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Critical mistakes lawyers make in mediating employment cases

By careful preparation, strategic negotiation and unfailing optimism, most every case can be closed through mediation

It is 10:25 a.m., and your client has just arrived (25 minutes late) for the mediation. The mediator is already in the other room with your opposing counsel breaking the ice and getting a better understanding of the fine points raised in their brief. Your case involves an egregious set of facts arising out of an abrupt termination of a 17-year employee after being diagnosed with a frozen shoulder, which required surgery and possibly a long recovery period.

The personnel files show that the plaintiff had a history of tardiness, for which she had been repeatedly admonished. Mediation is your chance to demonstrate pretext and get your client a respectable six-figure settlement before you have to incur considerable costs in the case. You are (understandably) upset and embarrassed that your client is late for the mediation and further stressed by the fact that you were unable to reach her to prepare for the mediation yesterday.

Mistake No. 1: Failing to prepare

"Never cut what you can untie."
—Joseph Joubert

Before you suggest mediation to your client or opposing counsel, you should carefully analyze whether the case is likely to be subject to a motion for summary judgment. If so, would the timing be best before the motion is filed, during the long period while it is pending or after it is heard? This is, of course, a measure of your confidence in successfully defeating the motion. Some cases will simply not settle for their true value until a judge has denied a motion for summary judgment. Others may be significantly devalued if, for example, the judge is likely to grant a motion for summary adjudication as to causes of action that provide for attorneys' fees.

Discuss the timing of the mediation with your opposing counsel to determine if they will come to the table earnestly before a motion for summary judgment is filed or heard. Your client should also be consulted on this issue to make a determination of her level of appetite for the risk associated with the motion.

A mediation is most effective at that pivotal moment in time when enough discovery has been undertaken that all parties are roughly aware of the evidence, but before every stone has been unturned. Plan your initial discovery strategically to reach that point before the date of the mediation hearing. The failure to invest in your case sufficiently to demonstrate your commitment to it signals a willingness to accept a settlement that is less than the case's full value.

In preparing, bring the salient evidence with you to the hearing. Although you may not have formal declarations or depositions, a simple recording of an interview of a key witness done on your smartphone (with permission) can be a clever tool. Be at least as smart and creative as your mobile phone!

There are no rules of evidence at a mediation hearing, so consider this your first mini-presentation of the facts and law to effectively persuade your opposing party (the decision-maker and the lawyer) that there is a real risk of a significant verdict against them if they are unable to resolve the matter in this informal and confidential way.

Many attorneys lose sight of the fact that there is no proscription against ex parte communication with a mediator. If you have a troubling issue, call your mediator and discuss it. In your pre-mediation call, you will want to consider whether a joint session, or a meeting with lawyers only or clients only is necessary or advisable.

If, for example, you have determined that the only way your client will accept any amount of money is if she has the chance to tell her former employer about all of the outrageous misconduct that went on in the work place, tip off your mediator that a brief joint session may be welcome or even critical to a successful mediation. If, on the other hand, your client makes a terrible witness, or has a language or cultural barrier which will make communication challenging, inform your mediator that you wish to avoid a joint session unless absolutely necessary.

If you have concerns about your client's own ability to make decisions, problems with certain evidence or discovery issues pending, explain those to the mediator too. Engage your mediator as your ally instead of allowing the other side to put you on the defensive.

Before the hearing, spend the time preparing your client in the same way you would prepare her for a deposition. From coaching her on her story to making sure she knows where to park her car and when to arrive, your client should present herself in the best possible light on that day. This includes the critical concept of managing your client's expectations.

Your client should be informed that the mediation is generally a long process, during which there may be hours of time before any dollars are offered and true negotiation begins. While you should discuss the range of possible settlement, you should also prepare your client that there may be new facts or wrinkles that come up which may throw your early evaluation out the window. Prepare her to be flexible and open-minded.

It is crucial that you prepare yourself by sorting through and providing all of

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the key evidence supporting your theories on both liability and damages. If you have a critical deposition transcript, bring it, highlight the relevant sections, and be prepared to show the video of those highlights to your mediator and to the decision-makers.

If your case rests upon personnel records, employment agreements or handbooks, do not depend upon the employer to have them on hand. Bring them to the hearing and be prepared to make copies of the relevant portions for the mediator to use as leverage.

Finally, if you have medical bills or other evidence of damages, make a summary, find out what liens there may be on your case, and provide that documentation to both the mediator and your opposing counsel in advance of the hearing.

