ALTERNATIVE RESOLUTION CENTERS®
A LIMITED LIABILITY COMPANY

CENTURY CITY: 1875 Century Park East • Suite 450 • Los Angeles, CA 90067 • Tel 310.284.8224 • Fax 310.284.8229
DOWNTOWN: 700 S. Flower Street • Suite 415 • Los Angeles, CA 90017 • Tel 213.623.0211 • Fax 213.623.0228
DISPUTE RESOLUTION FOR THE 21ST CENTURY • www.arc4adr.com • Toll-Free 1.800.347.4512

MEDIATING EMPLOYMENT DISPUTES -- ADVANCED TECHNIQUES TO MAXIMIZE OUTCOME AND EFFICIENCY

Max Factor, Esq.
Steven W. Paul, Esq.
Deborah C. Saxe, Esq.
Alternative Resolution Centers (ARC)

I. Convening and Opening:

A. Who Should Attend?

Conventional wisdom dictates that the decision makers with authority always attend the mediation. But should that always be the case? If the defendant is a large corporation and the potential settlement amount is substantial, the only decision maker with real authority may be a very busy CEO or CFO in a distant state who had nothing whatsoever to do with the events at issue in the case. In that event, it can be sufficient for someone else (with limited (or no) authority) to attend the mediation so long as the decision maker is available by phone. That scenario actually can be better if the client representative who attends the mediation can tell the defendant's story.

Similarly, it may not be necessary for the defendant's out-of-state insurance adjuster to attend the mediation. If the plaintiff's counsel has an argument or piece of evidence they think will win the day, then their presentation might require the adjuster's actual presence in the mediation to help increase the initial case valuation. On the other hand, if no "smoking gun" exists, it may work as well for the adjuster to participate by phone (so long as he/she commits to being on the phone (and engaged in the process) the entire time the mediator is meeting with the defendant). From the plaintiff's point of view, so long as they have the chance to tell their story and have the actual company representative(s) present with contribution from the carrier, there is no empty chair that would curtail the process. However, in certain circumstances, such as where the defendant is having trouble getting the carrier on board with settlement dollars, the actual presence of the adjuster to fully understand the case dynamics, exposure, and to size up a credible and sympathetic plaintiff may be needed. Getting the mediator on

board prior to mediation regarding possible coverage challenges can also be useful.

Should the parties always attend the mediation? The automatic answer is "yes" - an absentee party can alienate the other side, causing the mediation to stall or fail even before it can commence. Also, if the party is an individual, he/she can tell the story and the mediator can work with counsel to settle and help him/her assess options. If the party is a corporation, it is important for the person sent to the mediation to know something about the facts and to at least appear to have the authority to settle the case.

What about the "entourage," those folks the client says need to be there for support? Many times a litigant needs support from a family member or spouse or close friend. Find out in advance and prepare the other side for the presence of a third party. A plaintiff who is denied the presence of a valued individual may be reluctant to settle. "What will my spouse, partner, closest friend say if I settle after all that I have told them?" Asking about this in advance and preparing each side for the presence of an additional chair avoids unnecessary conflict and is another way that mediation creates an environment that is comfortable and facilitative of resolution for the claimant.

However, the presence of a third party can torpedo the mediation. Here's an example. There was a case where a woman had sued her employer for sex discrimination and wrongful termination. She worked in a dangerous geographical area, had been robbed twice at work, and then decided to buy a handgun for self-protection. She brought the gun to work in her purse, which did not please management. Her husband insisted that he attend the mediation. Once there, he hijacked the mediation, doing all of the negotiating and threatening to terminate the session while his pistol-packing spouse sat silent. He paralyzed the process, making it impossible for the mediator or counsel to make any headway.

Though convention may dictate who should attend, it may be worth a second look to assess who really needs to be there. The only way to find out is to have the mediator make some serious pre-session inquiry on all sides to take the temperature and get some clarity on this important issue. In so doing, there will be no surprises and the mediator can actually help prevent the mediation from being sidetracked. If a plaintiff (or defendant) needs to stay in close contact every step of the way with a spouse or

other close family member, it may (or may not) be wise to bring him/her in for support and to assist in getting the deal done without significant delays in the session.

