillingness to negotiate in any manner that involves substantial movement, as a party may not know enough to challenge preconceived ideas with a proper assessment of risks and rewards in moving forward.⁵

Despite these inherent limitations, there are at least four motivations for companies to consider early mediation, any or all of which can be a controlling factor:

1. when the company, or at least a rogue manager, actually did what's being alleged;
2. when the company didn't do what is being alleged, but the facts are quite messy to defend; or when the costs, publicity or potential risks make an early settlement otherwise attractive;
3. when the company didn't do what is being alleged, but wants to avoid the time, effort and expense of defending, *and* doesn't mind the workplace “precedent” of settling a case that it firmly believes has no merit; and
4. when the company has other goals to achieve — such as structuring an employment resignation as part of an overall settlement.



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Whatever the motivation, for early mediations to work, all parties must buy into the concept that trying to resolve a dispute at this point in time and with limited information is a good thing to do. As with all mediations, they must also bring a good-faith willingness to compromise, leaving behind the temptation of simply using the process for “free discovery,” or as a podium to express inflexible positions. Assuming these principles are followed, a mediated settlement conference before or soon after the start of litigation, and before discovery occurs, can be an extremely positive experience.

Tempering that experience, however, are two realities: First, as a general rule, the more documents and information that are shared, the better the parties will understand their positions and therefore properly assess their strengths and weaknesses, to prepare for any compromise. Second, although this usually translates into a greater opportunity for settlement, it also means playing certain “cards” before and during the mediation, which could affect the litigation moving forward. Those cards range from disclosing certain facts at an early, inopportune time, to revealing various legal theories and case strategies. If mediation fails, those may have been better served by keeping quiet until depositions or other discovery is conducted. In other words, mediating early can be like sharing a football playbook with the opposing team before kickoff even occurs, thereby handicapping certain moves if the litigation game continues. This is in addition to the common concern of setting a baseline for any later settlement discussions, which can happen despite a party’s clear admonition that whatever settlement offers are exchanged at the mediation will not bind them in the future.

Mediations during litigation

Many believe that the optimal time for a successful mediation is after the parties have conducted at least an

ACC Extras on... Employment Law Mediations

European Briefing

- Mediation a la Rus: Peace, Not War? (June 2011). www.acc.com/eb/mediation-a-la-rus_jun11

Quick Reference

- Litigation v. Arbitration v. Mediation Comparison Spreadsheet (Oct. 2011). www.acc.com/quickref/lit-arb-med_oct11

Top Ten

- Top Ten Things to Consider When Using Mediation for Alternative Dispute Resolution (Jan. 2011). www.acc.com/topten/mediation-adr_jan11

Presentation

- Alternative Dispute Resolution — What Works? (May 2011). www.acc.com/adr-what-works_may11

Article

- ADR — Options for Resolving Your Dispute (May 2011). www.acc.com/adr-options_may11



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initial round of written discovery and conducted the key depositions. According to this position, it is only then that strengths, weaknesses, risks and rewards can be properly assessed in terms of potential settlement versus moving forward with litigation. Timing can also be important in saving litigation costs, especially for companies planning to file a summary judgment or other dispositive motion. From at least an economic perspective, the legal fees and company involvement in completing depositions and other discovery, and then filing, briefing and arguing for or against a summary judgment motion, can often be better spent if applied to a settlement amount timed to avoid a good portion of those efforts.

Another optimal time for successful mediations is after a summary judgment or other dispositive motion has been filed but before it has been decided, especially if you want to signal your strengths to the plaintiff. The primary pur-

pose of that signal is to lower any expectation of a high monetary settlement (however “high” is defined), knowing that the risks in doing so are at least twofold: The first risk is that a plaintiff’s response to the motion may have the opposite intended effect by showing key weaknesses in your case, and thereby emboldening the plaintiff’s claims even more. The second risk is that by causing a plaintiff more litigation costs, and perhaps exacerbating hard feelings that already exist, a plaintiff can be pushed into an even less negotiable position. That may especially happen when the odds of obtaining summary judgment are in reality quite slim, and the plaintiff sees the motion as just one more example of the company striking back for the lawsuit being filed.

If a company’s summary judgment or other dispositive motion is denied, mediation can still be an effective way to avoid the time, expense and risks of trial. However, at this point — when everyone knows that a judge or jury will decide the case — the costs of a successful mediation are usually higher for the company. In fact, employers can normally count on plaintiffs demanding more money and perhaps other nonmonetary requirements to settle the case after surviving summary judgment.

Mediations on the eve of trial

Although mediations on the eve of trial are usually a subsequent voluntary attempt after an initial conference has failed, they can still be effective. This is especially true if the parties simply need a neutral set of eyes and ears to help them with a last-minute reality check of potential risks and rewards before trial begins.

The fact remains that many plaintiffs who survive summary judgment ultimately lose at trial — or win a lesser amount than they could have achieved at mediation. The fact also remains that many companies who go to trial get tagged for much more in monetary damages and equitable relief than they could have negotiated when mediating. Exceptions to both certainly abound, but no one has the proverbial crystal ball, and a good mediator will make sure that all parties are aware of these potential outcomes regardless of their confidence levels. (When the mediator is a judge as part of a last-gasp judicial settlement conference before trial, you can count on the potential outcomes being explored!)