Since so many more cases are resolved through mediation rather than trial, preparing for a successful mediation should be no less of an effort than preparing for trial. Consider trying out your trial theme, be prepared to present evidence that will substantiate your claims where they are disputed, and be prepared to come up with some logical evaluation of a range of damages that might be assessed. If possible, come armed with reports or stories of recent verdicts or settlements on similar facts or legal issues.

Mistake No. 2: Failing to plan your negotiation strategy

"In business, you don't get what you deserve, you get what you negotiate."

— Chester L. Karrass

Now it is 2:30 p.m. and your client is understandably steamed at you since you chastised her earlier for arriving late, and you still have no offer in response to your initial demand of $1.25 million. While you are determined to get to a "mid-six figure settlement" on this case, the defendants seem to be bogged down in the details of a dispute as to who bears the liability for the termination, since the company was sold after the plaintiff was fired. There seem to be unresolved coverage issues about which carrier has primary exposure on liability and whether they will need to litigate the rights of the various carriers under a declaratory relief action before you can get plaintiff's settlement paid.

One of the ways you can best address these detours in the negotiation is to contact each of the opposing counsel before the mediation, assure yourself that all of the appropriate decision-makers will be present and that they are all aware of the opening demand and how you arrived at it.

If there is a need, for example, to put an excess carrier on notice, you should ask the defense counsel whether there is excess coverage and then make clear that your demand will exceed the primary policy limits. If there is not, you may want to consider making your initial demand within policy limits in order to facilitate breaking through what may be a difficult conversation between insurer and insured in the other room where there is a policy-limits demand made, exposing the insured to excess at the time of a verdict.

In formulating your initial demand, you should assess liability, damages and the likelihood of collecting damages. In other words, with a defendant who is a small business that is struggling financially and has no insurance, making an initial demand at $1 million will only serve to discourage defendant from negotiating at all.

If there is an insurance policy of $1 million and no excess coverage, then making an initial demand of $4.5 million may be equally futile. Your initial demand should be calculated to entice the opposing side into negotiating with you. Without preparing yourself as to the availability of funds, your opening offer may have an effect of shutting down negotiations before they begin.

Start with a reasonable initial demand based upon your knowledge of the claims, damages and the particular defendants against whom you have brought the lawsuit. The initial communication is crucial to set the tone for the beginnings of the negotiations.

It is always a mistake to approach the mediation hearing with arrogance and without taking the time to develop a rapport with your negotiating "partner". Though you and the opposing counsel may be adversaries in motion practice and at trial, do not lose sight of the fact that negotiation is a collaborative process that requires a willing partner. A failure or refusal to meet with defense counsel, extend your hand and offer some encouragement about the process that you are entering into is a mistake, which cannot be easily remedied at the end of the day when you hit an impending impasse.

Part of any negotiating strategy must be a determination to remain flexible and adjust as needed. If your expectation was that defendant would respond to your initial demand of $1.25 million with an offer of $100,000 and instead there is an offer of $7,500 at 2:30 p.m., you probably will not want to reduce your demand by your expected $100,000 in response. Use your mediator to translate the basis for that low offer. Are there coverage issues, which remain unresolved? Is there some evidence that undermines the liability or damages in your case about which you are unaware? If, for example, you learn that there is a $1 million policy and no excess coverage, you may want to go down to $1 million. If, on the other hand, there is no insurance, you may want to offer a bracket designed to demonstrate your willingness to reduce your demand more quickly once a reasonable offer has been made.

There are times when the most difficult task in mediation is to summon some humility and listen to the mediator and opposing counsel to understand why they are evaluating your case so differently than you are. If necessary, have your mediator deliver the bad news to you and then to your client, so that your client does not see you at fault for the way the negotiation is proceeding. Admit to the mediator that you cannot refute all of the defenses raised, but be fully prepared to refute enough of the defenses to persuade the mediator, your own client and your adversary that your case has merit and deserves a respectable settlement.

Everyone has a different advocacy style, but the most effective advocates both give and command respect. In a mediation hearing, this will mean an open-mindedness to honest misunderstandings, cultural differences, communication breakdowns and limitations imposed by outside forces about which you may know nothing at all. A critical part of your negotiation strategy should be to include patience, strive to understand that which is unstated and to be prepared for the occasional low points that will cause you and your client to recalibrate your strategy if you are to get to the finish line.

