



Ten Suggestions For Negotiation In Employment Mediation

Bette J. Roth

*There are no perfect solutions in litigation,
but mediation can help you arrive at the
outcome everybody can live with.*

AS THE VOLUME OF employment litigation increases, more parties are turning to mediation to settle their wrongful termination, discrimination, and non-compete disputes. Why? Because mediation saves the parties significant litigation costs, including attorneys' fees, court expenses, and lost business opportunities due to time

spent in litigation. It also offers a confidential resolution (versus the possibility of a published court or state anti-discrimination agency decision), the elimination of stress, and a swift return to more productive business. Finally, mediation allows the parties to control the outcome of the case, rather than leaving it for a judge,

Bette J. Roth is a mediator and arbitrator, as well as the Executive Director of the Middlesex Multi-Door Courthouse in Cambridge, Massachusetts (www.multidoor.org). Before devoting her practice to dispute resolution in 1992, Ms. Roth was a trial lawyer for eight years. Ms. Roth has mediated or arbitrated more than 600 employment, securities, commercial, and construction disputes.

hearing officer, or arbitrator to decide. Therefore, it makes good sense to consider the possibility of a mediated settlement as soon as the parties are able to discuss meaningfully the evidence in the case.

WHAT IS MEDIATION? • Mediation is a confidential settlement negotiation assisted by a neutral third party. It is not an adjudicatory process in that the mediator does not order either side to do anything. Rather, the mediator helps the parties negotiate an agreement by exploring and evaluating with them their settlement options. It is a purely voluntary process that any party can end at any time.

Employment mediations generally last a few hours, but can take more than a full day. After each side presents a brief summary of their case and their settlement proposal, they spend the remainder of the session alternating with each other to meet privately with the mediator. During these “private caucus sessions,” the mediator explores individually with the parties the strengths and weaknesses of their case, as well as information and counter-proposals presented by the other side. Because the private caucus sessions are confidential, the mediator will share information only as permitted by the party providing the information.

Mediation is a unique adversarial process in a number of ways. It is less formal than an adjudicatory hearing and provides the flexibility the parties need to explore creative solutions. Also unlike court procedures, everything is “off the record” and *ex parte* communications are a part of the process. Parties communicate privately with the mediator before the mediation session with confidential conversations and briefs, during the mediation with the private caucuses, and after the mediation to iron out any settlement details. In fact, most of the time with the mediator will not be shared with the other side.

Despite the informality and flexibility of the process, mediation requires planning, preparation, and hard work. Many factors will affect each side’s ability to achieve their best possible settlement. While a good mediator will work with the parties through issues that arise during the mediation process, this article addresses factors to consider in preparing for the mediation.

1. Proposing Mediation To Your Opponent

The first challenge in the mediation process most likely will be how to get your opponent to the table. Don’t be timid; suggesting that the parties try mediation should be seen as a sign of confidence, not one of weakness. One might suggest that because both sides feel so strongly about their respective positions, they might benefit by a neutral third party’s input. The proposal to mediate should further include the fact that mediation shortens the litigation process, allows the parties to control the outcome, and saves both sides significant expenses. Equally worthy of mention is the fact that mediation provides the unique opportunity for each side to communicate directly with the responsible individuals on the other side, rather than continuing a dialogue filtered through each side’s counsel.

Finally, one might raise the overwhelming odds that a mediation session will conclude with a signed Memorandum of Understanding to be transformed into a final Settlement Agreement and Release—many reputable mediators settle more than 90 percent of their cases. Of course, if either side feels the process isn’t productive, they can terminate the proceeding at any time and continue to litigate the case.

2. Select The Best Mediator For Your Dispute

The selection of the mediator is critical to the outcome of the process. The mediator sets the tone and pace of the mediation, and will be largely responsible for its success or failure.

It takes considerable skill to step into a complex employment case, untangle bitter parties, and guide them to an amicable resolution. Find someone with the ability and expertise to get the job done. Practical and legal experience will enable the mediator to evaluate credibly the various possible outcomes in an employment case. Not only is there a specific body of state administrative and judicial case law on both liability and damages, but the agencies typically have their own procedural rules, which should be considered in valuing litigation alternatives.

Review the qualifications of any proposed mediators for their employment mediation experience. Don't be shy about speaking with the mediator and asking for references; any quality mediator would be happy to provide several. Questioning the references and the mediator directly will also give you a sense of whether or not his or her style and demeanor is the right mix for the parties.

3. Consider Mediators

Proposed By The Other Side

There seem to be two schools of thought regarding mediators proposed by the opponent:

- Always consider someone proposed by the other side;
- Never consider someone proposed by the other side.

The first comes from an attitude of confidence: because your case is so strong, you just need the mediator to understand it and communicate its strengths to the other side. Since your opponent already respects the mediator, the mediator is more likely to succeed in "enlightening" him or her about the strengths of your case.

