MEDIATION:
POSITIONING YOUR CASE FOR SETTLEMENT

BY

ADRIENNE FECHTER

MANAGED CONFLICT

POST OFFICE BOX 500205

ATLANTA, GEORGIA 31150

Telephone: 678-520-2026

Email: afechter@managedconflict.com

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In order to maximize the opportunity to settle a case at mediation, it is helpful to review a list of strategies the most effective negotiators employ. I have compiled the following non-exhaustive list for your consideration:

- Mediating at the right stage;
- Selecting the right mediator;
- Preparing the client;
- Preparing himself;
- Establishing a good working relationship between/among counsel;
- Remaining flexible;
- Looking past legal positions to uncover underlying interests;
- Engaging in creative thinking;
- Ensuring appropriate demeanor of himself and his client;
- Appropriately using Opening Statements;
- Freely disclosing persuasive evidence;
- Bringing the right people to the table;
- Ensuring adequate authority;
- Refraining from overselling the case;
- Avoiding unrealistic expectations of the attorney and/or client;
- Avoiding defensive posturing;
- Controlling emotion;
- Avoiding reactions;
- Refusing to engage in power plays;
- Avoiding unreasonably high/low demands/offers;
- Understanding that a party will not bid against himself;
- Understanding his best/worst alternatives to a mediated settlement;
- Projecting good faith;
- Being willing to listen;
- Staying positive;
- Understanding who the decision makers are and who holds the purse strings;
- Maintaining patience;
- Being persistent;
- Being willing to make bold moves;
- Diffusing anger and emotion;
- Understanding the dynamics of the other side;
- Knowing your audience.

Obviously, every case presents different challenges for attorneys and mediators alike. This means that strategies utilized by counsel and the mediator must be fluid,

responding to the specific circumstances before them. This said, however, there are a number of practices counsel can, and should, employ to increase the likelihood of resolving cases at mediation—strategies that begin immediately after agreeing to mediate, such as selecting the right neutral, through the presentation, negotiation, and drafting of the final settlement document. This paper will highlight a few of the above-listed strategies that greatly improve the chances of settlement at mediation, within the parameters you and your clients set.

I. WHEN IS THE BEST TIME TO MEDIATE?

The timing of mediation greatly impacts the chances of settlement. Some cases must be mediated pre-suit to achieve the goals of the parties, some pre-discovery, others at the close of discovery but prior to the filing of dispositive motions, and still others after the court issues its order on motions for summary judgment.

A. Pre-Suit & Pre-Discovery Mediations: Do They Really Work?

Pre-suit mediations can be very effective in resolving certain types of claims. Perhaps the most obvious is the case in which reputations of individuals or entities are at stake. Whenever a party fears publicity, there is a high likelihood that a confidential process like mediation will lead to early resolution. The possession of damaging information by a plaintiff, coupled with the unavoidable result of public dissemination of that information upon filing suit, often is sufficient to convince a defendant that resolution at mediation is the best option. Once the complaint is filed, these plaintiffs necessarily lose the leverage they may have had at the pre-suit stage. The most convincing scenario, which is not uncommon, is that the defense also is in possession of information—in this case about the plaintiff, or his activities—that similarly would be

damaging if publicly known. Pre-suit mediation is highly advisable in such circumstances.

Another situation in which pre-suit mediation has a high likelihood of success is when the remedy sought by the plaintiff involves little money and is fairly easy to implement. Examples might include failure to accommodate cases under the ADA, and disputes under the FMLA and FLSA. Another situation that lends itself well to pre-suit mediation from the plaintiff's perspective is when plaintiff's counsel has not committed to handling the case through trial, or the plaintiff and his counsel have a retainer agreement that limits the scope of representation to settlement discussions. This kind of arrangement between plaintiffs and their counsel do exist and they are rarely, if ever, known by the defense.

Similarly, a plaintiff or defendant may not have the wherewithal, either from a financial or emotional standpoint, to see the case through trial. This could be because of weaknesses in the claims or defenses, characteristics of either party, or fear of the discovery process. An individual plaintiff who is seeking damages for emotional distress may be concerned about the discovery of his medical records and history, or may be motivated by the desire to avoid an IME under Rule 35. A corporate defendant may want to avoid the disclosure of corporate documents, such as comparator information or financial disclosures. The possible concerns by each side are virtually limitless.

Yet another circumstance in which pre-suit mediation is attractive is the situation where plaintiff's counsel has been fortunate enough to have a terrific client—one who is bright, credible, articulate and persuasive (or even sympathetic). In such situations, parading the plaintiff in front of opposing counsel and the corporate representative at the

earliest possible opportunity can be enough to convince the defense that early settlement is desirable.