B. To Brief or Not to Brief?

Everybody drafts and submits briefs. We're used to that. It probably flows from the judicial model, because a judge cannot properly rule without facts and authority to rely on. But a mediator, even if she or he is a retired judge, isn't ruling on the law or evidence and the parties sometimes need to be reminded that, unless the mediation is morphing into arbitration, the mediator is there to help bring the sides together.

Mediation briefs in employment cases often are not much more than recitations of either the complaint or a series of affirmative defenses from the answer, along with applicable legal cites. Even in briefs that are heavy with facts, the parties, counsel and the mediator need to move beyond conventions (for example, "the defendants blatantly violated the plaintiff's civil rights" or "the plaintiff deserved to be fired"). It is helpful to identify potential witnesses, as well as confirming documents for material facts in order to create credibility and allow reality testing by the participants.

If the mediator is steeped in employment law, consider skipping the legal portion of your brief or limiting the legal discussion to new case developments or technical legal issues that are beyond standard. All the mediator really needs from a brief are some preliminary facts. The rest can be communicated in a variety of different ways: the story by counsel or client, choice excerpts from discovery (video clips from depositions, subpoenaed records that the other side forgot to request a copy of), or other materials that will assist the mediator in belt-sanding the respective positions of the parties and counsel into a form that will allow for a resolution. Thorough mediators will want to see key exhibits, email exchanges, declarations, deposition transcripts, and other documents allowing for valuation and assessment that may be key to resolving the case. In fact, mediators will be better equipped to inject more accurate valuation and better able to work harder in the other room when supplied with more "ammo" that supports your client's position.

Counsel should also consider the value, especially when there is no MSJ on file and it is early in the case, of drafting a brief for review by the other side. Rather than have

the mediator distill your position to the other side, it can be more effective to present, in writing, where you are coming from and why. Not everything needs to be placed in such a brief, and, tactically, it may be useful to keep some key items in reserve for use at the mediation or for a separate confidential brief for the mediator's eyes only. But, if there are facts whose verification or corroboration prior to the mediation will be of great weight (as opposed to bringing them up for the first time at the mediation and then having one side or the other opine that they cannot confirm or deny and you'll have to have a second session or addition round of expensive discovery), your best move might be to present it to the other side in advance so it can marinate for a few days or weeks.

C. Decide On Non-Monetary Settlement Terms In Advance

It always is a good idea to negotiate some or all of the non-monetary terms of a settlement agreement in advance and, if all of those terms can be negotiated in advance, it is a great idea for someone to bring a draft agreement to the mediation (with blanks for the dollar amounts). At a minimum, each party should be prepared to advise the mediator of the material terms that are needed in a resolution from its perspective. While many such terms may not be practical, having a list of them informs the mediator as to expectations and assists in communications so that there are no last minute surprises in negotiations over such terms as confidentiality (with or without liquidated damages), claw back provisions, letter(s) of reference, individuals who will provide reference, availability of post termination counseling, willingness to continue nominally employment while claimant looks for another job, no re-employment or termination of current employment, 1099 issues, mutual or one sided releases, specific or general and workers comp concerns, to identify a few of the common issues.

D. Consider Whether Your Client Should Speak In A Joint Session

In advance of the mediation, counsel should consider the possibility of the party making a presentation in a joint session relating to either liability or damages, in a manner that is compellingly persuasive and air tight. Such presentations often modify and focus the negotiations on the issues that are material for resolution. After all, at trial, it is the client who testifies and not the counsel.