The other way of thinking—that any mediator recommended by the opponent must be biased in their favor—comes from a misconception of the mediator's role and ignorance of the

process itself. This view presupposes a process—not mediation—in which the "mediator" starts with a specific settlement goal and then moves the parties to it. It also accepts as logical the premise that mediators would prefer to risk their professional reputation for more business from one side rather than enhance it by doing excellent work for both sides.

A good mediator will never start the process with a particular settlement in mind. Rather, the mediator's understanding of the case evolves along with the parties', as they advance the negotiation. Many mediators, even the most "evaluative" ones, resist suggesting a specific settlement proposal until the very end of the process, and then will do so only at the request of the parties. Learn to trust the process; good mediators work for both sides to reach resolution.

4. Know Your Case

Never mediate without adequate preparation. Conduct enough discovery and analysis to evaluate your case meaningfully for settlement and to be able to present it persuasively through the mediator to the other side.

Some parties believe that mediation will save them money by allowing them to settle without any discovery. Others attempt to use the mediation session to obtain discovery. Both approaches risk failure.

Skimping on preparation can make you the target of bluffing or leave you disadvantaged in valuing settlement proposals. Consider a sexual harassment case in which the plaintiff claimed her supervisor pursued her for a personal relationship and that she complained about it to HR. The respondent denied the allegations, not knowing that the employee's therapist at the time maintained session notes stating that the plaintiff told her she had complained to HR and was told to ignore the supervisor. In mediation, her demand reflected

Surprisingly, not every case is all about money. As employment cases tend to involve misunderstandings, hurt feelings, and career reputation issues, many settle with non-monetary components.

the fact that she had this corroborating evidence, but the respondent had not discovered the evidence to consider its impact before the mediation. It is easy to over- or undervalue a case without knowing the critical evidence.

Don't Use Mediation As A Discovery Substitute

On a related issue, do not misuse the mediation process. Using mediation to obtain discovery or "see what the other side's case is about" is not negotiating in good faith. Not only will it derail settlement, but it will leave the other side questioning your ethics and credibility. Additionally, most mediators will terminate the proceeding if they believe one side is misusing the process.

5. Don't Overspend In Preparing The Case

Although you should discover the critical facts before mediation, be realistic about the size of the case in light of your client's interests. Mediated settlements involve financial decisions and appropriate cost-benefit analyses. Spending more than necessary before the mediation may restrict your ability to settle.

For example, an employee claimed that disability discrimination was the basis of the

strained relationship with his supervisor. The parties opted for mediation soon after the case was filed in the hopes of an early resolution. At mediation, the plaintiff demanded that the employer appoint a different supervisor and pay his attorneys' fees. Having spent only 20 hours so far preparing its own case, the respondent offered to pay \$10,000 for the plaintiff's attorneys' fees. However, the plaintiff's attorney had spent more than 150 hours on the case, and was unwilling to compromise his \$30,000 invoice below \$20,000. The attorney's invoice nearly became a barrier to his client's settlement of an otherwise relatively simple case.

In addition to the client's interests, consider the issue of timing. Schedule the mediation session far enough in advance of the trial or public hearing to avoid spending time and money on trial preparation. Just as with discovery, the dollars spent on trial preparation are dollars taken off the table for settlement.

6. Be Creative In Addressing Your Client's Interests

Surprisingly, not every case is all about money. As employment cases tend to involve misunderstandings, hurt feelings, and career reputation issues, many settle with non-monetary components, such as an apology, letters of reference or sensitivity training for other employees. Some termination cases, although rare, settle with reinstatement. Conversely, some non-termination cases settle with a separation agreement.

Explore with your client what he or she needs to move beyond the litigation. Some plaintiffs feel so empowered in prosecuting their case that closure itself becomes a challenge to be addressed in mediation. Others are uncomfortable with the litigation, dreading the exposure of their private lives, and are looking for an excuse to settle.

Never place your opinions about settlement above your client's interests. Although you may believe your plaintiff client has a "slam dunk" liability case with big damages, it might not be in his or her emotional, physical, or financial interest to endure protracted litigation. Conversely, a great case to defend could still be a great case to settle in light of time, exposure, litigation costs and stresses on an individual or corporate client.

In short, the strength of your legal case and your client's interests are two different things. While a good mediator will work with your client to explore his or her interests, the mediation will proceed more effectively if you start this process privately with your client before the session.

7. Don't Reach An Impasse Before The Scheduled Mediation

Occasionally, parties decide to exchange settlement proposals before the start of the mediation, hoping to speed up the process. While the general exploration of settlement possibilities is always encouraged, parties should be mindful of how these negotiations may affect a subsequent mediation. Occasionally, the negotiation of specific proposals may result in an impasse before the mediation starts (which creates a formidable challenge for the mediator), or cause the parties to conclude that settlement is impossible and they forgo the mediation.

For example, in a case involving wrongful termination claims by a stock broker, the plaintiff's counsel presented a pre-mediation demand of \$100,000 based on commissions owed, other financial benefits lost in the termination, and emotional distress. Counsel for the brokerage firm valued the case at around \$10,000 for commissions owed, believing that strong evidence supported the termination. Finding the demand so unreasonable, he decided that the case couldn't possibly settle in mediation and

What matters in mediation is not where the parties start, but where they end. The process in between involves hard work, education, negotiation, and compromise.

cancelled the session, thus foreclosing the possibility of settlement.

