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Alternative Dispute Resolution: Best Practices for Advocates in Employment Mediation

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Cases involving the termination of employment are high-stakes matters for everyone involved. The employer likely believes that she exercised logic and good judgment in reaching a very difficult decision. On the other hand, the employee has experienced the trauma of loss of livelihood and likely believes that both the decision and the decision-making process were flawed and unfair. In addition, the employee is probably experiencing financial difficulties. The employer may believe that she is being unfairly attacked for a difficult decision that was made in good faith. Everyone has a lot to lose.

The intense emotions inherent in employment cases serve to make such disputes well-suited for mediation. In addition, the potential for attorney fees shifting to the employer if the employee prevails in discrimination and whistleblower cases makes mediation worthwhile for both sides. All of this requires that the advocates be exceptionally well-prepared. This article identifies the best practices for advocates to ensure that the mediation is productive and reaches a mutually satisfactory result.

Prior to the Mediation

Schedule the mediation at the appropriate juncture in the case. Consider whether the case is suited to an early mediation before positions harden, or whether the mediation should be scheduled at a later point, such as, after the conclusion of discovery, or perhaps after the filing of summary judgment motions. Then identify a date, time and location that will be conducive to maximizing the likelihood that the case will settle.

Ensure that all necessary participants will be in attendance. The mediation will not be successful if the key decision-makers are not present for the mediation. If people with supervisory authority over a party are to be available by phone during the mediation, avoid failure by ensuring that such individuals will be available for the entire duration of the mediation proceedings.

Work with your client to formulate a range of acceptable options for resolving the case and gather all of the information necessary to make these options possible. For instance, advise any lienholder that the mediation is going to occur, and either negotiate the lien ahead of time or ensure that a decision-maker with authority to resolve the lien will be available at the time of mediation. Meet with your client to discuss and identify the range of reasonable settlement.

Anticipate what the opposing party's requirements for settlement might be. For instance, what might the employer be willing to do in terms of allocating the settlement proceeds? How might the issue of an unemployment compensation lien be handled? Work with your client to identify any non-monetary goals that might be achieved through the mediation.

The Mediation

Arrive early; get your team established in the room and comfortable. Introduce yourself and your team

to the mediator and all participants.

Use the opening statement as an opportunity to speak directly to the opposing parties and their representatives. Consider allowing your client to use this opportunity to demonstrate to the mediator and your opponent that he or she is articulate, motivated and participating in the mediation in good faith.

Deliver a succinct and non-argumentative opening statement that identifies the key information you want your opponent to hear, and that will be useful to the mediator. Include in your opening statement the facts you believe you can include at trial, the law which will persuade your opponent and the mediator as to why you should prevail, the remedies that you seek and the history of any prior settlement discussions. If the mediator has asked that you agree to a time limit, do not exceed without asking.

Be considerate of others. Thank your opponents for participating, listen carefully to their opening statement and avoid interruptions.

Demonstrate to all participants that you and your client are serious by remaining fully engaged in the mediation for the entire proceeding. Do not wander away from the mediation location or use your smart phone to make calls or work on email.

Remember that a mediation session is not a trial, but a search for resolution of the case. Although you want to demonstrate to your opponent that you are ready, willing and able to try the case if necessary, resist sliding into trial mode and the type of behavior associated with contested litigation.

Use the mediator as a sounding board for your ideas and proposals and allow your client to observe the mediator's reaction. Don't do all the talking. Allow the mediator to get to know your client. Even if handwritten, the plaintiff's side should give the mediator a summary of lost wages, claimed benefits, compensatory damages, and attorney's fees to use in caucus with the employer. Visual impact is stronger than an oral explanation with regard to these dollar amounts.

Be patient, stick with the process and do all that you can to encourage your client to follow your example. Remind your client that you have prepared him for a grueling and sometimes tedious day, and that enough time should be allowed so that the mediation process has adequate time to work. This is especially important with executives who are used to being in charge. Emphasize that there is no particular time constraint that applies to mediation in general, or to the mediation of your client's case.

Get all the important "moving parts" of your settlement position on the table early. Since employment cases can often involve liens, tax requirements and allocation issues, discuss these issues with your client and with the mediator early on in the process so that a ministerial issue does not upend a promising mediation late in the day.

Finally, avoid taking an absolutist position. Do not identify a proposal as your final offer unless you absolutely mean it. An ultimatum may send the mediator in the wrong direction if you aren't totally committed to it.

Wrapping Up

Do not leave the mediation site without at least drafting a signed memorandum or letter of agreement. If you are negotiating with a party with whom you have settled previous cases, make sure that you have loaded a draft of the previous settlement agreement on to your laptop. Whether you represent the plaintiff or the defendant, it is a very good idea to arrive with draft agreements that can be finalized

before the parties leave the mediation. At a minimum, make sure that a memorandum of understanding addresses the allocation, tax and lien issues. Include a payment deadline so that there is no ambiguity going forward.

Whether the case settles or not, make an effort to say goodbye to your opponent and shake hands. Chances are you will probably encounter the opposing counsel again in the future. Thus, it is critically important to be polite and say goodbye to the opposing party even if the case has not settled.

If the case has not settled, prepare your client for the likelihood that you will receive a call from the mediator in the near future. Decide how you will use that opportunity to continue your efforts to resolve the case.

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