Preparing and Executing A Mediation Strategy

When To Mediate

When does it makes sense to mediate and when not? There is no general rule.

Some say to mediate only when you have enough information to realize that there is exposure and some sense of the order of magnitude of the potential recovery. There is a lot to say for the view that one needs sufficient information to know whether the deal one is making is a good deal or not. But as sensible as it sounds, this approach can be totally wrong! One cannot always know, and the adversary process can prevent us from finding out, if conditions are favorable for a good settlement through mediation.

- Suppose the employee is anxious to settle quickly for reasons you do not know—like a desire to make job-hunting less awkward? This may be the only chance for a relatively cheap settlement.
- Suppose the employee has information management doesn't have that makes the case much more dangerous than it appears and that could be important to the company for risk management purposes—such as the alleged harasser's confirmed history of past sexual harassment at other companies? It is better to find this out immediately, not after spending a year of litigation resisting the conclusion.
- Suppose you will be spending tens of thousands of dollars during discovery and only be educating the plaintiff's attorney on how good the case is? Wouldn't it be wiser to settle when there is still uncertainty and won't it be easier while the lawyer's one-third of the recovery still represents mostly profit to the attorney? The opportunity for discounting based on avoiding legal cost decreases as each day passes.

Information is something that can be acquired in the mediation itself, and at a much lower cost. A lack of information means that the person or persons making the decision will have to accept that part of the choice is based on probability and guesswork. But that's true of most business decisions.

Three factors must always be considered. First, you must have everyone at the table who is necessary to achieve a resolution that would be acceptable to each side. Second, you must be prepared to consider alternatives to the outcome on which you insist, and some reason to think that the other side is flexible as well. Third, consider whether the resolution can be brought about just as effectively through direct negotiation with no intermediary.

Mediation at the Get-Go. Human resources managers are regularly engaged in mediation among employees and between employees and management. Where the stakes may become significant and emotions are high, a mediation at the moment when the dispute arises—before it gets legal—can be a

wise choice. This kind of mediation operates on a different model from a legal mediation. The process challenges the participants to treat the dispute as a problem and work together cooperatively to figure out the best resolution. A professional mediator is an absolute necessity for such a dispute, because the legal side of the matter is in the background and the human side is at the fore.

The EEOC mediation program in the Chicago area has had success because, at the outset, many claimants are not looking for extended litigation and a large payoff. A chance to be listened to by management and receive some small benefit (often a neutral reference or nominal separation payment) may be enough. The point is that a large number of those who go down the path to litigation can be turned aside from a process that does at least as much harm to claimants as it does to the companies for whom they work or have worked.

This is especially the case with employee-plaintiffs who are still in the workplace. Mediation provides an opportunity to resolve the emotional conflict that always lies beneath the surface and can allow the employee to return to work as a productive worker. If that is not possible, as is more frequently the case, the opportunity to eliminate the management headache of dealing with an employee who is suing the company through an agreed "exit strategy" is usually one of those situations in which each side is better off than it would be in court.

Where counsel is in the picture and management is willing to examine the merits and potential costs (tangible and intangible) of the case objectively at the start, it is likely to find a less expensive settlement is possible at the start. Employees are more likely to be thinking in a "separation pay" mindset, rather than the more expensive "punitive damages" mindset. Attorneys for claimants who are on a contingent fee may be anxious to resolve the case with a minimum of effort, and turn a profit on the case.

Sometimes it comes down to a judgment call:

Don't settle right away if…	**But consider this:**
…the plaintiff, plaintiff's attorney or management have unreasonable expectations about settlement. Some of the pain and frustration of litigation may be needed to get one or both sides ready to make a deal.	*Aggressive opening stances in negotiation are common, and do not necessarily demonstrate that expectations are high. It is also easy for an employee to become emotionally involved and increasingly unreasonable as the case progresses.*
… the plaintiff does not seem litigation-worthy and may never proceed to court with a legal claim. Some lawyers bluff about filing lawsuits, and if the one representing the employee falls into this category, perhaps the claim will simply disappear.	*Once an attorney makes a commitment to proceed to court, especially in a contingent fee case, the lawyer has generally made a judgment about the merits of the case that will encourage the employee to be unreasonable and which will be difficult to displace.*
… the plaintiff is a good candidate for re-employment at an equal or higher rate of pay. Sometimes the early press for a quick settlement is because the employee has a new job already waiting, or almost waiting, and is looking for a windfall.	*Fired employees often are not good in early interviews—and the employee's prospects for new employment may actually be worse than the employee believes.*