Whether pre-suit or pre-discovery mediation makes sense in a particular case will have to be determined by counsel, who must weigh the benefits of early resolution and the risks of going forward (often not an easy task so early in the matter). In employment cases this is often less of a problem for defense counsel than it is for plaintiff's counsel because typically in these cases the corporate defendant has within its control most, if not all, of the key documents and witnesses. The plaintiff must rely much more heavily on discovery to uncover documents to support his case. Of course, where the EEOC has investigated the underlying claims and in so doing was provided with position statements and supporting documentation during the administrative process, plaintiff's counsel may conclude that a review of that material along with informal interviews of available witnesses will provide enough information to permit effective negotiation without the benefit of further discovery.

B. Mediating at Either the Close of Discovery or After Filing Dispositive Motions

Often, parties decide to delay mediation until the close of discovery or until dispositive motions have been filed. The rationale for this decision usually is that the parties cannot effectively negotiate without a full understanding of the facts and the evidence. While this argument clearly has some validity, there are several factors that negatively impact the chances of settlement at this later stage.

First and foremost is the obvious drawback that a significant sum has been expended in reaching this point in the litigation. This is true for both sides. Plaintiff's counsel will usually have invested a tremendous amount of time, energy and money to

pursue the claims, and that factor invariably plays into the calculation of what his client is willing to accept as a full and final settlement. On the defense side, more often than not, money paid to defense counsel to reach this stage is an element the corporate defendant factors into the equation as well. Moreover, defense counsel may recognize—and advise his client accordingly—that for perhaps as little as an additional $20,000, a motion for summary judgment could dispose of at least some, and possibly all, of plaintiff's claims.

More and more we are seeing insurance coverage for employment claims. Often, the coverage limit includes the expenses incurred in the defense of the matter. There may be little left to apply to damages if mediation is utilized late in the litigation. Similarly, an employer's financial motivation to settle may be diminished later in litigation once its deductible has been met. Defendants often conclude that they would prefer to take a "wait and see approach." As long as they have waited this long, why not go ahead and see which, if any, of plaintiff's claims survive the motion for summary judgment before putting any significant amount of money on the table. **BEWARE** of this choice. The settlement value of a case rides on the court's decision—if the plaintiff survives summary judgment, it will become much more expensive for the defendant to settle the case, mediator or no mediator. Sometimes a plaintiff won't even discuss settlement and won't agree to mediate after surviving a motion for summary judgment. Other times, a plaintiff will agree to mediate, but achieving a resolution is made much more difficult by virtue of the plaintiff's significant investment to reach this point . . . against the odds. His newfound confidence can have the effect of negatively impacting subsequent attempts to negotiate a settlement. Even with a questionable claim, a plaintiff who has survived summary judgment might prefer to "roll the dice" with a jury rather than settle for what

the case might reasonably be worth. And in light of the difficult odds of surviving summary judgment, who could blame him?

To further complicate matters, by this stage in the litigation, the bad feelings between the parties often have been exacerbated by the litigation process itself. There is animosity, distrust, and anger on both sides that can create major obstacles to settlement. Moreover, the parties have now become deeply entrenched in their respective positions, thereby creating a real challenge for even the best mediator.

The bottom line is that there is no hard and fast rule about the optimal time to mediate. My advice, however, is to mediate at the earliest possible opportunity, once the parties recognize they are ready to resolve the case. Each side must be ready and willing to listen, to make concessions, to be creative and to deal.

C. The Beauty of Mediation After "Early Limited Discovery"

More and more parties are agreeing to mediate after "early limited discovery." Absent the key motivators to mediate pre-suit, this timing in my experience leads to the greatest likelihood of settlement success in mediation.

It is difficult, if not impossible, to evaluate claims and defenses without the benefit of some discovery. This is particularly true for plaintiffs, since as stated earlier, the defendant corporation usually has within its control the relevant documents and witnesses. But it also can be critical to the defense when it takes the position that there is a need to at least depose the plaintiff before assessing the desirability of mediation and the value of settlement. It is understandable that an adequate assessment cannot be done without some discovery.

Moreover, in addition to the goal of gathering information to establish defenses, the defense often believes that taking the plaintiff's deposition before engaging in

mediation serves other important goals. One goal might simply be to demonstrate to the plaintiff that litigation won't be an easy road, or that his background can and will become an issue in the case if it goes to trial. Defense counsel rarely overlooks the potential impact of this strategy on the plaintiff's willingness to engage in reasonable settlement discussions.

Similarly, plaintiff's counsel often recognizes the desirability of deposing at least one key witness or corporate representative, and serving requests to produce. Not only does this send the clear signal that the plaintiff is actively and thoroughly pursing evidence to support the claims, but serves to nail down potentially damaging testimony as early in the case as possible.

Agreeing in advance to pursue mediation after clearly defined "early limited discovery" offers a good compromise in the mediation decision. Not only does it circumvent the nagging feeling that decisions made too early in a case are being made in the blind, but it allows counsel to discuss mediation as an option on the front end, without any concern that opposing counsel will see such a willingness as an expression of weakness. On the contrary, it is an agreement that reflects the parties' respective beliefs in the strength of the evidence, by being confident enough to reveal key aspects of the case or defense without fear of the impact it will have on subsequent negotiations in mediation.