In this example, had the parties not exchanged specific numbers in advance, they would have started the mediation with those numbers as their initial settlement proposals. Although the chasm seemed insurmountable to the parties in their direct negotiations, it is something that experienced mediators face, and successfully address, every day.

8. Never Decide On Your Firm Bottom Line Before The Mediation

Many parties decide their bottom line when they prepare for the mediation and hope that the mediator will succeed in moving the other side to it. This approach overlooks the potential of the mediation process, and compromises their chances of settlement by drawing a line in the sand before the mediation has started.

Rather than deciding on a firm bottom line in advance, parties are advised instead to consider a range of options, keeping in mind that once the mediation starts, they will be challenged to re-evaluate those options.

What matters in mediation is not where the parties start, but where they end. The process in between involves hard work, education, negotiation, and compromise. The negotiation itself creates a momentum and an investment in the process that intensifies as the parties work together over a period of hours. Settlement might

Start the session with respect for the process and for the other side. Always present rational proposals that can be justified, and let the mediator use them to move the other side. Always consider your opponent's proposals.

not be apparent until the final stages of the mediation process, so be prepared to tough it out before then. Patience is almost always rewarded with a settlement that reflects the interests of both sides.

9. Bring The Right People To The Mediation

Who attends the mediation can make the difference between success and failure. Bring the person with the ultimate authority to make the settlement decision. Telephone availability of the person with settlement authority is not as effective as participating in the actual work it takes to gain the perspective necessary to reach resolution. If it is the only option, however, make sure he or she is available as needed, so that the communication doesn't disrupt the flow of the session.

If it is not possible to bring the ultimate decision-maker because it is a committee or a board of individuals, bring someone with enough influence in the organization so that his or her recommendations will likely be followed once the session has ended.

Leave behind "witnesses," particularly if they might be volatile or further strain the relationship between the parties. This is particularly true in a harassment case, unless the alleged "harasser" is also a named party. However, if the case is very complex or if the credibility of key players is particularly critical, consider bringing in the appropriate individual to

present specific information. Keep in mind, however, that the goal of mediation is settlement; parties do not "win" on the evidence. Accordingly, keep any such presentations brief and informal.

Do not bring friends or non-party family members. Although other individuals may want to attend the mediation to show support, they also come with their own perspectives, interests, and opinions about how the case should resolve. Adding these to the mix can derail a negotiation.

If there is any question about whom to bring, talk to the mediator in advance and resolve the issue before the session starts.

10. Show Respect

Mediation is a unique adversarial process. Although you need to educate the other side about the strengths of your case, don't compromise your chances for settlement with bombastic language, insults, and disrespect. Start the session with respect for the process and for the other side. Always present rational proposals that can be justified, and let the mediator use them to move the other side. Always consider your opponent's proposals. The old adage, "there are two sides to every story" rings true in this process where settlement is often based on an understanding of the other side's case. An open mind will go a long way in building the foundation for a successful negotiation.

CONCLUSION • Disputes arising in the workplace can be resolved at many points along a continuum. Some can be resolved between the affected employees. Others can be resolved in the HR office. Still others can't be resolved short of full trial. But in many cases, mediation is the right choice. The issues can be identified and clarified, miscommunications remedied, and a solution crafted with the significant input of the parties. Mediation can't prevent the disputes from arising. But it can resolve them in a way that is fast, efficient, and satisfactory all around.

PRACTICE CHECKLIST FOR Ten Suggestions For Negotiation In Employment Mediation

Mediation offers a quick, efficient, and manageable way to produce litigation outcomes that the parties can live with. The essence is forthright and honest negotiation.

- When proposing mediation to an opponent be sure to emphasize that mediating the case is the best way to arrive at an efficient result at a low cost.
- Do not automatically balk at a mediator suggested by your opponent. A mediator with a good record will be more interested in doing a good job than taking sides.
- Know the case. You may not need to conduct discovery in the same depth as if you were going to trial, but you still must know enough to present a compelling case and avoid being “bluffed.” Keep it within reason, since one of the virtues of mediation is its potential for relatively low cost.
- Involve your client in the creation of a resolution. Never place your opinions above your client’s interests. It may be that your client has no interest in a monetary settlement, but simply wishes an apology, a letter of reference, sensitivity training for other employees, or some other less-than-obvious outcome. Working toward the best solution for your client is the best approach.
- Be careful with attempts to settle the matter before mediation. If you don’t some important facts at this stage, you may ask for too little and jeopardize your client’s position, or know ask for too much and reach an impasse even before the mediation begins.
- Bring the right people to the session. You want the people who were involved, and who have the authority to resolve the case.
- Be respectful. The tone of mediation can be the key to its success; and even if it doesn’t succeed, it may set the stage for cooperation in reaching settlement at a later date.

To purchase the online version of this article, go to www.ali-aba.org and click on “online”