Mediation In Mid-Stream. Suit has been filed, perhaps some discovery has been taken, the outlines of a summary judgment motion, if there is to be one, are mostly evident to both sides. The judge is assigned and the lawyers know what to expect from the judge and one another. There are uncertainties about what the evidence will show, but probabilities are becoming easier to assess. The recoverable range of damages can be estimated intelligently.

The principal obstacle to settlement at this stage usually lies in the parties' substantially different views of the merits of the litigation, which counsel on both sides exaggerate to one another as part of the ritual of pre-negotiation posturing. A secondary obstacle lies in the emotional toll the litigation has started to take, causing the clients to demonize one another and begin to reframe the human issues that brought about the conflict as partisan legal contentions.

Another obstacle lies in the "sunk legal cost" problem—both sides have invested significantly in the conflict with the expectation of a favorable outcome, so neither is in the mood to be flexible—it feels too much like giving in. On the other side, there is still time to save considerably on the total expense and emotional toll that taking the case to conclusion in a courtroom would entail.

This is often the easiest time to pursue settlement of the case. It is the stage at which for both economic and emotional reasons, settlement has begun to

look more attractive as an option on both sides. Where the defense has a serious chance to prevail on summary judgment, that risk factor can bring down the cost of settlement.

At this stage, it makes sense—if there is a taste for settlement on any terms—to explore settlement by direct negotiations. But posturing aside, sometimes the chance of summary judgment is being overrated by the defense or underestimated by the plaintiff. Similarly, either side may have an overly optimistic view of its probability of prevailing at trial should the case proceed to that stage.

In such circumstances, mediation offers an excellent opportunity to bring the case to resolution. The greatest benefit of mediation at this stage is simply that it brings the parties and counsel together at the same place to work on reaching a settlement—there is no more putting the unpleasant matter off. Anxiety fills the room at the start of a mediation, and eliminating uncertainty is one critical motivating agent in the mediation.

Consider carefully whether it is wise to engage in any negotiation at all before the mediation. For one thing, it uses up bargaining room you might do better to have available at the mediation. More important, it can lead to "false despair" about the chance of settlement. Negotiations often appear to be at impasse when they are not. Mediators see this all the time and good ones have a number of tools with which to prevent impasse. If what looks like an impasse is reached in direct negotiations, that is generally the end of the negotiations, at least until a material change occurs. Mediation under these circumstances will appear to be pointless. So it may also be wiser to make all concessions in the direction of settlement in a choreographed effort to obtain the best outcome on the mediation day.

Mediation on the Courthouse Steps. Nothing concentrates the mind on settlement like a firm trial date. There is no time left for bluffing at this stage, and serious negotiations will usually be pursued by the trial judge. No mediator has the capacity to motivate parties to compromise as effectively as the individual who is poised to make a host of discretionary judgment calls that could affect the outcome of the trial. But mediation at this stage can be the best option when the judge is passive or lacks credibility with the attorneys; where there are emotional factors that need time to be aired before one party will accept compromise; where the judge seems to be on one side of the case, especially if that is the employee side; and where the judge is unwilling or unable to devote the time needed to bring the case to settlement.

Preparing For Mediation

Know Your Case. The first step to preparing for mediation is to know the facts and law. There is no substitute for knowing the evidence cold and completing research of *all* significant legal issues. New factual information is usually developed from the process, and knowing the record is the way to know whether someone is trying to snow you and confronting you with a problem you

had not considered. Because the mediation often represents the first full-fledged confrontation of the opposing viewpoints on the case, the decisive legal point is usually not obvious until the mediation is actually underway. Often one side has worked out a twist on one of the legal issues in the case that the other side needs be concerned about but does not recognize as a problem before the mediation. Come armed with your precedents, because the other side will discount everything you have to say about the law, but may modify its view upon reading the cases themselves.

