Mediation Advocacy in Employment Litigation

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Employment litigation is a challenging and rewarding practice area. Cases can be as diverse as fact-driven racial or sexual harassment claims, to document-driven fair labor standard actions. Causes of action include not only retaliation and wrongful termination but discrimination, harassment, wage claims, ADA violation, as well as collective and multi-party actions or class litigation.

Employment Cases are Different

Settling employment cases is different from accident and injury litigation. PI cases are relatively straight forward, focusing on either liability or damages, sometimes both. Employment litigation involves many issues including methods of proof through direct or indirect evidence, different burdens of proof depending upon the nature of the claim, complex damage issues including back pay, front pay attorney's fees, and exemplary damages and complex evidentiary issues. Where injury case generally involve one emotionally invested party (the plaintiff), employment litigation involves personal feelings for both plaintiff and defendant. Generally insurance coverage makes personal injury litigation less susceptible to considerations of cost of defense and allows relatively straight forward estimations of total cost for both parties. Employment cases also involve a wide variety of non economic and tax issues.

Employment cases are not only about money. What we do for a living defines us as human beings; this applies to both the employee/claimant and the employer/respondent alike. A person harassed or abused at work is likely to feel shame, anger, and betrayal. The person accused of such action will feel stigmatized, angry, and humiliated. Careers and economic futures are at risk for both.

Settlement considerations are different. In personal injury, the defense is analytical, professional, and tightly controlled by an insurance carrier whose financial acumen and settlement experience is statistically huge. The costs of defense are generally limited, very predictable, and do not represent a significant factor in settlement. Only the plaintiff’s emotional investment needs to be addressed. Settlement negotiations focus exclusively on monetary terms.

In employment cases, litigation and transaction costs can be extremely high. Document production, discovery depositions, and dispositive motions can easily drive defense costs over $70,000.00 just to secure ruling on dispositive motion. Frequently costs must be shared, if not paid in full, by the employer. They often lack the "frequent flier" status of an insurance carrier who is accustomed to the evaluation and assessment of risks and can actualize those risks over time, minimizing the consequences of a wrong decision. A variety of terms in addition to a dollar payment are involved in many settlements including tax and structure issues, reapplication or rehire, or confidentiality.

Mediation as a Settlement Tool

Mediation can help settle employment cases. It focuses the parties' time and energy on a single day, spending less time than in traditional "back and forth" negotiation. It minimizes the "rebound" effect where over time the client forgets his earlier agreement with the attorney's wise advice about settlement. Counsel can be a strong advocate for the client (to the mediator) without driving the other side apoplectic. Conversely, counsel can candidly acknowledge weaknesses and problems with the case (to the mediator) without finding the other counsel closing in for the kill. Finally, the neutral mediator has an opportunity to listen empathetically to the parties and allow some venting, can provide objective reality testing, define and analyze possible ranges of outcome, and help to communicate information (demands, facts, arguments) so as to minimize the competitive impact on lawyers or the emotional impact on the client.

The presence of a corporate representative with full settlement authority is crucial; such person’s absence is a frequent source of failed mediation. The decision maker may be less skilled in risk assessment and more emotionally involved than in accident cases. For this reason they should be present to have direct contact with the plaintiff and her counsel, to absorb and consider through the day the advice of her own attorney, and to hear, question, and utilize the input, suggestions, and perspectives of the neutral mediator. As such, in the preparation for mediation, counsel and the mediator should confer to confirm their presence. One caveat; when the decision maker is also the alleged wrongdoer, bring someone with a more removed perspective and who is less emotionally invested in the outcome, if possible.

The timing of mediation offers its own opportunities. While "late stage" mediation is often effective, early mediation has significant advantages. The presence of large and certain future expenses (often paid out of pocket) encourage flexibility in the early stages. While most employers would affirm that they cannot pay costs of defense whenever they are sued (it would only encourage such lawsuits), for some lesser amount they will often make necessary concessions to avoid the costs of litigation.

Early mediation has other benefits. At this point the party's emotional and legal positions have not yet hardened. Lawsuits polarize and are emotionally destructive. Early mediation allows the parties resolution while they still retain some flexibility and residue of possible good will. Also, early mediation can be a rich source of information to both parties. If a joint session is held (see below), each receives an opportunity to evaluate the character, demeanor, and jury appeal of the primary actors in the case. Questions can be addressed to the parties or counsel. Each party's claims can be brought into focus and clarified at a time when they are still flexible and hopeful of early resolution.

If the case does not settle at the first mediation, the parties can refocus or refine a litigation plan. Both have a better understanding of the pivotal issues and can agree to conduct limited discovery or document production to secure the information necessary so they view the case in the same light, insofar as possible. The deposition of a key witness or party, production of specific documents, or the preparation and submission of a preliminary expert report can narrow the “information gap” and facilitate settlement at a later mediation. Often the parties will agree to a time frame and a "game plan" after which they will return to mediation.

Getting Ready to Mediate

Preparation for employment mediation is similar to personal injury cases. Prepare the client early by discussing how mediation works. Explain that every case has two numbers, the one you present at mediation and the true value you have placed on the case. Make sure the client understands that every case has weaknesses. Prepare the mediator by providing necessary documents including deposition summaries, employment records, investigative records, and case citations for key points (both pro and con) which you feel will influence the outcome. Try to avoid providing complete copies of depositions; excerpt, or at least highlight, those portions which you feel are critical. This way the mediator comes properly prepared to discuss the key legal or factual issues. Provide information about trial costs and jury verdict information if you have it. Most mediators appreciate some direct contact with counsel in advance. In especially difficult matters, a meeting with the client before mediation may be appropriate.

