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10 lessons from an employment mediator: What I wish I knew all along

From evidence gathering to negotiation tactics, these tips could help reshape your approach to case resolution.

By Ramit Mizrahi

After nearly two decades as a litigator, I pivoted to employment mediation. In doing so, I chose my favorite parts of the job–the high-level strategic thinking and getting to a resolution. From the 30,000-foot view of a mediator, I offer deceivingly simple-sounding insights that can lead parties to better outcomes:

1. Gather key evidence early

Lawyers are often so busy that they can only triage and focus on imminent deadlines. But don't wait for discovery requests before gathering and analyzing key documents (emails, text messages, medical records, etc.). Don't wait to receive a deposition notice or subpoena before speaking with important case witnesses. Much can be done outside of the formal discovery process, and the earlier you have key information, the better you can formulate case strategy and assess the merits and value of a case.

2. Fight the right battles

The "leave no stone unturned" approach to litigation rarely leads to a better outcome than strategic, efficient litigation. In fact, this exhaustive method often backfires. That fourth motion to compel likely won't change the outcome of a case, but it may lead to bad blood and become costly in time and money, making a case harder to settle. It can also lead to attorney burnout. As the expression goes, is the juice worth the squeeze?

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3. Focus on what matters most--the people

Most cases hinge on credibility determinations, so witness testimony is critical. Interview friendly witnesses. Gather declarations. Don't wait until every last written discovery dispute is resolved–or worse, the eve of trial–before proceeding with key depositions. Prepare your party witnesses diligently and thoroughly.

4. Strategically share evidence

Lawyers sometimes withhold information that exposes the other side's vulnerabilities–even when they are working toward resolution. Most of the time that information will be turned over in discovery anyway. Unless you hold true impeachment evidence, it often pays to show other side the vulnerabilities in their case so they can adjust their settlement posture accordingly.

5. Recognize your own biases

Lawyers are often quick to dismiss or explain away bad evidence. Indeed, if I asked each side at mediation to assess their chances of prevailing at trial, their combined estimates would almost always exceed 100%–potentially adding up to 150% or more. Recognizing that your natural tendency is to view your case in a manner that favors your client and actively seeking to genuinely understand your opponent's position will help you assess more objectively.

6. Speak with your opposing counsel--and don't be afraid to acknowledge their positions

I recently saw a meme with two photos of the same man, one cheering and the other devastated. The first was labeled "seeing a bear eat a fish in a documentary about bears," and the second "seeing a bear eat a fish in a documentary about fish." Talk to your opposing counsel (don't just send emails and nastygrams). Discuss your respective positions. Acknowledge theirs. By showing that you understand their perspectives and recognize the risks in your own case, you earn trust, credibility, and goodwill. You may even be able to work together to reach a resolution.

7. Set expectations early and often for both clients and opposing parties

Parties often go into mediation without an opening demand. In fact, sometimes lawyers don't even know their own clients' expectations. Some fear that a pre-mediation demand might be seen as excessive and derail what could otherwise be a successful mediation. But going in cold risks a disconnect between the parties. When each side has a general idea of how the other side sees the case, it helps with preparation and expectation–setting, and lays the groundwork for more meaningful negotiations. That is true even when conveyed in vague terms (e.g., "we see this as a mid-six figure case"). Similarly, if a demand or offer was made long ago (for example, before litigation or before key evidence was revealed), it is

helpful to assess and signal whether your position has changed.

8. Consider settlement timing

Case valuations evolve over time. There may be a discount (or premium) for early resolution. The discovery process can reveal evidence that bolsters or challenges a party's positions. Attorneys' fees and costs can accrue, and parties may "get real" when a trial is imminent. Each side should be strategic in thinking about the likely evolution of case value over time to resolve at the most advantageous time.

9. Use Section 998 offers as strategic and framing tools

When well-calibrated, Code of Civil Procedure Section 998 offers can effectively signal a "bottom line" by establishing a line in the sand with legal ramifications (even if there is some wiggle room). Accordingly, the receiving attorney must seriously discuss the offer with the client. Attorneys' fees can be the tail that wags the dog in statutory employment cases. Although Section 998 offers cannot be used to shift the costs of defense in most employment cases, the prospect of cutting off a prevailing plaintiff's statutory attorneys' fees and costs can still create strong settlement pressure. Plaintiffs, too, can benefit from making Section 998 offers, including by gaining the potential for pre-judgment interest, expert witness fees, and the ability to show the court that they were "reasonable" in their settlement efforts when seeking attorneys' fees.

10. Reputation matters--be a formidable but fair opponent

Diligence and experience, including trial experience, help you maximize value for your clients. But you can be a zealous advocate for your clients while extending professional courtesies and being gracious. Most people are doing the best they can–juggling heavy workloads, family responsibilities, and the trials and tribulations of life. They will remember how you treat them. Don't fear that your decency will be taken advantage of. To quote Al Capone: "Don't mistake my kindness for weakness. I am kind to everyone, but when someone is unkind to me, weak is not what you are going to remember about me."

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