Assess Settlement Incentives. There is always more to the settlement decision than just the merits of the case. Assess your own, and the employee's, risk profile—if the plaintiff's damage claim is substantial and appears to represent a legitimate calculation, for example, it may suggest a greater exposure, but it also suggests that the plaintiff is less likely to be ready to "roll the dice" because s/he needs the money. Consider also any other factors that could affect the employee's incentive to settle. Then turn the analysis around: what factors unrelated to the lawsuit should affect management's willingness to come to settlement? These can be economic pressures; they can also be collateral considerations, such as an impending layoff of potential witnesses that could affect the case, or plans for a sale of the business or an IPO that makes financial statements with no litigation footnotes desirable.

Know Your Negotiating Partner. It is important to know what to expect from the players around the table. Most negotiators are remarkably consistent in how they respond in a negotiation. It pays to educate yourself about the negotiation style and habits of opposing counsel and the employee through a review of how they have behaved in past negotiations. If there will be a need to check in with someone at higher levels before finalizing a settlement beyond a certain level, it is important to have a sense of what to expect from that person, too. Don't ignore the need to know the mediator, his or her usual *modus operandi*, and how flexible the mediator will be in modifying the approach if things are not going well.

Identify The Employee's Interests/Emotional Issues. The next consideration is the most important one, but also the most difficult to uncover. Do everything you can to figure out what it is that the plaintiff is *really* after. If you perceive that a huge concern of the former employee, for example, is the indignity s/he suffered, you may be able to satisfy that need without paying a cent. A genuine apology may go a long way to altering the employee's point of view. Or it might embolden the employee to be more aggressive—you need to think hard about which is the more likely reaction, and consider whether it is better simply to acknowledge the reality of the harm the plaintiff has suffered. Do not try to "negotiate" an apology, because an apology has little value when it lacks sincerity or when it has been extracted.

There are a number of other emotional needs that employees can bring to a mediation. There may be a genuine fear of the financial impact of a termination, or a real belief that the employee's reputation in the industry has

been destroyed. The employee may need to put on a show of aggressiveness for a spouse or family member. Some people simply have a need for some drama before they are able to accept a compromise. Do all you can to figure these emotional needs out, so that you can address the issues they present, so you can educate the mediator and so you can ensure that your negotiating plan does not exacerbate the problem.

Be Able To Prove All Significant Assumptions. In about half of all mediations, the parties need nothing more than a forum in which to negotiate, and will come to settlement, perhaps after some bluffing or brinksmanship, without any significant help from the mediator. Settlement is usually the result of reasoned review of the dispute and the comfort of having a neutral third party validate the reasonableness of the settlement. But in the other half of the cases, someone comes into the mediation with firm expectations about the case or the negotiation that will need to change if the case is to settle. This possibility must be anticipated. The preparation for such a confrontation consists of identifying the key assumptions (about facts, law and negotiating situation) on your side and on the other side. Prepare to back up each assumption about the case with hard evidence or case law, and prepare to shatter the illusion under which you believe the other side is laboring. On the critical points, where the assumptions are direct contradictions, be prepared to support your position, and your fall-back position, convincingly.

Keep in mind that the key here will not be proving a case to judge or jury. It will not be convincing the mediator, although that can help. It will be convincing your adversary or at least inducing uncertainty. If there are two arguments against the employee's position, one casting the employee in a negative light and the other not, focus on the one that is likely to be easier for the employee and plaintiff's attorney to accept.

Do The Damage Calculations. Analyze and calculate the "hard" and "soft" numbers on the damage side of the case. You should arrive at the mediation having already crunched the numbers in a credible way, not just with a view to coming up with the lowest totals possible. Numbers are powerful persuaders, but far less likely than legal issues to provoke emotional responses. It is surprising how often a plaintiff is so focused on liability issues that a damage calculation resulting in a low number comes as a complete surprise. A detailed spreadsheet showing figures that reflect consideration of all relevant factors can become the starting point for negotiations for the other side. This can do wonders in keeping the negotiating range under control.