At the Mediation: Joint Sessions, Offers, and Issues

Joint sessions can be very productive in employment cases. Although some lawyers seem reluctant to utilize this aspect of mediation, it provides significant benefits when correctly handled. Joint sessions are not the same as "opening statements." Unless a party deliberately chooses to inflame and polarize the situation, (and some do) this aspect of the process needs to be handled with tact, sensitivity, and a cooperative spirit.

In the joint session, the mediator and counsel promote the exchange of information and begin a cooperative process. The presentation of the case, either through counsel or questioning by the mediator, allows each party to receive an overview of the other's case. This meeting may be the only opportunity during the litigation for the people in the conflict to meet face to face and talk to one another. While this may seem disconcerting to lawyers, it is after all how most people solve conflict in their lives. Factual information about the case, background, claims, and damages as well as the personal values of the parties can be shared. The jury appeal, character, and presentation of the important witness/parties can be judged. While these meetings can be emotional, that too can be a significant factor in moving forward. Employment cases have strong emotional overtones. Who we are as human beings is defined in many ways by what we do in our work. Both parties may hunger for their chance to "tell the story" or have "a day in court." Mediation allows the expression of these emotions (within limits) and the consequent catharsis which may result. Tension precedes release in science, economics and conflict resolution. Once these emotional experiences occur, if they are properly managed, otherwise invisible obstacles to settlement may be removed.

Counsel's conduct is crucial. Cooperation is contagious but so is competition. If possible, the client or corporate representative should make a presentation at the mediation. While some may not be appropriate for this role, remember they will be deposed and they will be witnesses at trail. This is counsel's opportunity to give them a chance to express themselves and to determine how well they will present, all in a neutral safe environment. A well-prepared client can make a good impression and engage in meaningful dialogue with his counsel or the other

party. This can sometimes significantly alter valuation decisions; this impression, and a "human touch", can change the parties' view of the value of the claim.

Be conciliatory but firm; avoid becoming competitive. A reasonable presentation would be: "Clearly we disagree on the facts/meaning of the facts/law/damages but we recognize each person has their own view of this case. We're here to get this resolved if it's reasonably possible to do so." Avoid personal attacks or angry rhetoric. Prepare your client to stay calm in the face of such bluster. This type of behavior is sometimes driven by emotion or personality; sometimes counsel just wants to continue the fight. While it is tempting to respond strongly to such childish behaviors, you and the client have made the effort to come to mediation. Little can be served from a strong emotional except to derail the settlement process and move the case back onto expensive time-consuming litigation. Give the mediator and the other lawyer (or sometimes the other client) a chance to do their work, to moderate the behavior, and to get the case settled.

Considerations in Settling the Case

Settling employment cases often involves tax questions and other terms. Most employment claims are subject to income tax which substantially reduces the client's net recovery. Negotiation options available include paying plaintiff's attorney fee separately so tax documents do not show the full amount attributable as a payment to the plaintiff. The employer can agree to submit a 1099 rather than a W-2 so that withholding is not necessary. If there is personal injury, workers' compensation, or other tort claims, an allocation of payments for them is exempt from taxation. Unless most evidence of a tort is strong, employers are reluctant to structure the entire payment for that purpose. However they will sometimes set some portion of it aside as a settlement tool. Also, consider a structured payout over a two-year period to minimize the tax consequences, particularly if the settlement occurs in the fourth quarter.

Non-monetary terms can advance settlement negotiations. Will the employer agree to allow reapplication or rehiring? Confidentiality of settlement may be important. Other services might be provided to the employee such as consultancy agreements, employment counseling and job search assistance from major employers. In many circumstances, a carefully worded favorable letter of reference can make a significant difference helping the employee return to a good paying job, and moving settlement forward. Be sure to agree on the text of this agreement at the mediation.

Settlement agreements should be finalized at mediation. A separate substantial contractual agreement is usually prepared. If that agreement is not signed at mediation, the parties don't quite have a deal. If one or the other later become reluctant, the terms of the final settlement documents can become the subject of conflict. The parties should bring a digital copy of their standard settlement agreement. Once an agreement in principal is reached, this document can be modified, printed and circulated for review, and approval at the mediation. The spirit of cooperation that exists when the parties have reached an agreement generally carries over to a cooperative spirit resolving potentially troublesome terms. Allowing the parties to separate prior to signing this agreement creates the opportunity for outside influences to unravel the settlement. Those who did not participate in the mediation do not have the *gestalt* of the case which led the parties to make the agreement. This can have a corrosive effect on the client's willingness to continue to abide by agreed-on terms.

Selecting the Mediator

There are special considerations in choosing a mediator. All mediators should be adept at helping negotiations, providing options, assessing facts and arguments, and keeping the process moving forward. Because of the emotional content and the inevitability of its expression, choose someone who understands and is willing to accept the obligation for properly allowing and responding to it. The mediator should be confident and comfortable with the joint session process. The unique dynamics of these cases means skills in the mediation process may be more important than substantive knowledge of the legal issues. There are some excellent non lawyer mediators in this area. The mediator must understand the need for empathic listening and true understanding for both sides of the conflict. They must be able to accept and promote the release of emotion and dysfunctional feelings, even those that may seem initially "over the top" and negative or harmful. Once released, accepted and dealt with, these may provide the very energy necessary for the resolution of the case.

Settlement of employment cases can be maximized when the parties effectively participate in alternative dispute resolution, particularly mediation. The unique aspects of employment cases can provide particular opportunities for mutually beneficial outcomes. Careful preparation and effective presentation set the stage for successful resolution for all concerned.

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