Assuming the mediation conference is a second attempt, a key decision is whether to keep the same mediator or try someone different. This should depend on how the initial mediation went and what caused the original impasse. If



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Preparation for mediation with a goal to settle will vary depending on the type of case, the stage of litigation, and the people and personalities involved. Certain common principles seem to exist in cases that settle versus cases that don't.

the earlier mediation failed because of improper timing, or an entrenched position due to known or believed facts at the time, or some other reason that had nothing to do with the mediator's performance, then having the same mediator is normally the best course. After all, she already has a solid grasp of the case facts and legal issues, has built at least some relationship with the parties, and can spend the bulk of mediation time talking frankly with everyone about the "now or probably never" chance of settling before trial. But if the mediator's style or abilities were an issue in the first mediation, or if the parties simply want a new mediator's perspective, then a change in who conducts the conference can help invigorate the process.

Preparing for and conducting a mediation

Preparation for mediation with a goal to settle will vary depending on the type of case, the stage of litigation, and the people and personalities involved. Certain common principles seem to exist in cases that settle versus cases that don't. By following all or most of these concepts, companies can increase their chance of successfully resolving a lawsuit, charge or other dispute:

1. **Be educated.** This at least means knowing the facts at issue and having a working knowledge of the applicable law. Challenge yourself with a truthful and straightforward assessment of the strengths, weaknesses, risks and rewards of all sides in the dispute. In addition, educate the mediator, both at the mediation and, if possible, before the conference by submitting a confidential, written mediation statement that summarizes your position.

2. **Be confident, not cocky.** Being strong and confident is one thing; being cocky and arrogant is another. Simply stated, do not oversell your case when preparing for mediation. If you do, then as defense counsel, you'll likely devalue any potential settlement. This could have unfortunate consequences if mediation fails and the case evolves in unexpected ways.
3. **Distinguish "probabilities" from "pipe dreams."** Make sure you know the difference between what can reasonably be achieved at mediation and what is likely a pipe dream. You might get lucky, but odds are that your dreams won't come true, whether at the close of mediation or at the conclusion of any trial.
4. **Determine the nature and amount of settlement authority.** Know your expected settlement limit, but also whether that limit might be reconsidered depending on what happens at mediation. If so, have a procedure for doing that if needed, including how to contact an appropriate person for greater settlement authority.
5. **Arrive on time and don't plan to leave early.** One of the quickest ways to set a negative tone for mediations is when one party is significantly late. Another way is to set an unreasonably quick timetable for concluding the conference. If airline schedules are an issue, it greatly benefits the process if flights are arranged for as late as possible, since employment mediations often last longer than other types of mediated settlement conferences.
6. **Be professional.** The more professional and courteous the parties and attorneys, the more likely it will be that the first several hours of a mediation are not filled with undoing the damage of a contentious opening session. This does not mean that firm or even strong words and positions cannot be conveyed in an opening, or that emotions cannot be expressed. What it does mean is that how you conduct yourself can be as important as what you do at mediations. As a general rule, the following actions usually work against any chance of a mediated settlement: aggressive or loud statements and behavior; pointing fingers at opposing parties; directly addressing individual plaintiffs in a condescending, threatening or arrogant manner; and dictating uncompromising expectations of how a mediation should be conducted, without considering the thoughts of opposing parties or the mediator's authority.

7. **Be properly conciliatory.** Regardless of how strongly you believe in your case, at least say that you've come to the mediation in good faith hoping to resolve it. Even if that hope is tempered by words like "through a reasonable settlement" or "as long as Mr./Ms. Doe is quite reasonable." Remember also that a touch of humility can go a long way toward fostering a settlement — and humility can be expressed in many subtle and overt ways, without ever compromising the strength of your position.

Being flexible and prepared

Whatever the strategy when preparing for a mediation conference, companies also need to be flexible and to think alternatively. In short, if you want to increase your chance of settlement, then thoroughly prepare, expect the unexpected, adopt a conciliatory posture even while maintaining the strengths of your position, and consider the other concepts discussed in this article. By following these principles, unlike the USS Enterprise, you might actually go where many have gone before, and in the process, resolve some employment law disputes that will allow your company to focus on more productive business than the time and expense of litigation. 🚩

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NOTES

- 1 While mediation outside of litigation is a frequent and growing area of alternative dispute resolution, this article focuses upon mandatory and voluntary mediations conducted during the course of a lawsuit in state or federal courts, and through administrative agencies such as the Equal Employment Opportunity Commission (EEOC).
- 2 It is usually critical for employers to get past the concept of "principle" if mediation is to occur in good faith, and with a reasonable chance of settlement. Tempering that qualifier, however, is the degree to which the employer believes that settling the claim might establish a precedent that could encourage other workers to attempt the same litigious path. Companies and situations may differ on these points, but both are concerns that should be initially addressed as part of the mediation process.
- 3 Although the conventional wisdom is that settlement values increase when a lawyer represents an employee or former employee, there are exceptions. The main exception is when it takes an independent person whom the individual trusts — such as her own attorney — to provide the "reality check" needed to explain the facts and the relevant law, in a manner that may help achieve a reasonable settlement.



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