Consider Both Parties' "BATNA." Assess your "Best Alternative To A Negotiated Agreement" (BATNA) and that of the other side. Developments during the mediation may prompt you to revise this calculation, which identifies the point at which you are indifferent between settlement and no settlement. This should include your prospective defense costs and a probability analysis of the claims asserted, taking into consideration the chance of summary judgment and liability determinations, and the range of possible damage figures (and

plaintiff's attorneys fees, where applicable) in a "decision tree" format. Then turn the analysis around and do it from the Plaintiff's point of view, and trying to see the case from the plaintiff's attorneys' point of view. You can expect that you will negotiate between those two outcomes, which is a wide range in most cases.

This BATNA number will likely be considerably higher than you would ever consider going in negotiations, but it provides several things. First, it helps you to stop and think about what is going on if the negotiations seem to be approaching or exceeding that number as a final result. You may be getting too eager to make the deal and need to take a more recalcitrant posture. Second, when you come down to making a final decision on a settlement and you are preparing to walk away, you should review this calculation, as revised by developments during the mediation, and ask if you are acting logically. For example, if you are thinking "I'd rather pay the money to my lawyer than to the likes of that plaintiff," you need to reframe your thinking about the negotiation to: "If I pay the money to the plaintiff, I end the lawsuit right here and never have to deal with it. If I pay it to my lawyer, the lawsuit goes on and I have to deal with the exposure to liability. Which of these two approaches makes more sense?"

Get Your Best Case and Plaintiff's Best Case To The EPLI Carrier. If you have EPLI coverage, it is critical to educate the carrier about the dispute well in advance of serious settlement discussions. Settlement authority is usually set by a committee or through consultation, and the participants in those discussions can only operate on the information they have. It is thus important to solicit from the plaintiff's attorney a presentation of his or her "best case" so that it can be considered by the carrier in establishing what it will pay. If, as happens with some regularity, new information and a new assessment develop during the mediation, you will be faced with a choice of reconvening the mediation at a later date or making a financial contribution to the settlement in order to get immediate resolution.

Prepare And Distribute A Mediation Statement. It is virtually always best to prepare a mediation statement summarizing your view of the case. The statement speaks to the merits of the case, sets out your negotiating posture and calls to the mediator's attention the weaknesses and unreasonableness of the other side's approach. Lay out the damage side of the case in detail and provide any appropriate technical materials, addressing tax questions, regulatory provisions, or other items that are of special importance to the case.

Give the mediation statement to the mediator and GIVE IT TO THE EMPLOYEE'S COUNSEL. It is an almost universal practice *not* to do this, and it is a mistake virtually every time. The phenomenon of "reactive devaluation" means that when you make a powerful point or present strong evidence at the mediation that the other side has not considered before, the reaction is not likely to be the fear and trembling that you are hoping to induce. The reaction is usually denial or at least extreme skepticism. Sometimes there is a powerful

answer to your point and you are the one caught off-guard. The attorney is likely to disbelieve your evidence or legal argument simply because there is no opportunity to verify or critically analyze it. It is thus crucial to permit the other side, especially the attorney, to think your arguments over in a calm setting for a time and come to the realization that there is no good answer to your strong points. At most, keep one or two points (on which you have ironclad proof) in reserve—and be sure the mediator knows what they are. Those you can try to use during the mediation as circumstances dictate.

Your mediation statement begins the process of educating the most important and hard-to-educate audience: the employee and plaintiff's lawyer. If there is information you do not want shared with the other side, you can put that in a separate confidential submission that the mediator agrees not to disclose without your prior approval. The only way you can be sure that a particular revelation will be taken seriously by the other side is to make sure that it does *not* come as a surprise.

Make A Negotiating Plan. The first few steps of the negotiation can usually be choreographed in advance, although there is a need to plan different second and third offers depending on the counteroffer. Doing this is important to unify your approach, at least in the early going, by forcing you to establish an objective. Studies consistently show that negotiators who have an objective going into negotiation achieve better outcomes, although they usually do not achieve that objective.