E. Talk To The Mediator In Advance

Many mediators encourage a pre-mediation conference call, either jointly or separately. If not initiated by the mediator, you can insist on at least a brief pre-mediation discussion to address process, settlement history, barriers to settlement, relationships between the parties (and counsel/insurance carriers), and any other issues deemed relevant. The mediator may also request that certain documents referenced in the brief be brought to the mediation. The mediator can be better equipped to efficiently and effectively engage in the mediation process with this advanced information, and avoid the chances of being blind-sided by inflexible positions or unexpected relationships, facts, conflicts, and/or personalities.

If the parties appear to be far apart on settlement, the mediator can come equipped with tools to minimize or resolve impasse. As discussed above, the mediator can ensure that the right parties are at the session, can address coverage issues in advance, assist with client-control issues, strategize about settlement negotiations, and address anything that is not in the briefs. If you have not worked with this mediator before, there is also the chance to establish a rapport and further ascertain the mediator's approach before the mediation session. You can also discuss having settlement documents on hand, or at least readily available.

Establishing and managing expectations is critical, and the earlier the better. Your client may be under the impression (through counsel, friends, publicity, or otherwise) that their position is ironclad and the dispute is worth much more (or less) than the other side would accept. Unrealistic expectations can become ingrained, and even realistic valuations can be unattainable if the other side is simply unwilling to pay that much (or receive that little). Advance discussions with the mediator, and even the other side, that temper expectations (both on how much or little it will take to settle) encourage flexibility and the ability to understand the other's point of view, and assessing alternatives to settlement can greatly assist the mediator and the process. Bridging the gap between the expectations of what would be a good (or at least acceptable) outcome is a whole lot easier if each side's expectations are based on objective criteria, and not illusory assurances, "principle," or emotions before the mediation even starts. Otherwise, you can be in for a long day (and night).

As part of establishing expectations and analyzing the best way to approach the mediation (*e.g.*, objective criteria, lowering client expectations, showing resolve, joint or separate sessions), discussing parameters for the mediation in advance can assist in efficiency at the mediation. Often, it can take ample time to even get a first offer/demand on the table. Having an idea of the settlement range and options posed by the other side, and discussions of the basis for their settlement position, can help establish your own opening offer/demand, temper (or enhance) client expectations, and diffuse initial surprise or disappointment. It also can help ascertain whether mediation is timely, or if some other process should be utilized beforehand (*e.g.*, further discovery, neutral evaluation, appraisal, investigation, financial assessment, etc.). At a minimum, it helps the mediator know where he or she may need to spend the most time initially. These advance discussions, including building rapport and commitment to working out a deal, can be called upon when it seems that the parties are reaching deadlock.

II. At the Mediation

A. Separate Caucus, Joint Sessions, and Timing

Joint sessions used to be *de rigeur* but have now been largely dispensed with. In a sexual harassment case, for example, most folks prefer not to have a joint session because the possibility of a thermonuclear event is high. Most counsel and parties these days think a joint session takes up precious time that could otherwise be spent using shuttle diplomacy to resolve the matter. But mediations are and should be fluid. Maybe a joint session at the beginning is premature—the mantra being that the right idea at the wrong time is the wrong idea—but it could be OK later.

Lawyers and counsel should consider keeping the joint session in their respective pockets as an option as the mediation day wears on. Mediators should insert themselves into discussions with counsel to explore when, and with what limiting conditions, a joint session on a particular issue may be particularly effective. There might be a point during the day (or night) where everyone gets together; the lawyers meet with the mediator without their clients, the clients meet with the mediator without their lawyers (do you trust your clients to do that?) or, under carefully choreographed circumstances, the clients meet—no mediator, no legal types, no colleagues. Often, that

is the first time since the filing of the lawsuit that the parties have had the chance to sit down and have a chin wag. The mediator must be plugged into the heartbeat of the mediation to understand if it will be worthwhile to constructively stray off the path of trekking from one room to another and get some or all of those who will ultimately decide how the mediation ends in the same space.