II. SELECTING THE MEDIATOR: DOES THE CHOICE REALLY MATTER?

My motto is, "Your choice of a mediator is as important as your client's choice of counsel." If you don't believe this, then you haven't mediated enough.

So, how do you go about finding a good mediator, and what qualities should you be looking for? Again, there are no hard and fast rules, but there are a number of considerations that should factor into a good decision. I will assume, for purposes of this discussion, that the parties have decided to mediate voluntarily and have a sincere desire to resolve the matter.

A. Is it Necessary or Desirable for the Mediator to Have Substantive Knowledge or Trial Experience?

This is a loaded question for me, because I hold myself out as a mediator who does have substantive knowledge in employment law, and trial experience in my area of substantive expertise. However, I also recognize that not all issues in dispute require that a mediator have expertise in the subject matter to be mediated. In the area of employment law, however, attorneys are more and more interested in whether a mediator will fully comprehend the claims, defenses and nuances in the law. This has become a fairly technical area, and much time in mediation can be lost, and energy expended, simply in educating the mediator about the law and the significance, or lack thereof, of facts or evidence if your mediator does not have an employment law background. Not everyone agrees with me, however. Most mediators still are generalists, who believe that what is of primary importance is expertise in the process, rather than the substance.

B. How Important is a Mediator's Style?

Mediators' styles differ as much as litigators' styles. One primary difference is whether a mediator has what I will call an "active" or "passive" approach to the process.

Passive mediators believe that a mediator's role primarily is to take a back seat in the process. In doing so, they practice good listening skills and convey messages and information to each side, leaving analysis, commentary, and suggestions to the parties and their representatives. In fact, this is the method often taught in mediation training courses, with the emphasis on finding common ground and re-framing what each side relays. Passive mediators often believe it is the process that will enlighten the parties, providing a catharsis, which undoubtedly is so often critical to the process of settlement, and will allow the parties to identify and dictate the terms of settlement.

Active mediators take this a step further. Yes, they listen and allow for the catharsis to take place, but they take an active role in the process by questioning, commenting, and making many suggestions along the way. Active mediators become, to a limited extent, important participants in the mediation. They analyze risk and ensure the parties have done so as well, and they are not shy about communicating that risk. They are anything BUT messengers. In cases where the parties are not able to reach agreement, active mediators often make mediator's proposed settlements, giving each party the opportunity to confidentially accept or decline. This type of mediator believes that parties may need prodding—sometimes significant prodding—to get the process to result in resolution. They are more "deal makers" and "closers" and see the importance of mediation not just in going through the motions, but in reaching resolution.

C. Does Creativity in a Mediator Really Matter?

More often than not, mediators hear from the parties or their counsel that money is all that is at issue. While undoubtedly, money is a BIG issue in most employment cases, it is by no means the only issue, and a good mediator . . . a creative mediator . . . will search for other "things of value" that can be offered as part of a mediated

settlement. You want a mediator who has the ability to look beyond pure financial demands to ascertain what motivates the parties and to determine where their interests lie. This kind of mediator will begin to craft ideas for resolution as soon as he reads the complaint and the respective mediation statements.

What kinds of creative resolutions can be a substitute for a large, up front lump sum payment of cold hard cash? You would be surprised. It might be an agreement to provide college tuition assistance to the plaintiff or even a family member. Or, it could be to enter into some kind of non-employment subcontracting or consulting arrangement for a designated period of time. A mediated settlement might include an agreement to modify policies or implement procedures, or to create or modify a diversity or sensitivity program. Simple recognition devices can be offered as a settlement term, such as announcements, certificates, awards or complimentary articles in corporate newsletters. It could even be a charitable donation in the plaintiff's honor, or in honor of a family member or friend, or an agreement to hold a fundraising event for a cause championed by the plaintiff. The possibilities are literally limitless, and a good mediator will work with you and your client to develop ideas that can be incorporated into settlement agreements. Remember, there are plenty of things that might be valuable to your client that a judge cannot order, and a jury cannot award, even if the plaintiff prevails on each and every claim. Given the right circumstances, they can be powerful incentives for both sides, and they provide an opportunity to resolve disputes in a manner that recognizes the real interests of all parties.

D. Persistence and Tenacity: Isn't it Just Irritating?

Well, I suppose they can be, but they are important characteristics in a good mediator nonetheless! Active mediators have a hard time taking "no" for an answer.

They also discount all those threats by the parties that they are going to walk out of the mediation. And they will not leave the mediation when the clock strikes 5:00 or even midnight if progress is being made. The best mediators will stay with the process as long as it makes sense to do so, and will not see the failure to settle at mediation as the end of the mediation chapter. Look for a mediator who "takes the case home" with him and continues to create and relay potential solutions long after the mediation participants have packed up and left.

Too often mediators comment that they prefer mediation to litigation because they don't "have to live with the case" beyond the time actually spent in mediation. These mediators are happy to just move on to the next dispute. Avoid this type of mediator. You want to find someone who, when a case doesn't settle, thinks about you and your client well past the end of the day, and someone who stays in touch, offering fresh ideas and suggestions for resolution. Persistence and tenacity are key characteristics of active mediators whose goals are to assist the parties in getting beyond the adversarial process either at mediation or at some subsequent point prior to trial.

