Gail Glick
ALEXANDER KRAKOW + GLICK LLP

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Maximizing your outcome in employment mediation

HOW TO EXCEL AT EMPLOYMENT MEDIATION, FROM CLIENT INTAKE TO RESOLUTION

This article will discuss the steps for employment-law advocates to achieve a successful resolution for clients in mediation. The first question we ask is what a good resolution will mean to our clients. After we determine the best result, it takes painstaking focus at every phase of the representation to achieve the end goal of resolution. This article is premised on the assumption that we are seeking to resolve our dispute during, or shortly following, the mediation session. It will address preliminary steps in the representation to ensure a good result for your client, strategies in litigation to achieve your result, preparation for the mediation session, and finalizing a deal after the mediation is successful.

Preparing for mediation at the initial consultation

Because almost every case settles short of trial or arbitration, and most of our cases resolve with the assistance of a third-party neutral mediator, it is imperative that we consider how the case will work in mediation from the moment we meet our client. The same factors that dictate whether we will take a case will dictate whether we can win at mediation. If we were forced to proceed to trial or arbitration, is this a winnable case? We must consider whether the client has a good case factually as well as legally.

Even more importantly, we must assess the quality of the client as a witness for herself. Especially in a mediation session, the client is the person who will tell the story of the case. If she is unable to do that effectively, she will not achieve a satisfactory result.

The intake questionnaire

Even before meeting the potential client in person, it is helpful to obtain her completed intake questionnaire, which might reside on your firm website or might be in a Word format and easily transmitted via email before the first in-person meeting. Besides the obvious benefit of providing us concrete information surrounding the circumstances of the potential client's termination even before she arrives at our office, an intake questionnaire serves more subtle purposes. It shows us whether a potential client:

- Can understand simple questions (including whether English may be her second language)
- Is thorough (completing the questionnaire in detail)
- Is cooperative in her interaction with the law firm
- Can express herself well in writing
- Has a positive or negative demeanor
- Is realistic in her expectations of the representation
- Has personality traits that would interfere with an effective representation
- Is fabricating facts

At the in-person initial consultation, collect all documentation from the potential client that is related to her employment. We will rely on these documents to tell the client's story and create our chronology. We should not base our belief about the strength of the case solely on the client's expected testimony. While testimony can assist us in defeating summary judgment, without corroborating witnesses and documentation, it is very difficult to win at trial.

The initial meeting

The initial meeting should cover thoroughly the facts giving rise to her claims and cover all background information about her history with the employer. While it is important to help the potential client feel comfortable at the initial consultation by use of both open and closed questioning, you should "grill" her for the same information that your opponent will likely explore in a deposition, including whether she has: (1) been involved in a lawsuit, (2) been fired from a job, (3) resigned from a job to avoid a termination, (4) declared bankruptcy, (5) taken anything from the company that might be deemed a trade secret,

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(6) unfairly competed with the company, (7) received significant discipline that might legitimately result in termination, (8) engaged in conduct that might legitimately result in termination, (9) visited a doctor or therapist to discuss her emotional distress resulting from the poor treatment at work, (10) been convicted of a felony, (11) begun a current job, and (12) begun to look for new work and has evidence of it.

Most important is your client's demeanor and whether you find her credible, sincere, and likeable. The same traits that we need for a plaintiff to prevail at trial are necessary to achieve a strong settlement without the necessity of engaging in significant litigation. If she is not credible, sincere, and likeable, it is very difficult to win at either negotiation or litigation.

After gleaning information from the potential client and determining that she has a case worth pursuing, the key question to answer is what a successful resolution looks like to your client. Many clients cannot withstand the rigors of litigation. The reasons are varied and numerous. Some are not well physically and cannot endure a two-year representation. Some believe they are too old to waste precious time on a legal dispute. Others are not emotionally equipped to handle it. Others cannot afford it. Consider what the best resolution is to your client in light of her unique circumstances. This requires a serious, and often difficult discussion about the wrongs that have been committed against the client and the practicalities of pursuing the case in a legal forum on her behalf.