B. Storytelling

People communicate and learn to understand one another when they tell stories. In the course of a mediation, there isn't just one, but dozens, that need to be heard. Sure, the story with top billing is the lawsuit, soon-to-be-filed claim, or the can't-miss summary judgment motion, but the key to success usually lies amongst the others. Counsel should embrace the chance to hear and learn about the narratives that drive the case, if for no other reason than to be able to gauge how the story and its narrator may play to the jury, judge or arbitrator.

A while back, one of us mediated a very different kind of wrongful termination suit. In that case, two brothers were suing their former company, which happened to be run and owned by their mom and dad (who cross-complained). The family had operated the business successfully for decades, but something in the last year or two had gone horribly awry. The brothers complained of unpaid bonuses, stock fraud, defamation, cooking the books, etc. The parents thought their sons were embezzling money and product. In the separate caucuses, the sons and their folks spoke angrily about how each side was out to annihilate the other and would not rest until they had achieved that goal. But as the day continued, the mediation began to take a different tack. Mom and Dad began to reflect upon the past, and what a good job the boys had done in helping to grow the business, while the sons began to speak about the break their folks had given them by bringing them into the company. At the end of the day, it was learned that the case had little to do with money or product, but rather was rooted in something that had happened in this family years ago. This issue had never been addressed until it was safe to do so - in a joint session at the end of the mediation when the brothers and their parents could, in a safe place, tell each other their own stories and move to a better place in their lives.

In employment mediation, every single word said (and not said) by the parties, counsel and anyone else present, assists the mediator in observing and understanding how everyone is affected and can be directed to a successful outcome. Having a free-flowing dialogue, as opposed to sound bites, provides the mediator with a better chance to settle the case. And, especially in emotionally driven employment cases, allowing the plaintiff to vent and have his or her "day in court" through being listened to and heard can go a long ways towards resolution.

C. Who Opens and Why?

Unless there's been a lot of communication between counsel, the defense is usually looking for an opening demand from the plaintiff. However, understanding that the first *reasonable* demand or offer drives the mediation, what difference does it make who goes first?

In every employment mediation, there is a number at which the case is going to settle, which has very little to do with the opening demand or offer. The mediator has a sense of what that number is or at least a notion of the finite range in which it may fall, and it isn't tethered to either party pitching figures during the mediation.

When an opening demand is ridiculously high and cannot be justified when presented by the mediator to the opposing side or the opening defense offer is so low as to be nonsensical, it may be valuable for the mediator to insert him or herself into the early negotiating process and express reluctance to adopt an unrealistic approach that is likely to cut off productive discussions, encourage counterproductive financial positioning and delay resolution, when compared to demands and offers that are closer to a well reasoned analysis of the potential liability and damage considerations, and the associated probable costs, risks and rewards of taking initial highly antagonistic financial positions.

When parties and counsel ask themselves, "What's this case worth?" they would do well during (and perhaps even before) the mediation to migrate from the platitudes uncontaminated by reality and begin focusing on where the case is likely to finish instead of where it's starting. When a party insists on making an unreasonable

demand/offer, the mediator can keep the negotiations alive by simply reminding the recipient that the only number that is important is the last one.

What gain is there for a plaintiff who opens at $600,000, only to settle the case eight hours later for $10,000? Perhaps in that situation, it's not the plaintiff who should make the first move, but the defense. In those instances, the defendant or carrier sets the tone because they're writing the check. When the defense makes the first move, we have found that often times it provides the first dose of reality that the plaintiff has had.

C. Creative solutions and alternatives

Creative, non-monetary options can be an important ingredient, where gains are made without equal loss to the other side. In the workplace, benefits such as outplacement, payment for retraining skills, a letter of recommendation (or resignation instead of discharge), health insurance or pension coverage, stock options, or amending a complaint to include causes of action that are more tax advantaged than earned income or other forms of compensation can enhance an offer. In the rare instance, reinstatement can be explored. Whatever the nature of the dispute, mediators and the parties themselves can brainstorm to find ways to address the problem and reach a resolution with integrative and collaborative bargaining. Most times, settling cases is just about money. That being said, counsel and clients should have their radar dialed up to consider and appreciate what value can be added other than cash.

