MEDIATION OF THE MOCK PROBLEM SCENARIO FROM A DEFENSE ATTORNEY'S PERSPECTIVE

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From a defense perspective, there are generally four stages in the mediation process: pre-mediation conference with the client, preparation for the mediation conference, the mediation conference, and post-mediation activity. This outline will briefly discuss each of these stages.

A. Pre-Mediation Conference with the Client

Not all clients are experienced in mediation. Accordingly, it is important to explain the mediation process. Your clients should not only be familiar with the process but well prepared so that they are not intimidated and can provide meaningful input. If a client is intimidated or confused about the process, it makes mediation less productive and, probably, less likely to result in settlement.

Once you have explained to your client what they can expect at the mediation conference, you must also explain the risk associated with the lawsuit. Hopefully, as their attorney, you have kept your client apprised of the major developments in the case and they know, or at least have a good feeling, about the risk associated with the suit. If not, they certainly should be made aware of the risk prior to entering into the mediation conference. In this same regard, it is also important to explain the "cost" of going to trial. The client needs to understand that if the case does not settle, a lot of time and energy will be required on their part in defending the suit. Not only will they have to make themselves available for the trial, but they also must make themselves

available prior to trial for assisting the attorneys in preparation of the case.

After you have explained the mediation process and all the risk and cost associated with the suit, as their attorney, it is necessary to get an idea if the client wishes to settle at mediation or go to trial. Obviously, if the client is anxious to settle because of the risk and/or cost associated with going to trial, the settlement authority will probably be higher than if the client decides that it is in their best interest to try the case. In either case, prior to the mediation conference, it is a good idea to get a range of settlement authority. Of course, the settlement range can change depending upon what is learned or discovered at the mediation conference.

B. Preparation for the Mediation Conference

After you have discussed the mediation process with your client, you must then prepare yourself for the mediation conference. This is done by having an excellent working knowledge of the facts. You should have discussed the case with the main potential witnesses. If the case is already in litigation and if you were not present during the plaintiff's deposition, it is important that you read and be familiar with the plaintiff's deposition. In addition, if the plaintiff is seeking compensatory damages for emotional distress, you should have taken or at least reviewed the deposition of any doctor which the plaintiff has seen as a result of the alleged emotional distress. Furthermore, you should have a good working knowledge as to both the strengths and weaknesses of your case. Sometimes it is more important to know the weaknesses of your case than the strengths so that you can

anticipate and explain away the weaknesses at the mediation conference. The more you are able to articulate both the strengths of your case and to explain away the weaknesses, the better your chances are in obtaining a settlement within the range that you had previously discussed with your client.

If you have not already done so, it is also important that you prepare an exposure analysis prior to the mediation conference. The analysis should contain a best case, worst case, and most likely scenario.

Finally, you need to consider what your mediation strategy will be and how this strategy affects your trial strategy in the event mediation is not successful. Specifically, is your strategy at mediation going to be conciliatory or is it going to be more confrontational. Furthermore, are you going to tell the opposing party all the strengths of your case and the weaknesses of theirs or are you going to hold back some information for trial. Obviously, your mediation strategy should be the one that you and your client have previously agreed to which will be the most effective in reaching your goals toward settlement or trial.

C. Mediation Conference

1. General Session

In the general session, the mediator typically explains the mediation process. Thereafter, each attorney is generally provided the opportunity to talk about their respective case. Depending upon your mediation strategy, this is an opportunity to talk directly to the opposing party. This is your opportunity to convince the opposing party why the defendant is going to be successful in the event the matter cannot settled and why settling

the case based upon the terms that you have previously discussed with your client is in the best interest of the opposing party. Again, depending upon the mediation strategy, I have found it more productive to be conciliatory but strong in the opening presentation. I believe it is important from a defense perspective to let the opposing party know that if the matter cannot be settled, the defendant is fully prepared to do what is necessary in order to prevail at trial.

Equally important as presenting your case is listening when the opposing party presents its case. This is your opportunity to hear what you can expect to be the plaintiff's "best case" at trial.

2. Caucuses

In the caucus sessions, typically only the mediator is present with you and your client. The mediator generally relays information from the opposing party. As is the case with the opposing party's opening statement, you can learn a lot about the opposing party's case by listening to the information coming from the mediator. In addition, the mediator may ask you questions that you had not previously considered. You need to use this opportunity to learn more about your case.

D. Post-Mediation Activity

There are times that the mediator has declared an impasse before you have presented your client's final proposal. In those instances, you should explore with your client the possibility of calling the opposing attorney to see if you can continue the settlement dialogue. While a good number of cases do not settle at the mediation conference, quite a few cases settle shortly

thereafter if both parties are willing to continue with the settlement process.

From a defense perspective, you should discuss with your client the option of making an offer of judgment based upon the terms of your client's final proposal at the mediation conference. More likely than not, if the opposing party does not accept your last offer at the mediation conference, it is unlikely that he will accept the offer of judgment based upon the same terms. The offer of judgment has some advantages in that it possibly prevents a further award of attorney's fees in the event the plaintiff prevails.

E. Conclusion

When confronted with an employment dispute, one should consider the most appropriate time, if at all, for mediation. Pre-suit mediation has become very popular for employment related disputes. Mediating a dispute prior to litigation has several advantages. First, in this particular mock problem scenario, confidentiality might be very important. If the case is settled prior to litigation, confidentiality might be preserved. Another advantage to pre-suit mediation is that a dispute could be resolved prior to either side investing a tremendous amount of time, energy and money. Sometimes disputes cannot be resolved short of trial because of the investment of time, energy and money both sides have incurred in litigating the case. Pre-suit mediation helps in this regard.

A second point in time to consider mediation is after suit has been filed, the plaintiff has been deposed, but before the experts have been retained. After the plaintiff has been deposed, you

should have a good idea as to the range of potential exposure. This helps alleviate your client's concerns of settling a case before they know all the risks. At the same time, mediating a case early in litigation reduces the amount of time, energy and money a party must spend litigating a case through trial and possible appeal.

The point in time in which most cases are mediated is after the pre-trial conference and shortly before trial. Mediating a case at this juncture reduces the risk and uncertainties of trial. However, confidentiality is no longer preserved and a lot of the cost of litigation has already been incurred.

A final note one should consider about mediation is the limited type of damage award one can obtain at trial versus the unlimited type of settlement one can structure in mediation. There are times when an aggrieved party wants a remedy that cannot be obtained at trial even if he is successful in prevailing on the merits. In those instances, mediation is a very attractive way of resolving a dispute.