If your goal is to reach a settlement, the most effective strategy for doing so is called "tit-for-tat." This has been validated in studies involving a hundred thousand different negotiating events. It recognizes that every negotiation is partly cooperative (if no one made concessions, then there would be no deals) and partly competitive (if you just make concessions, you aren't negotiating, you're surrendering). It teaches your negotiating partner to be cooperative. These are the four rules to the strategy:

1. Open with a concession. Your opening position should invite the other side to respond with a concessionary response. If you get one, continue to respond the same way.
2. Retaliate. Answer aggression with aggression. If you get aggression back, retaliate again. And again.
3. Forgive. Every second or third time, open the door to a different response from the other side with a concession and demand a concession in response.
4. Be Clear. This should not be done as a secret strategy. Announce with the first offer what you are doing. Reinforce with each move what you are up to.

Caution: "tit-for-tat" may not yield the most favorable outcome. It puts you in a position, some of the time, to have your good will exploited. But the

"tit-for-tat" negotiator will reach acceptable agreement far more often than the aggressive negotiator, who will walk away from what could have been acceptable deals if the other negotiator is either also aggressive or views the appropriate price range differently.

The two sides will often have different ideas of what represents a concession and what represents an aggressive posture. One rule of thumb says to take the first offer on each side that is not insane and assume that the final settlement will be near the sum of the defendant's first offer plus one-third of the difference between the two offers. In other words, expect to do better than meeting halfway. This may be a result of the universal tendency of plaintiffs to inflate their demands, or of the innate aggressiveness of management counsel, or of the fact that management offers are cash and employee offers are but dreams. Most of the time, you can do better than "splitting the difference."

Your plan should identify some intermediate points after your first offer and provide rationales for why each makes some sense as a compromise offer. There is some value with even the most cynical and seasoned negotiator to provide some rational basis for an offer. Plaintiffs always complain that "I came down $100,000 and they only came up $10,000. That's bad faith negotiating!" In the same situation, the defense side will say "We went from $10,000 to $20,000—we doubled our offer. They came down from $1 million to $900,000, just 10%. That's bad faith negotiating!" These arguments are meaningless and not worth making. Far better to be saying, "Hey, I've got a good shot at summary judgment and $20,000 is four months' pay—that's a generous offer."

Don't Fall In Love With Your Plan Or Objective. No war plan survives first contact with the enemy, and no negotiating plan survives the first exchange of offer and counteroffer. To negotiate effectively, it will be necessary to maintain flexibility to meet whatever develops.

Most important, do not talk yourself into an advance "bottom line." This is a huge trap. Half the time, one side or even both will find out things that should significantly alter their assessments of the case. You are very unlikely to come out of the mediation process with a more optimistic view of your position than the one you started with. But it is in the nature of the process to affect the thinking of at least one side fairly frequently, so you should expect to have a less optimistic view of things as the mediation progresses. If your thinking is focused on a predetermined bottom line, it means you will not take into consideration what you learn in the mediation.

A "bottom line" is an arbitrary, largely emotional figure, unless it is a true calculation of your BATNA. Once you reach it, you will be affected by the phenomenon of "loss aversion," a universal human characteristic: people will risk about twice as much to avoid a loss as they will risk to achieve a corresponding gain. A predetermined "bottom line" establishes a point at which you begin to experience concessions as losses, and thus accept more risk of loss than is logical under the circumstances. Employees are even more prone experience this problem, but their "bottom line" is generally so emotionally

driven that the mediator can often convince the plaintiff's attorney of the folly of that approach. On the employer side, a predetermined bottom line makes the negotiator in the mediation look like an ineffective negotiator to upper management when all that has happened is that the mediation process has educated you about the case. The employer representative loses the chance to come back with a success and must choose between looking weak back at the office or rejecting a deal that is in the employer's interest to accept.

Believe What You Are Saying. Convince yourself of your opening position. Sincerity is effective.

Conclusion

Mediation is partly a setting in which negotiation can take place. It is partly an opportunity to get a look at what the risks of a dispute are and select options that would not otherwise be presented. It is partly an opportunity to find a collaborative solution, or a collaborative element of a solution, that is beneficial to both sides. It is partly an opportunity for healing wounds inflicted in the workplace or courtroom. Working within the process presents employers with a powerful tool for disposing of disputes with employees and former employees in a cost-effective manner.