E. The Devil is in the Details

We all know that agreements can break down over the details of how and when the parties will carry out their agreed upon obligations, as well as what language will be used to describe those obligations. You will find that mediators differ greatly in the level of detail they not only convey during the mediation, but in what they include in a mediated settlement agreement as well.

During mediation, if details are laid on the table and discussed as necessary elements of an acceptable agreement, the mediator must convey and keep a running list of each element. They rarely should be saved until the end and suddenly sprung on the

other side. This running list should be repeated each time the mediator caucuses, so as to avoid any misunderstandings.

Once agreement is reached, the parties will be required to sign off on some form of written agreement. Beware of mediators who do not require a signed writing at the conclusion of a mediation. These documents can be a simple listing of the terms, with the intent that the attorneys will haggle over exact language later, or they can be final settlement documents. My advice is, whenever possible, to err (and seek a mediator who will err) on the side of being overly detailed, rather than risk the disintegration of an entire deal reached after many hours of negotiating. In my practice, I advise the parties to come prepared to execute the final settlement agreement at the conclusion of the mediation. This usually means that counsel will each bring with them to mediation a laptop computer or flash drive on which is their standard settlement language. While this can be time consuming after a long day of mediation, in the long run it saves significant time, effort and frustration. **And the deal is really done when the parties walk away.**

This practice does not leave anything to chance and avoids the unnecessary delay of weeks of exchanging draft settlement agreements that inevitably occurs following a successful mediation that did not result in a final settlement document at the time. Of course, there are always those cases where this simply is not possible due to the complexity of the matter, or the need to go through a third party final approval process, but those situations are the exception rather than the rule.

F. The Mediator's Ability to Establish a Rapport and Sense of Trust With the Attorneys and Clients

Not all mediators have the interest or inter-personal skills to establish a rapport with the attorneys or the attorneys' clients. There is a sense among these mediators that it is important to remain detached from all parties and counsel in order to be truly neutral. I completely disagree with this viewpoint and believe it is critical for a mediator to be able to relate to everyone in the room in order to be effective. This means that a mediator should be able to gauge the personalities he must deal with and to react to those personalities in a manner that allows for the building of trust. If a mediator is faced with an attorney who has a need to be "in charge" of the process, it is important to take a step back and give counsel the room he needs to negotiate. If a mediator is faced with a party who doesn't want to feel he is being pushed, then the mediator must take care to not come on too strong with that party. If a mediator encounters a corporate representative who has a need to be recognized as the real decision-maker, then a mediator needs to provide that recognition. The list could go on and on, but the bottom line is that a mediator must spend some time to recognize the different personalities and the needs of those who will dictate the outcome of a mediation.

III. MEDIATION STATEMENTS: ARE THEY REALLY NECESSARY & WHAT SHOULD THEY CONTAIN?

Providing the mediator with a mediation statement is your opportunity to educate the mediator about the key facts of your claims or defenses as well as many other important matters as described below. Providing the mediator with this information—in advance of the mediation—will save time and energy at the mediation itself. It also is a good opportunity to explain your view of the law, particularly nuances in the law as they

apply to your facts. It is the time when you first introduce the mediator to the parties and witnesses and shed light on motivations and expectations.

A mediation statement can be used as a tool to provide the mediator with confidential or sensitive information you may or may not want to use in the mediation. This is common, particularly in employment cases. Should this be the case, identifying it ahead of time in your mediation statement provides important perspective and allows you to get the mediator's sense of whether and how it could be used. Your mediator should discuss such facts with counsel, and may even offer an opinion on the usefulness of disclosure.

The following is a sample list of information that is helpful to include in your mediation statements (in addition to an explanation of the facts and applicable law):

- ✓ A description of who will be attending the mediation, their roles (including who the decision-maker(s) is/are), and how they may impact the potential for resolution;
- ✓ An explanation of the interpersonal dynamics at play;
- ✓ A listing of known or perceived impediments to settlement;
- ✓ A statement regarding the status of the case and any previous settlement discussions;
- ✓ A prediction regarding what will happen if the case is not settled at mediation;
- ✓ The identification of any client control problems (if your client is going to see the mediation statement, save this for your conversation with the mediator when your client is not present);
- ✓ A description of your relationship with opposing counsel;
- ✓ An explanation of what you believe the mediator should focus on or emphasize with your client or the other side;
- ✓ A disclosure of confidential or sensitive information;
- ✓ Your description of potential damages and their values;
- ✓ Concessions regarding weaknesses in your claims or defenses, as well as those of your opponent; and
- ✓ Suggestions for creative solutions.

