HOT TOPICS IN LABOR AND EMPLOYMENT LAW

“HOW ADVOCATES CAN MAKE MEDIATION WORK FOR THEM”

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I. Introduction.

A. Litigation and an ancient, two-part Arabic curse: “May you have a lawsuit, and may you be right.”

B. Decide: “Do you really want to settle?” and “Do you really want to settle now?”

1. Full settlement isn’t the only option.

a. Mediation can also develop strategies to simplify the dispute and either expedite its solution by alternate means or expedite its litigation.

   (1) E.g., advisory arbitration of critical credibility issue.

   (2) E.g., “baseball arbitration” of multi-issue dispute after joint identification of criteria.

   (3) E.g., private magistrate services by mediator to manage discovery, define factual issues, and facilitate trial preparation.
C. Mediation is really about neutrally-facilitated negotiations, and negotiating is really about effective exchange of information.

D. General principles for making mediation “work”:

1. Preparing yourself.
2. Preparing your client.
3. Preparing the mediator.
4. Participating usefully in the mediation.

II. Preparing yourself.

A. Know your case.

1. Know what you do know.
2. Know what you don’t know (but need to know).
3. Know what your adversary knows, doesn’t know, and needs to know.

B. Get what you don’t know through pre-mediation case-management activities.

1. Information and document exchange.
2. Focused discovery.
3. Working with your adversary.

C. Know your client.

1. What does your client want?
2. What does your client need?
3. What doesn’t your client know that he/she needs?
4. What is your client’s state of mind/emotional state that will advance or retard the mediation process?
5. Is another person’s participation necessary for your client to reach a settlement decision?
6. Can your client endure and participate effectively in an extended litigation, both financially and emotionally?
7. Can your client participate usefully in joint meetings with the opposing party and with “the bad guy?”

D. Know your mediator.

1. What’s your mediator’s “style?”
   a. Facilitative
   b. Evaluative
   c. “Transformative”

2. What emphasis is necessary for this case?
   a. Does your client need catharsis before being able to move?
   b. Do your client’s expectations need to be brought back to Earth before movement can occur?
   c. Do the parties’ interactions need to be transformed through empowerment and recognition shifts?

(1) http://www.transformativemediation.org/transformative.php explains the transformative mediation model, which assumes that transformation of the parties’ interaction is what matters most to parties in conflict - even more than resolution of their dispute on favorable terms.

3. Does your mediator have credibility with both sides?

4. Does your mediator generate ideas, and will your mediator say no to demands that won’t fly or will torpedo the process?

5. Is your mediator active and persistent?

6. Does your mediator listen and take new approaches as new information and interests emerge?
E. Know yourself.

1. How much time have you really put in the case, and can your fee be adjusted to allow a reasonable settlement offer to fly?

III. Preparing your client

A. “Empower” your client with confidence in his/her control of the outcome.

1. Mediation is voluntary, and settlement is voluntary.
2. Nothing will happen unless your client says yes.

B. Explain the process to enable comfortable and effective participation.

1. The physical process.

   a. Joint sessions.
   b. Caucuses with the parties.
   c. “Executive” caucuses with counsel.
   d. Long breaks.
   e. Possible additional sessions.

2. The substantive process.

   a. Exchanges of information and proposals.
   b. Probing factual contentions and interests.
   c. Reality testing.
   d. Credibility issues.
   e. Devil’s advocacy.
   g. Questions, questions, and more questions.
   h. Active listening.
   i. Creative ideas, both inspired and lousy.
   j. Mediator’s proposals.
3. The emotional process.

a. Don’t expect to be happy; win/win outcomes are rare.
   (1) The likely outcome will be a mutually-acceptable level of dissatisfaction.
   (2) Punitive agendas don’t help, even if the son-of-a-bitch deserves to suffer.

b. Be patient; mediation takes time.
   (1) Bring a book, knitting, or a laptop.
   (2) Don’t expect immediate numbers.

c. Don’t take low-ball numbers personally.

d. Don’t expect “justice” in some Platonic sense.
   (1) The value of closure and getting on with life.
   (2) Define what’s needed to get on with life.
   (3) Be realistic about needs.

e. Be forthcoming with the mediator.
   (1) The mediator will be listening to hear what’s really important and necessary to move things forward.
   (2) The mediator can’t use what he/she doesn’t know.

f. Listen, listen, and listen some more.

g. Be open to consider creative proposals and strategies.

IV. Preparing the mediator.
A. Make the mediator “hot” with as much information as possible before the mediation begins.

1. *Ex parte* communication is essential in mediation.

2. Use confidential memoranda and phone conversations to educate the mediator about all of the above considerations with respect to your case, your client, and your own needs.

3. Tell the mediator what you think he/she will need to do to help move things along productively.
   
a. Be honest.
b. Be forthcoming.
c. Be prepared to share essential information, “smoking guns,” and “bleeding feet.”

   (1) Eschew “bottom lines,” and embrace “resistance points.”
   
   (a) Resistance points change with receipt of relevant information; bottom lines are forever.

   (2) All the information will come out in discovery; withholding it in mediation is counterproductive.

d. Specify concrete elements of claimed damages.

B. Tell the mediator what additional information will be necessary for settlement discussions so that productive pre-mediation activity can occur.

C. Tell the mediator what your client needs.

1. Reality checks for the out-of-control client.
2. Emotional needs.
   a. E.g., the importance of catharsis.
   b. E.g., the efficacy of apologies.

3. Practical needs.
   a. E.g., special accommodations for disabilities and comfort.
   b. E.g., training and outplacement services.
   c. E.g., dependent issues.
   d. E.g., references.

   a. E.g., insurance coverage, cash flow, retirement issues.

D. Warn the mediator about any problems between you and opposing counsel.

V. Participating usefully in the mediation.
   A. Let your client speak.
      1. You client needs to be heard and to know that he/she has been heard.
   B. Don’t “perform;” it’s not about you.
   C. Be the kind of adversary you want your adversary to be.
   D. Use the mediator for what you can’t do.
      1. Floating proposals you can’t be known to have made.
      2. Secure necessary information.
      3. Exploring non-traditional remedies.
      4. “Naming the monster.”
5. Translating English to English.
6. Facilitating accommodations to enable return to work.
7. Developing and pursuing such other creative strategies as imagination can conjure.
8. Issuing a “Mediator’s Proposal.”

E. Bring a laptop or thumb drive with a draft settlement agreement.

F. Never leave the mediation without a written agreement, Memorandum of Understanding, or term sheet that the parties have signed or initialed.

VI. Conclusion.

A. Mediation is a useful tool for the management of conflict, not a stage for dramatizing differences. It is a pragmatic, problem-solving exercise that works best when parties cooperate to address issues rationally and with information that enables them to identify and pursue the mutual interests they share in getting on with their lives. Mediation “works” when parties approach and participate in it with a mind-set that enables it to work.