Schedule an early mediation via demand letter

Promptly after the initial client intake meeting and obtaining a signed retainer agreement from the client, assuming deadlines to file suit are not close, send a demand letter to the employer to introduce yourself, outline the facts of the case, and explain its potential liability for the adverse employment action it took against your client. The demand letter will be heavy on the specific facts of the case, and it will set forth the basic laws that support liability and establish that the plaintiff will likely defeat summary judgment in the event the matter were to be litigated. If you send demand letters in some cases, it is important to send such letters in *all cases*. This avoids your opponent using the letter as a sign of whether your client will proceed with litigation. That is, if you only send demand letters in cases where you do not intend to file suit, you will quickly gain that reputation, and it will be difficult to obtain top settlement value in any of your clients' cases.

If you have written an effective demand letter and your opponent is willing to negotiate early, you will select a mediator and be in a position to resolve your case within three to six months of retention. This is a great outcome for many clients who prefer to move forward with new jobs, careers, retirement, or just a generally positive outlook.

If deadlines prevent you from sending a demand letter in advance of filing suit, you can use service of process as an opportunity to suggest negotiating an early settlement. Serve a letter along with the summons, complaint, and new lawsuit paperwork that invites a negotiation in the early phase of the litigation. Alternatively, bring up the possibility of an early resolution with opposing counsel soon after learning his or her identity.

Let defense suggest a mediator

Without a high-quality mediator in whom all parties and their counsel can place a high level of trust, the parties cannot resolve their dispute. In order to ensure you select the right mediator, ask your opposing counsel to provide a list of possible mediators. If the defendant's counsel likes, respects, and trusts the mediator, the defendant is likely to listen to that mediator when he or she is pushed to pay the plaintiff a significant sum to settle the case. Only propose mediators yourself if defense counsel insists on it or if entirely unacceptable mediators have been proposed in the first discussions of mediator selection.

Using a mediator who really knows employment law is important, especially if there are esoteric issues in your case. A mediator who is well versed in the law will be able to come up with "ammunition" to identify for your opponent during mediation caucuses that is separate from that evidence which you have provided to the mediator to push the defendant towards a satisfactory high number at which your client would be comfortable settling the case.

Prepare for the mediation

Informal discovery – gather your client's documents

If you have not obtained all documents in your client's possession at the initial consultation meeting, you must obtain a full set of documents from the client. Insist that the client provide you with every document in her possession that relates to her employment. This includes payroll information, paystubs, employee handbooks and policies of the employer, resumes, employment applications, disciplinary notices, performance evaluations, emails, memoranda, complaints, commendations, and new job search documentation. If the case involves requests for time off, medical leave, or disability discrimination, the documentation should include medical and psychiatric records, doctors' notes excusing the employee from attending work, and prescription and medication information.

Informal discovery – interview witnesses

If there are witnesses outside of the employer's control group, interview them prior to mediation and determine whether they are willing to sign a declaration in support of your client's case. Oftentimes in employment cases, key witnesses are still employed by the defendant-employer and unwilling to speak with counsel because they are fearful of losing their jobs. Take this into consideration when formulating your best evidence of wrongful conduct to present at mediation.

Obtain a psychiatric assessment of your client

It is often advantageous to obtain a psychiatric assessment from an expert-

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witness psychologist or psychiatrist who you might designate and use at trial if the matter proceeds beyond mediation. You can have an experienced psychiatric expert prepare a report for mediation only, establishing it is confidential and will not be used for any other purpose in the litigation. Especially where your client is a low-wage earner, this assessment can enhance case value substantially, as defendants often tie their evaluation of case value to the income level of the plaintiff. It also gives you a "baseline" assessment's psychiatric condition – from a time that is not too remote from the termination date. Often, an employee's emotional distress can fade as the employment case proceeds, especially if she is able to find new employment promptly during the course of the litigation. To have the initial psychological assessment prepared early gives you the best opportunity to lock in an extreme emotional response to a wrongful termination, harassment scenario, or defamatory situation.