IV. HOW TO PREPARE YOURSELF & YOUR CLIENT FOR MEDIATION

As a general matter, the attorneys who appear at mediations should not only have a thorough understanding of the facts and the law, but also should possess good negotiation skills. The best advice I can give to attorneys is to treat mediation as seriously as you would a trial. This means that attorneys need to know the case, the law, the witnesses, and the documents. The attorney's handling of a case at mediation is often seen by the other side as a preview of how it will be handled at trial. Give the other side something to worry about!

A. Selecting the Right Participants

The person or persons defense counsel chooses to bring to the mediation table can easily dictate the outcome of mediation. (Of course this discussion presumes that defense counsel has control over this decision.) While defense counsel may want to have a corporate representative present who is familiar with the facts of a case, it can be counter-productive to bring an employee, manager or officer who is viewed by the plaintiff as a "wrong-doer" or "co-conspirator." Bringing such a person can have many negative effects on the process, such as:

- ✓ Putting the plaintiff in a defensive posture;
- ✓ Appearing to the plaintiff as if conciliation is not the real reason for the defense agreeing to mediate;
- ✓ Making settlement more difficult if the alleged "wrong-doer" is unable—either for professional or personal reasons—to make necessary concessions. (This is particularly true when the corporate representative at the mediation is the implicated decision-maker or actor.)

Another piece of advice concerning who should and who should not be present at mediation, is that in cases where there is an individual defendant, such as in sexual harassment cases with state law tort claims, the accused should be persuaded not to

have his spouse present at the mediation. More than one potential settlement has been derailed at mediation as a direct result of a spouse vehemently defending the other, and refusing to allow concessions that might be viewed as an implicit admission of guilt. The individual defendant may not be nearly as vehement in his denials as the spouse may be.

So, assuming the defendant's counsel has a choice, who should he bring to the table? Clearly, counsel must have someone with sufficient authority and stature to send the message that you are taking the plaintiff's claims seriously. Bringing someone who is very low in the chain of command, or has little authority, can have the effect of really "ruffling some feathers." Similarly, ensuring that the corporate representative is not simply someone trying to "save his own hide" will set a productive tone for mediation.

It should be noted that while plaintiffs do not have the same choices regarding who should attend the mediation, the issue does sometimes arise. At times, plaintiffs want to bring someone with them either for moral support or to assist in necessary decision-making. In my experience, defendants rarely object in principle, but may want to exclude individuals who are potential witnesses from the joint session, especially where that person has not yet been deposed. Counsel should consider carefully who this person is and what role he will likely play. Again, it is not always advisable to have spouses present—particularly in the joint session—where sensitive issues may be discussed, and where accusations are sometimes leveled.

B. Preparing Substantively

It is critical to a successful outcome at mediation to do more than just explain the mediation process to your client. It is the attorney's job to understand what is important

or necessary to achieve, to recognize what is in the client's best interests, and to explain what is really reasonable to expect and what is achievable at mediation.

The most critical component of preparation for mediation, however, is the one most often overlooked by clients and counsel alike . . . a search for what is motivating the client and the other side. In other words, what interests does he need to have addressed, and what options are there to meet these interests in the context of a negotiated settlement? For example, the plaintiff tells his attorney that he absolutely cannot settle his claim for less than a net of $40,000.00. The defense's position is that it cannot settle the case for more than a gross of $15,000. These are fixed in their minds even before the mediation process is underway. Can this case be settled? Of course it can, but how? Does a good mediator simply pressure each side to give a little? NO! A good mediator will flesh out with each party WHY they have taken those positions. Does the plaintiff have a reason for insisting on a specific amount and no less? Does the defendant have an explanation (other than they think they will win at trial) for offering no more that a max of $15,000? What if the mediator finds out that the reason behind plaintiff's demand is that he needs the money for an investment, to pay for college tuition, to buy a car, or to obtain insurance? Suppose the defendant is basing its willingness to pay a certain amount on budgetary restrictions? Does that change the equation? By determining what the underlying interests of each party are, counsel and the mediator have created the opportunity for creative brainstorming regarding how this claim could be settled with both sides' interests being met.

After you have met with your client and tried to determine what is motivating him, the next step is to prepare with your client—in advance of mediation—a working

list of acceptable settlement terms, both financial and non-financial, and create a list of acceptable options for meeting your client's underlying needs. You must be certain that your client's expectations are **reasonable and fluid**, and that your client is prepared to make concessions at mediation. Just as important, while your client may have a fairly good idea of what the "bottom line" or "top dollar" is from his perspective, try to avoid making such inflexible pronouncements. Mediation should be viewed as an opportunity to respond to what you hear from the other side, and from the mediator. A skillful attorney will instill in his client a sense of trust and will encourage the client to be—and remain—as flexible as possible throughout the mediation process.

You must also prepare your client for what he is likely to hear. Surprises in mediation are rarely good ones, and what goes on may not be all pleasant. Be certain that the client recognizes not only the strengths of the claims or defenses, but the weaknesses as well. Every case has its warts and the client needs to know not only what and where they are, but how they could impact the outcome at the summary judgment stage or at trial. Remind him to keep his eye on the ball . . . to remember what his real interests are and to thoroughly consider all alternatives that will put him on the path toward realizing his real underlying goals.