Part of the advantage of mediation is that it allows you to learn the information upon which your opponent is relying in defending the claim in a confidential, informal way. Listen to it. It will help you to evaluate and re-evaluate your chances of success at trial.

In terms of the negotiation itself, there are several techniques that you can employ to maintain some control over the negotiations. In the hypothetical where you made an initial demand of $1.25 million and the defense countered with $7,500 at 2:30 in the afternoon, you may want to be prepared with a series of ranges or brackets which would be acceptable to you and your client. If you had pre-determined that you would not settle for less than $100,000, you may want to offer a range of $250,000 to $750,000, but be prepared to also offer a lower range of $100,000 to $500,000. Failing to plan out a series of reasonable moves is a mistake. For example, if you offer a bracket of $25,000 to $125,000 in a case which you expect to bring in $100,000, you can be almost assured that the case will settle for something less than $75,000, based upon your proposed mid-point. Don't be afraid to use a calculator, but look at the midpoints before you articulate a range that sells your client short.

A common mistake is to give too much negotiating power to either the mediator or your opposing counsel by inviting them to offer a range first, or by entering into too low of a range at the outset. In this example, you could have offered a range of $50,000 to $150,000, signaling a mid-point of $100,000. But in response, the defendant might well ask for a range of $10,000 to $50,000, thus anchoring the negotiation at a five-figure number. Failing to have the courage of your convictions and taking the lead on the numbers in the proposed ranges is a common mistake that should be avoided.

It is also a mistake to underestimate your mediator's listening skills and power to "escort" the negotiation towards an outcome that you channel would be acceptable. Like psychologists and other professionals, mediators are trained to listen to every word you and your clients say. If, for example, you suggest early on that your client would accept between $60,000 and $80,000 in a settlement, do not expect the mediator to push the defendant too hard once they make an offer of $70,000. It is okay to be honest with your mediator, with an understanding that all negotiation is confidential, but it is really difficult to get your mediator to change the course of the negotiation if the train is steering towards an acceptable range and then you communicate it is no longer acceptable late in the day. Be clear but fair to you, your client and your mediator.

Another mistake is to leave money on the table by failing to test that "last, best and final" offer. Here is where it is advisable to engage your mediator in some testing before you accept a "final" offer. Most mediators will not lie to you about whether there is any more money on the table, but they won't offer it to you if you don't ask for it. It is worth the extra half hour it can take to assure yourself that you have gotten the highest settlement you can.

Mistake No. 3: Failing to prepare to close the deal

"My father said: 'you must never try to make all the money that's in a deal. Let the other fellow make some money too, because if you have a reputation for always making all the money, you won't have many deals.'" ***—J. Paul Getty***

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It is now 6:30 p.m., and you are starting to believe that you may not be able to close the gap between your current demand of $550,000 and the defendant's global offer of $55,000. You need to call your wife and let her know you will be late for dinner. You have asked the mediator to make a mediator's proposal, but she is reluctant to do it because she thinks any proposal over $100,000 will be rejected by the defense. Your client is growing impatient and has child-care issues that will require her to leave very soon. What do you do?

While it is awkward to initiate a joint session after a long day in separate caucus rooms, a late day counsel-only meeting can be an extremely effective means of breaking impasse. Ask your mediator to facilitate a meeting with your opposing counsel, extend a hand, smile politely and level with him. Often times, he will want to close this deal as much as you do.

Be prepared to suggest some non-monetary terms that may sweeten the deal: a willingness to take payment over time, an offer to extend critical deadlines so that he can take care of the lingering issues, the value of converting your client's termination to a voluntary resignation, or taking the payment in the next tax year.

Often, these creative brainstorming meetings between counsel on non-monetary issues can pave the road to an agreement on the larger issue of damages. Failing to earnestly acknowledge the hard work the other side has done to get a reluctant client from $7,500 to now $55,000 is also a mistake. Thank your opposing counsel and recognize that they are not making the ultimate decision, but likely are urging their clients to settle this lawsuit just as you are.

Assuming that you get to an agreement, it is a mistake to overlook the critical details involved in its documentation. According to mediator Nikki Tolt, many trial attorneys do not understand the way that worker's compensation figures into settling an employment dispute. Is there a lien in the civil case? Is worker's compensation the exclusive remedy for damages such as emotional distress? What is the interplay between worker's compensation and FEHA? How does a pending worker's compensation claim affect damages in your civil case? What is the language that would either extinguish the lien or release the claim? Can it be carved out? What is the value of an

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enhancement under the worker's compensation system? Does the civil lawyer have the right to make a global settlement, which includes a pending worker's compensation claim?