Meet with your client

It is essential to schedule a meeting with your client, either in person or on the telephone, of at least one half hour in length, a few days in advance of the mediation to prepare for it. Managing expectations is critical to your success in achieving a resolution. During this meeting, review the mediation process with your client, from the most basic and general logistical concerns to specific tactics to achieve a favorable result, including:

- Inform her that she can expect the mediation to last at least eight hours
- Determine whether she needs to have certain foods or accommodations on the day of the mediation, and encourage her to bring any prescription medicines or comfort foods she will need to make it through the day
- Describe the location of the mediation
- Clarify that you will have your own room for the mediation session and explain the "caucus process"
- Explain that the mediator's role is to serve as a neutral third party, not an advocate or representative, and that the mediator's "client" is settlement, so she can expect the mediator to seem to be on the side of the opposing party as the mediator makes efforts to reduce your demand for settlement
- Explain the role of the client – to explain facts, tell the mediator about her emotional condition as a result of the wrongful conduct, and yet maintain a "poker face" when it comes to discussions about settlement value
- Prepare her for big numbers to be demanded at the outset that may have little logical relationship to the final settlement number
- Discuss a range of possible settlement value, but clarify that the settlement value could increase or decrease, depending on what is learned during the mediation session
- Explain the possible use of "brackets," "mediator's proposals," and other creative strategies
- Discuss insurance issues and the likely participants in the defendant's room
- Ask the client what she expects from the mediation and manage those expectations, if necessary, including a discussion of any non-monetary terms that the client expects to achieve
- Enlist your client's assistance in achieving a great result at mediation
- Review your contingent fee with the client to ensure she recognizes that the settlement amount will be reduced by that percentage fee and costs incurred, as applicable
- Discuss the notion that a settlement is a compromise of claims and requires the client to be willing to agree to take less than she might receive if she were to prevail at trial
- Prepare her for those times when the mediator might ask the attorneys to speak privately, outside of the parties' presence

Prepare the mediation brief, exhibits, and evidence

Your mediation brief should confidently and thoroughly describe the reasons why your client's case has a high value and your client will prevail at trial in the event the parties are not able to resolve the dispute at mediation. While your demand letter outlines your facts in detail, you should not simply re-state the contents of your demand letter in your mediation brief. Instead, provide the demand letter as an exhibit to the mediation brief, and refer the mediator to the demand letter for an outline of facts that you believe will be proven through further litigation if the case does not resolve.

Detail the applicable law, especially if the mediator is not well versed in employment law or your case involves esoteric legal issues. Prepare a chart of liability that includes separate figures for back pay, front pay, emotional distress, attorney fees and costs, and punitive damages, if applicable.

You should focus on damages over liability. Your posture during the entire negotiating process, including your brief, should be to presume that liability is clear, and, therefore, (a) you will clearly defeat summary judgment, (b) a jury (or even an arbitrator) will like the plaintiff and find her story compelling, and (c) damages will be based on fact, not speculation, and will be at least an express amount.

Provide documentary support for the key assertions in your demand letter that you did not share with your opponent previously. Some examples of persuasive evidence are: (1) an email complaining about illegality at the work place, (2) a doctor's note confirming the length of time your client requested to take off of work, (3) an email from the boss complaining about your client's inability to concentrate on work since his wife became ill with cancer, or (4) text messages from a supervisor containing lewd, sexually harassing comments, jokes, and pictures.

If you have declarations from important witnesses, it is usually preferable to bring them with you to the mediation rather than sharing them with the mediator as exhibits to the brief. These documents are too valuable a part of your arsenal of evidence to risk having the mediator share them with the defendant before you believe the time is right. Bring a folder of hard copies of important "hot documents" that you might want to share with the mediator or your opponent during the mediation session.

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If you have videotaped depositions, bring clips of important testimony to establish the strength of your client's case, the negative demeanor of opposing parties and decision-makers as well as conflicts in their testimony, and the strength of your client as a witness on her own behalf.