Your client, particularly if your client is the plaintiff, should know and understand what type of contractual clauses corporate defendants will likely expect to include in a settlement agreement. These might include non-disparagement language, confidentiality provisions, and agreements to not reapply or accept future employment from the defendant company. It could be an indemnification agreement, or an agreement not to voluntarily assist another individual in bringing a charge against the company. It could

relate to the issues surrounding payment options and taxation issues. You know what the possibilities are, and you should go over this list with your client to avoid surprising or upsetting your client during a long and often stressful day of negotiations.

Probably as important as anything else, is the preparation of your client for what could be a marathon day of negotiations. Most significant employment cases take more than 7 or 8 hours to resolve and to draft the final agreement, and persistent mediators will do everything possible to keep you there as long as it takes. Suggest to your client that he bring work or reading material or anything else that will allow for productivity or relaxation.

C. Relationship Between/Among Counsel

I can say with certainty that the most successful and mutually satisfactory settlements are achieved in cases where counsel have enjoyed a professional relationship with each other during the course of litigation. This does not mean you have to be personal friends, although that doesn't hurt either, but it does mean that your professional dealings with each other have been more positive than negative and that you share a mutual trust and respect. The manner in which you treat the other side from the beginning of the case can either pave the way for a successful mediation or become an obstacle the mediator must address. Far too often clients and their counsel don't think this far ahead or their judgment is clouded by the putting on of war paint during litigation. Professionalism always makes resolution easier and less painful.

If what I say comes too late for you in a particular matter, try having another attorney handle the mediation for you. Be willing to take a back seat in negotiations for the greater good. You might be surprised what concessions the other side might be willing to make so long as they are not made to you! If you only come to realize that

your strained relationship or difficult history with counsel is standing in the way of settlement during the course of mediation, discuss this with the mediator The mediator should be able to assist you in overcoming this obstacle. As a last resort, consider re-convening at another time with one of your partners present in your place.

These same principles apply to the virtually inevitable strained relationship that will exist between opposing parties. While it is not always an option to substitute who will be present at mediation, such as in the case of the plaintiff, it might be possible to hand pick who will sit on the other side of the table when a corporation is the defendant as discussed in more detail elsewhere in this paper.

D. Opening Statements and Conducting Yourself at Mediation

Presentations by counsel in mediation opening statements differ with each case and each attorney. Some attorneys decline the opportunity to do an opening altogether, and others use their time to give the other side a detailed preview of what will be said during opening or closing at trial. Additionally, counsel must decide whether they want their client to speak on his own behalf during the joint session. In addition to these decisions, counsel must decide whether and how much evidence to present during the opening statement.

It is important to remember that this is your chance to speak directly to the client on the other side, without having to go through the filter of counsel. It may also be a great opportunity to persuade the other side that you have evidence and a presentation that will be very persuasive with a jury. All too often, attorneys are afraid to give away their strategy, and don't want to give the other side a preview of how they will present or summarize key facts. My advice is to give this significant thought and don't have a single rule of thumb for all cases. Some may require you to lay out your battle plan for

the benefit of opposing counsel, while in other cases it will only serve to create an environment hostile to the concept of cooperative decision-making. My own practice as an attorney—in those cases where I felt it necessary—was to "go for broke" in mediation, especially when I represented plaintiffs, assuming of course it was not too early in the case.

Also, don't ignore the importance of discussing damages in the joint session. All too often plaintiff's counsel spends so much effort in the opening on liability, that he neglects the issue of damages. While economic damages are relatively easy to assess and calculate, damages for emotional distress are more difficult to demonstrate. Plaintiff's counsel must come to mediation prepared to make a showing that leaves the other side concerned about what a jury might award. The plaintiff, himself, might be allowed to describe for the defense what impact the conduct has had from an emotional and physical perspective. He must be prepared to describe in as much detail as possible how his damaged emotional/physical state has affected his relationships and lifestyle. Proffers should be made to the defense regarding what other witnesses will say regarding the emotional damage to the plaintiff. Never forget that this is a critical aspect of mediation wherein the plaintiff's counsel *and* his client have a real opportunity to persuade the defense that a jury is likely to award significant damages.

That being said, convincing the other side they have good reasons to make concessions is only one of your goals at mediation, and in some cases not always the most important. Mediation is not litigation, and if you treat it as such, it may make a cooperative settlement just that much more difficult. Trying to "blow the other side away" in mediation often backfires. I always advise counsel to make conciliatory

statements during the opening. Make it clear that you are not at mediation to fight, but to try and work together to achieve closure. Focus on areas of agreement whenever and wherever possible. Look for opportunities to bring humor to the table where appropriate. It may even be necessary to stroke egos, but be careful that you are sincere whenever doing so, as insincerity can surely destroy a party's desire to engage you in cooperative discussions. There are many small things that can be done so as to have maximum impact.