D. The Reality Check

When positions are ingrained, and overly-confident parties are reaching impasse, it is time for a reality check. Mediators with strong employment law backgrounds can ask the right questions, diplomatically challenge the parties, and begin to assess the credibility and likeability of the parties and key witnesses and the value of key pieces of evidence. Instead of directly minimizing positions, the goal is for the parties themselves to come to terms with the true weaknesses and strengths of the case. Questions should be posed, such as, "How do you think that email will play to a jury," "What are your next steps if this case does not resolve today?" and/or "How much do you estimate it will cost to take this case to trial?". If the reluctance to settle is based on perceived

principle, then discussion of the "cost" of the principle can be effective to point out that the gain of standing on principle may not be worth the cost of continued litigation. Given the confidentiality of the mediation process, the defendant's financial condition can be more readily explored (here, the question is "So how are you going to collect, even if you win big at trial?").

Each of us has had mediations in which a confirming phone call to a potential witness has allowed counsel and client to adjust expectations to a more realistic place. Sometimes the phone call confirms that a witness is unwilling to risk his or her position with the same employer by testifying fully and truthfully. In a recent case, a phone call to a former manager confirmed that executives at the company were concerned about placing women in certain position because of a fear that a female would not be able to handle the roughness of the company's customers in that area. Whether that extra phone call during mediation assists plaintiff or defendant, it would never have been made unless counsel and clients come prepared to allow "reality testing" – handled diplomatically, during mediation.

III. Closing it Up

As a resolution draws near, effective mediators will begin to discuss payment terms, confidentiality, tax treatment, and other material settlement terms that should be addressed before the final number is reached. This way, there are no surprises or "added costs" of any settlement terms that have not been previously discussed. And, the parties are increasingly thinking of the settlement, and not the continued litigation.

It is essential for the parties to sign off on the material settlement terms before the mediation session concludes. As noted, the best scenario is if the parties have negotiated the non-monetary terms in advance and brought an agreement to the mediation (with the dollar figures blank). Also, it is not uncommon for the defense or plaintiff to bring its own long form agreement on a laptop or in paper format.

Want to go green and bypass the paper? Technology has advanced to the point where we can digitally sign almost anything, including a settlement agreement. If your laptop does not have that feature, look into it. It will allow you to not only make changes to the agreement on the fly, but also free you from dependence on the

technology, or lack thereof, at the mediation place. During the pre-mediation conference, the mediator can ensure that settlement can be finalized efficiently.

IV. Transcending Convention

A certain degree of convention in employment mediations is necessary. But in preparing for and participating in your next mediation, take a page from your bar exam days and issue-spot. Maybe you're happy embracing the maxim that if you do what you've always done, you're going to get what you've always got. On the other hand, maybe your next mediation calls for something just a bit different. You'll have a sense of what that might be when you are preparing for it and you will certainly understand once you're there.

Mediations in general, and employment mediations in particular, are fluid and, in that way, very much like sports. Wayne Gretzky, the hockey great, was once quoted as saying that he paid attention to where the puck was going to be, not where it was. Michael Jordan observed that he let the basketball game and the court come to him instead of vice versa.

The landscape of an employment mediation changes from minute to minute. Like sports and life, counsel and parties need to plug in to the ebb and flow of what is happening in the moment. They need to be equally prepared to not only drift with the current, pay attention to the progress made and direction traveled, but also to appreciate the rewards that might come from ditching convention and using a different stroke to resolve their case.

Mediators are hired to be creative, flexible, evaluative, good listeners and excellent closers. However, they do not work in a vacuum. If you sense that something added or an approach abandoned might help, speak up (never a problem with advocates) and let the mediator know. He or she will be doing that throughout the day with you, but settlement oftentimes does take a village and you, as counsel, are living in it. Help yourself, your client and your neutral if you see something that needs direction—it will always inure to your benefit and your client's.