It is a mistake not to arm yourself with answers to all of these questions before the mediation begins. If there is a settlement agreement made late in the day of the hearing, the plaintiff's worker's compensation lawyer's office might be closed for the day! Contact the worker's compensation lawyer before the mediation and inform yourself on these issues fully.

Another oft-misunderstood issue, according to defense attorney Jeremy Mittman of Proskauer Rose is the tax allocation of damages in settlement of an employment case. While insurance carriers are generally not opposed to making settlement payments in a lump sum, employers usually have some justifiable concerns that there must be at least some allocation made towards wages, subject to tax withholdings in order to avoid tax consequences for both employee and employer.

Failing to consider what allocation you would deem fair and acceptable to your client under their particular financial and tax circumstances is a mistake. Encourage your client to discuss this with their accountant, or inform yourself as to the tax consequences of an employment settlement so that you are prepared to request a reasonable allocation be made.

You should always have an early discussion with your own client about your attorney's fees in the event of a settlement, too. It is painful for mediators and lawyers to be having discussions at the literal eleventh hour about the costs and fees.

It is a terrible mistake to have mismanaged your client's expectations to such an extent that the attorney-client relationship is deteriorated at the end of a mediation and she is demanding for you to reduce your already discounted rate in order to make the deal that has been negotiated with the defense palatable to her. Discuss the net to client early on in the mediation so that your client is not surprised or disappointed at the end of the day.

Finally, counsel should come prepared with a term sheet or template for drafting an acceptable long-form agreement, with all of the necessary terms, including language regarding the Older Worker's Protection Act, carve outs for

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any worker's compensation claims, handling of any liens, including a Medi-Cal lien if applicable and all of the necessary language involved for the indemnity of that lien, confidentiality language and language which will allow you to enforce the settlement should there be a breach. Before the mediation, you should have a fair idea of how any outstanding liens can be negotiated and at least be able to set forth all liens and how they will be paid upon settlement of the case.

Before beginning the mediation be prepared to conclude it by either bringing all necessary forms, having access to an acceptable template electronically, or specifically asking the mediator or your opposing counsel to have those forms ready. It is a mistake not to do so.

Mistake No. 4: Failing to remain open to a later closing

"He who has learned to disagree without being disagreeable has discovered the most valuable secret of a diplomat."
– Robert Estabrook

It is now 8:00 p.m. and the decision-maker for the defendant has had to make his flight home. You have worked out a lot of the non-monetary terms, but defendant has only offered you $72,000 and your client will not accept anything under $100,000. Your last demand was $185,000. Some frustrated attorneys will give up, slam doors, pack up and storm away. This is always a mistake. It is disrespectful to the mediator, the opposing side and your own client. What is worse, it makes it all the more difficult to bridge the gap that remains following the mediation session.

Instead of losing patience when it appears you cannot get to your "bottom line," plan your appropriate exit strategy in advance. Do you want to ask your mediator to make a reasonable proposal that will remain open for 24 hours? Do you want to again meet with opposing counsel and suggest that you have some flexibility in your "bottom line" demand? Do you want to arrange to speak through the mediator and continue the dialogue by phone once the claims adjuster gets back to Connecticut? Make a plan to exhaust every possibility, even if it means taking a few more depositions or getting a bit closer to trial and then pre-arranging to revisit the discussions 30 days later.

By careful preparation, strategic negotiation and unfailing optimism, most every case can be closed through mediation. Although your clients may be constrained by the confidentiality provisions of the settlement agreement from disclosing details of the settlement, they will nevertheless sing your praises loudly to their friends and colleagues for representing them flawlessly and getting them the satisfaction that they deserve without the risk, uncertainty, expense or delay of trial.

In this age where more clients have real experiences in mediation than in trial, you do not want to make the ultimate mistake of failing to take that critical day to showcase what a truly experienced and skilled advocate you are.

Jan Frankel Schau, a mediator with ADR Services, Inc., *settles cases arising out of tort, employment and business disputes throughout Southern California. She has over 20 years of experience as a litigator.*

Since 2003, Jan Schau has mediated over 1,000 litigated cases throughout Southern California. She was recognized as a Top 50 Neutral in California by the Los Angeles Daily Journal *for 2013 and named as Super Lawyer in ADRS annually since 2010.*