Don't be afraid to make conciliatory statements during your opening in joint caucus. Make it clear that you are not at mediation to fight, but to try and work together to achieve closure for both sides. Focus on areas of agreement whenever possible, and look for opportunities to bring humor to the table in appropriate circumstances. It might even be necessary to stroke egos, but be careful that you are sincere whenever doing so as insincerity can surely destroy a party's desire to engage in cooperative discussions.

There are many small things that can be done so as to have maximum impact. If you are hosting a mediation, be a good host. This may mean nothing more than ensuring everyone's comfort, but often means buying lunch for the opposing side and paying for parking in your parking garage. If you are not hosting, bring snacks or cookies for everyone. You would be surprised how much people appreciate this type of gesture. If you have the opportunity during the day, engage the other side in small talk unrelated to the case, but never speak to an opposing party without counsel present. Show a real interest in others. Be nice. Be optimistic. Be friendly. Mediation is no place for power plays and tempers. Whatever else you do, never brag about your successes as a trial

attorney to the other side. It won't impress anyone except perhaps your client, and is likely to make you look foolish.

So, how can you demonstrate your competence, confidence and commitment—in front of your client—without being an advocate who engages in nonproductive adversarial type tactics? In sum, always remain respectful of the other side. The importance of this seemingly simple suggestion cannot be overstated, particularly for defense counsel in an employment matter. More often than not, an employment plaintiff comes to the negotiating table feeling completely unappreciated, and often victimized by his former employer. Any act on the part of counsel for the employer that has even a whiff of disrespect, will serve only to confirm the plaintiff's most negative feelings about the defendant and the employment action at issue.

The loss of self-esteem and personal value often are underlying issues in employment claims. Defense counsel should make every effort to avoid devaluing a plaintiff, perhaps even find an opportunity to make positive comments about the individual's accomplishments. You will be amazed at how effective sincere praise can be for setting the stage for a cooperative resolution. At the very least, it will "soften" emotions that undoubtedly are raw. This same concept applies equally to plaintiff's counsel. Remember that when an accused wrongdoer is present at the mediation, he too may be feeling unjustifiably targeted or demeaned. Plaintiff's counsel should similarly conduct himself in a way as to avoid personal attacks.

Listening to what a party has to say helps to set the necessary cooperative tone of mediation. It always is helpful, and much appreciated by the other side as well as by the mediator, for counsel to emphasize and reiterate—when and where appropriate—the

client's willingness to work toward a mutually agreeable resolution. Be sure to direct the discussions toward the future by talking about what you hope to achieve, rather than what "really happened" and who is right and who is wrong. As the process unfolds, try focusing on areas of agreement, while continuing to work on the more difficult points or more troublesome issues.

V. DEALING WITH DESTRUCTIVE EMOTIONS AND REACTIONS

We have all been there. The other side has just made an infuriating and outrageous statement (against my best advice)! To make matters worse, their offer is downright insulting! Boy is your head spinning! How should you respond?

William Ury in his bestseller, Getting Past No, offers excellent advice on how to handle these situations. He explains that it is imperative you **suspend your reaction**. Take a break, either mentally or physically, to give yourself time to gain some perspective. Ury calls it "going to the balcony." By doing this, you suspend your reaction and allow yourself the opportunity to see things more clearly. Envision yourself "going to the balcony" in a theater and looking over the crowd. You have taken yourself out of that crowd and given yourself the whole perspective of what is going on below. You will see everyone and everything much more clearly than if you were in the midst of it. By doing this, you follow one of the most important rules in mediation: **Don't react!** Give yourself time to gain perspective and evaluate where you are. You will buy yourself and your client valuable time and your judgment will not be distorted by emotions.

Each of us has our own way of "going to the balcony." For some, it might mean actually taking a break, getting some coffee or taking a walk. For others it might be

nothing more than taking the opportunity to lighten up the room with an appropriate joke, or cutting the tension with some kind of small talk. When things get tense, I start passing out ice cream!

Ok, so you can control yourself, but what about the other side? How are you going to control their emotions? What if they aren't buying the "going to the balcony" concept? The answer is you can't control them, but you can influence how they deal with you and your client. Ury describes a technique that I find works in the majority of cases. He suggests you "do the opposite from what they expect." This means avoiding playing the game of "Well, just watch me dish out the same stuff!" Don't respond in kind. If they are upset, you stay calm. If they are yelling, you stay quiet. If they are threatening, you just listen.

Listening is an important and often overlooked skill by lawyers. You should always demonstrate that you are truly listening to the other side by looking directly at them when they speak. Make eye contact and repeat or summarize what you have heard to show them you were listening. Ask clarifying questions and acknowledge their position.

VI. MAKING OFFERS THAT KEEP THE PARTIES TALKING

For some reason, opposing counsel usually are most comfortable beginning a day of mediation by making offers that can best be described as "polar extremes." The most often cited justification for doing this is that counsel believes it is necessary in order to have somewhere to move during the negotiations. Does this work? Sometimes. Is it the most productive way of moving toward resolution? Not from my perspective, and not in my experience.