Exchange information with your opponent

Either through formal discovery or by informal discussions, many weeks in advance of the mediation, ask opposing counsel to provide the details of any insurance policy that may provide coverage for the dispute. Even if they are unwilling to produce the whole policy, if they are serious about achieving a resolution, they will frequently be willing to disclose the limits of liability and the identity and location of the insurance carrier even without formal discovery in play. Also ask opposing counsel what you can provide to the defendant to make it more likely that the parties will get to a resolution at the mediation session. If the request for information is reasonable, provide facts, figures, and documents to your opponent as soon as possible in order to facilitate a productive negotiation.

Further, within about a week prior to the mediation, ask counsel to provide a draft settlement agreement. This can tend to get the ball rolling towards resolution even before beginning the mediation session. Resolving non-monetary terms and the form of the agreement prior to the mediation session can also save the parties many hours of work at the end of the mediation session.

The mediation hearing

Unless opposing counsel insists on it, do not give an initial demand to the defendant outside of the mediation session. The large number in the demand letter which outlined a likely result in the event the plaintiff prevails at trial is a good signal to the defendant and its insurer of the amount it will have to "reserve" or authorize for the mediation. Instead of giving a demand to an opponent who insists on it, instruct them to look at the demand letter for a sense of the plaintiff's likely starting point, minus some of the attorney fees that have been estimated in the letter.

Enlist the mediator in your strategy to obtain high value in the case. Assuming you have selected a quality mediator in whom you trust, ask the mediator for an assessment of the best method of approaching moves in the negotiation. Listen carefully to the mediator's comments in caucus with your side to glean hints at the likely range of settlement for the case and obstacles to settlement. For example, the mediator may intimate the intransigence of an insurer, or, alternatively, the insurer's relative cooperation. Give the mediator strategic information to overcome barriers to settlement in the other room. Use your own creativity to achieve resolution.

Be sure to raise essential non-monetary terms with the mediator long before you arrive at a final number on which the parties agree. Surprises on non-monetary terms can be deal-breakers if they are not disclosed in conjunction with the negotiation over the final number. At the same time, discussions about non-monetary terms before the parties get to a final number can create momentum towards settlement in the final caucuses of a mediation session.

Finalizing the settlement agreement

It is essential to finalize the deal, in writing, at the mediation session. Getting a written agreement starts the clock ticking on payment of the monetary part of the settlement. To ensure that you can provide opposing counsel with everything she needs as a precedent to paying the settlement sum, you should come to mediation armed with your firm's completed IRS Form W-9 and a blank IRS Form W-9 for your client to complete, if necessary. At the least, obtain a deal memorandum that is signed by all parties prior to leaving the mediation session, and include a provision that the memorandum shall become the final settlement of the parties in the event the parties do not execute a more complete agreement within a discreet period of time.

Some key terms that employment plaintiffs should insist on include mutual releases, mutual waivers of section 1542 of the California Civil Code, mutual non-disparagement, a neutral employment reference that will only confirm the dates of employment and the last position plaintiff held at the employer, and a fair allocation of the settlement amount to (a) wages, (b) emotional distress, and (c) attorney fees and costs.

Conclusion

Even if the parties do not resolve their dispute at a mediation, there are many benefits to participating in it. First of all, we can learn the defendant's and its counsel's settlement posture, personality, demeanor, and view of the plaintiff's case. Secondly, it helps us to hone our strategy for further litigation and trial and to learn about some of the weaknesses in the case. Thirdly, it enables us to get to know our clients better and see whether they can endure the pressures of a drawn-out lawsuit, while giving our clients a sense of the emotional pressures that inhere in the litigation process. Finally, it allows our clients and us to assess whether entering into or continuing litigation makes sense for them.

Gail Glick has been practicing law since 1994 and mediating disputes since 2003. She is a founding partner in the Santa Monica employment law firm of Alexander Krakow + Glick LLP. *She received her J.D. from Loyola Law School in 1994 and her B.A., cum laude, from Amherst College in 1991. Gail is the Treasurer of LACBA's Labor and Employment Law Section and is a Vice President on the board of directors of the Disability Rights Legal Center. Gail is also a member of CELA, NELA, CAALA, CAOC, BHBA, and the ABA. She has been named a "Rising Star" or "Super Lawyer" by Super Lawyers Magazine since 2009.*