Seven secrets for successful mediations

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1. Establish a positive working relationship with opposing counsel early.

When I started practicing employment law many years ago, the employment law bar was a small closed fraternity, primarily consisting of Union side and Management attorneys. Everyone knew everybody and there was a very collegial atmosphere. However, now the practice of employment law has exploded and there are hundreds of employment lawyers who hardly know each other. Therefore, the key to success is to start off on the right foot with your opponent. Try to get to know each other personally in the beginning. This will establish the foundation for a relationship of mutual trust and respect, which will lead to a successful mediation down the road. On the other hand, if you start off too aggressively with "Rambo" style tactics, it will be very difficult to have a successful mediation later on.

2. Select the appropriate mediator for your case.

Mediators are not one size fits all. There are numerous variables to consider. You need to carefully analyze your case to determine what mediator is the right fit for your case. Some mediators specialize in wage and hour, while others focus on discrimination cases or all types of employment cases. Some have more empathy for immigrants, females or minorities. Certain mediators may be better suited for highly emotional cases such as sexual harassment. Different mediators have different styles; some are mere "messenger boys" relaying offers back and forth, while others will be more involved in aggressively pushing the parties toward settlement. You must make a preliminary evaluation of the potential range of the settlement value of your case. If it is a high value case you will want to have a mediator who can push to obtain that result. After analyzing all of the variables you need to find a mediator that will be the right fit for the unique facts and circumstances of your case. Then you will need to be able to persuade the other side to accept the mediator. Ultimately, you want to select a mediator that *both* sides will trust. It does you no good to select a mediator who you love, but who the other side does not trust.

Since good mediators are in high demand, their calendars are backed up months in advance. Therefore, once you decide that your case is an appropriate case for mediation, you should select your mediator immediately. It is a good idea to ask the other side which mediators they like. Sometimes, your favorite choice may be on their short list.

3. You need to know when is the appropriate time to mediate your case.

In employment cases, the employer will always know much more information in the beginning. The plaintiff's task in informal and formal discovery is to ascertain the relevant facts and discover the important documents to support his claims. The trick for the plaintiff, as well as the defendant, is to be able to determine when it has sufficient information to successfully mediate its case before both sides have spent so much money in litigation costs as to make mediation not cost-effective.

In some cases, it makes sense to have a pre-litigation mediation if the parties have sufficient information to have a meaningful mediation. Other cases will not be ripe for mediation until after discovery has been completed and a motion for summary judgment has been filed. Most cases will be ready for mediation after the plaintiff's deposition has been taken, but before a motion for summary judgment has been filed.

Each case is different; the dynamics of the relationships between the parties and their lawyers varies. Some defense firms will not agree to go to mediation until after they have "billed" the case substantially. Others will want to take a more "cost-effective" approach for the client and attempt to have an early mediation.

4. Draft a winning brief.

Today, very few cases go to trial. Therefore, since in most cases mediation is your trial, you should prepare for it as if you were going to trial. Spend the time necessary to craft a winning brief that will persuade your opponent and the mediator of the merits of your case. Since most employment law mediators are already well versed in employment law, don't dwell on it. The mediator already knows the law unless there is a special nuance in your case. Focus on the facts. Tell a compelling story that persuades the reader to see the case your way. Use exhibits where helpful but don't inundate the mediator with documents. Work together with your client as you review the facts and gather documents while drafting your brief. That will assist you in preparing your client for the mediation at the same time.

I recommend that you exchange briefs with opposing counsel before the mediation. Send your brief far enough in advance of the mediation to allow sufficient time for all the relevant parties to review it and to obtain the necessary authority to resolve the case. This helps ensure that all of the parties understand the potential strengths and weaknesses of the case. It will make the mediation more productive because the parties will be ready to go. I have been in mediations where we have wasted the first half of the day just coming to an agreement on the basic facts, which could have easily been avoided had the defense provided its brief. If you want to save some information for impeachment or trial, you can always send a "private letter" to the mediator with confidential information that you want to save to supplement your mediation brief.

5. Build Trust with your opponent and the mediator.

If you have started to build trust with opposing counsel from the beginning of the case, then you will have a better relationship during the mediation process. On the other hand, if you haven't yet developed a relationship with your opponent, then you should call them in advance of the mediation to try to establish rapport with them and to narrow the issues in dispute. Exchanging mediation briefs is a good step towards that goal.

It is great to work with a mediator who you have settled cases with in the past, but if you are using a new mediator, call them in advance and introduce yourself and your case to them.

6. Preparation, preparation, preparation.

There is no substitute for solid preparation. If you fail to prepare, you are preparing to fail. It is critical to prepare your client during multiple sessions about the mediation process itself about what to expect during the mediation, how to conduct himself or herself during the mediation, and most importantly, the facts of his case. You will need to set expectations about a range of possible outcomes, including the risk and expense of trial. Explore non-monetary issues that are important for your client, such as a letter of recommendation. You should prepare a draft settlement agreement to bring with you to the mediation which includes your client's non-monetary concerns.

7. Patience

My many years of experience have taught me that the parties never get serious "until the sun starts to go down." You have to "do the proverbial dance." There is no way to short circuit it and "cut to the chase." Therefore, be patient. It will be a long day. Even if you are only scheduled for a half day, the parties won't get serious until the end of the mediation session. I have volunteered as a mediator through the bar's "Resolve" program, which has a 3-hour time limit, after which you lose your computer connection. It has been my experience that the parties posture for the first two-and-a-half hours, and then there is a flurry of activity during the last 30 minutes, when the case is settled.

Conclusion

If you use my seven secrets, you will have a successful mediation. While these tips are designed for employment law mediations, they are applicable to all types of mediations.

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