Beginning with an extreme negotiating position may have a number of unintended negative effects. For example, it might send a message of insult or lack of good faith. It may make the other side throw up their hands in anger or frustration, asking themselves and the mediator what, then, are they doing there. It might just make the other side get up and leave. So how do you start with a more reasonable number and still end up in an acceptable place?

First and foremost, discuss with the other side – in advance of mediation -- your sincere desire to avoid this type of negotiation strategy. Hopefully both sides will agree that it is not the most productive way to approach a resolution. Attempt to get an agreement between counsel that neither will employ this tactic. Often, Defense counsel will insist that the plaintiff made a demand prior to mediation. Plaintiff's counsel may be hesitant to do. In such circumstances, plaintiff's counsel might consider agreeing to making a pre-mediation demand, but only if the defense agrees to respond with an offer pre-mediation. Another possible strategy is to work with opposing counsel to come up with a range in which negotiations at mediation will take place. If you do not have the kind of relationship with opposing counsel that would allow for this discussion, utilize your mediator's skills to do it for you.

How can this be achieved? One idea is for counsel to each prepare charts reflecting damages calculations as they see them. Each chart should include worst case and best case scenarios. Exchange these charts either directly with the other side, or through the mediator, prior to the mediation. Plaintiff's counsel might want to consider also disclosing the actual amount of attorney's fees and costs incurred to date, or at least placing a reasonable value on these items.

An effective mediator will review those calculations with you (and with your client should you so choose) and discuss with your what is reasonable to expect in light of many factors, such as the likelihood and impact of an Offer of Judgment, rulings on admissibility, and the possible outcomes at the summary judgment stage. This discussion will lead to the creation of alternative damages charts and calculations on each side, and will undoubtedly lead to the consideration of more realistic, and more reasonable views regarding the appropriate range that can be used in mediation. Of course these discussions with each side are confidential, as are the alternative calculations arrived at through conversation with the mediator. This is an important exercise for both the attorney and his client. If desired, the mediator can use these calculations to propose a range within which to begin negotiations, and the parties can choose to accept it or not. Even where the parties and or their counsel reject the concept of negotiations within a specified range ("bracketing"), the exercise will undoubtedly lead to a more reasonable starting point in the negotiations. Remember, while you want to put a first offer or demand on the table that says you are confident in the strength of your case or defenses, it needs to also be one that does not lead the other side to question counsel's competence or sincerity, or that of his client. Moreover, an extreme offer by a plaintiff may require that he later make substantial moves or large jumps to achieve settlement. Under such circumstances, defense counsel may view plaintiff's counsel as inexperienced or insincere, and will undoubtedly remember it the next time they face each other in a litigation matter. The same can be said of the defense that chooses to start at an extremely low number. Extreme numbers that have no basis in the law or facts of a case

negatively impact negotiations and often invite the dreaded "tit for tat" response, or prompt the participants to walk out of the mediation.

Once initial offers are on the table, parties and counsel grapple with what subsequent moves to make. There, of course, can be no general rule for how this is done, as each and every case is different and requires different strategies. Notwithstanding the absence of such rules, there are some strategies that can be examined for effectiveness. For example, it is a good rule of thumb to resist the temptation to simply make moves that mirror the moves being made by the other side. Remember the advice above, when you don't like what the other side is doing, don't respond in kind. Don't play by their rules! Surprise them by doing the unexpected. Make a bold move. Never be afraid to make big moves, especially if recommended by the mediator. You can always send the mediator with a message telling the other side not to expect continued moves of this magnitude, or that you are doing it with the expectation and trust that it will encourage the other side to act in a similar fashion. And don't forget, you can always apply the brakes if you find yourself outside your zone of comfort. Finally, I often get asked whether making a "final offer" is productive. My response is never to do it, **unless** you really mean it. The credibility of counsel and client depend on this.

VII. NUDGING THE OTHER SIDE

All this advice is fine and good if both sides are playing by the same rules, but what if the other side hasn't signed on? What if the other side is inflexible and doesn't appear interested in cooperative discussions? What if the other side simply chooses to give you a demand or offer and indicates an unwillingness to change his mind?

At this point, it is critical that you and the mediator try to determine **why** there is apparent inflexibility. Are they just playing "hard ball," or are there financial issues or "smoking guns" you need to know about? Never jump to the conclusion that other side is acting in bad faith. Ask the other side to help you in understanding the motive behind the number and brainstorm about other ways of addressing the discovered motive. Be candid by explaining your client's interests and asking the other side for ideas as to how best both sides' interests could be addressed. Enlist the mediator and opposing counsel in helping to solve the problem with you, as opposed to working against you.

If your mediator does not offer it, do not be shy about asking your mediator for the opportunity to meet with counsel at any point during the day when you believe it is important or has become necessary to encourage this kind of joint participation by opposing counsel. By all means, sit down with opposing counsel and the mediator and review where you are in negotiations and enlist the other's assistance in continuing to move toward resolution You would be surprised how often discussions between counsel out of earshot of clients can lead to a swift resolution.