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Mediation Can Be the Antidote for Costly Litigation

Don't waste the opportunity offered by this unique forum

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When the order referring a case to mandatory, nonbinding mediation arrives, many attorneys simply toss it to the side, viewing mediation as just another (sometimes irksome) step in the litigation process. However, treating mandatory mediation as merely a hurdle during which the participants simply "go through the motions" results in a lost opportunity. Whether mandatory or voluntary, mediation is a productive forum that, when utilized to its fullest, can (and often does) lead to the swift and cost-effective conclusion of a dispute. Clogged dockets and a lengthy, often delayed and always contentious discovery process make taking full advantage of the mediation process in employment cases imperative.

Timing Is Everything

All cases filed in New Jersey state court and designated as employment cases are subject to mandatory, nonbinding mediation through the court's complimentary dispute resolution program. In most counties, the referral order arrives approximately 60 days after the defendant's answer is filed. One of the often-heard criticisms of this system is the sense that the parties are forced to mediate their case when they are simply not ready. The timing of any attempt to resolve a disputed claim is critical but this is particularly so in employment cases. If too soon in the litigation, the parties have insufficient information about the strengths (or weaknesses) of the other party's position, are often firmly entrenched in an idealistic view of their own case, and are emotionally wrapped up in the case. If too late, the significant time and effort put into the case (and the resulting fees in these typically fee-shifting cases) can become an impediment to resolution.

Effective use of mediation means scheduling the mediation session when it makes the most sense for the case. What do you, or your client, really need to fairly evaluate the case and come to the mediation table with an open mind and a willingness to try to settle it? The appropriate time for mediation varies from case to case, but practitioners and mediators seem to agree that the parties dramatically improve the likelihood of success at mediation when they are ready to mediate and make a meaningful investment in the process. It's no secret that the large majority of cases settle prior to trial. The litigants do themselves a disservice when they squander the mediation opportunity.

Key Advantages of Mediation

There are many advantages to mediation that, while seemingly obvious, are worth repeating:

• Mediation is less costly than litigation and saves time. The preparation for and length of an average employment case, from discovery through trial, tips the scales in favor of mediation.

• Resolution of a disputed claim can preserve relationships that may have developed during years of employment, allowing the parties to move on and put a negative experience behind them.

• Mediation prevents ongoing disruption to the business that is caused when managers and other personnel are asked to participate in strategy sessions, document collection, depositions and trial.

• At mediation, the parties themselves are full participants and have control over the process and outcome, giving them a greater ability to chart their own destiny.

Getting the Most Out of Mediation

There are many steps that counsel and the parties can take to get the most out of the mediation experience.

• *Select the Right Mediator.* Selecting

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the right mediator for your case can mean the difference between success and failure. In court-ordered mediation referrals, the parties can either use the designated mediator or agree upon an alternate. Regardless, the mediation should be conducted by an individual with the requisite knowledge and expertise, including substantive knowledge of the area of law involved in the case. Having a skilled neutral identify and discuss the risks to each party in continuing the dispute can be invaluable. The parties benefit not only from the insight of their own interested counsel, but also from that of a disinterested third party who can open the parties' eyes to the benefits of settling the dispute. There are many mediator options but one universal truism applies: mediators rely upon their reputations for neutrality and fairness and are zealously committed to preserving it. The right mediator will serve the parties well.

• *Be prepared.* To achieve success, the parties, counsel, and the mediator should prepare for and be prepared at the mediation. Counsel should review key facts and issues, evaluate the strengths and weaknesses of the case from both sides, and consider the other party's likely approach to mediation. If discovery has commenced, counsel should also be prepared to address damaging evidence, harmful deposition testimony, or pending or decided motions.

All participants must be prepared for the mediation through a discussion with counsel. This discussion should include an explanation of the mediation process, the mediation strategy and anticipated mediation costs. The prospect of facing the adverse party and opposing counsel and the emotional response that might occur in that encounter should also be addressed.

One of the most important steps in preparing for mediation is drafting the mediation statement. The mediation statement is the first opportunity to gain credibility with and support from the mediator. The mediation statement should be drafted to persuade the mediator and should include: the factual background of the case; the procedural history, including the status of discovery; any legal argument or defenses; claimed damages; and the settlement position. The mediation statement should be accompanied by pleadings, documents or deposition testimony that the party believes support its position and give the mediator ammunition to use when discussing the case with the opposing party.

• *Establish your settlement position, and bring the right person to mediation*. Surprisingly, formulating a realistic settlement position and obtaining settlement authority is often given short shrift. Whatever the settlement position, the parties must be able to explain the basis for it to the mediator, so that the mediator can adequately convey it to the opposing party. For settlement purposes, the three components of damages in an employment claim are lost wages, emotional distress and counsel fees. Being able to justify your settlement demand or offer with these components in mind, while factoring in liability considerations, offers some credibility to the party's position. A stratospheric demand or de minimis offer that is not factually or legally supported serves no useful purpose.

Once the settlement position is established, make sure that the right person(s) attend mediation. Being available by phone is really no substitute for being present at the mediation table. While it is not always possible to bring key personnel and decision-makers to mediation, every effort should be made to do so. Mediation is a momentum-building process and the unavailability of individuals with authority brings the process to a screeching halt. Even the promise of further discussions, with our without the mediator's involvement, is not good enough. Once the parties walk out the door, even the most promising negotiations can end.

• *Be honest with the mediator*. Counsel often keep their true settlement position hidden from the mediator until late in the process. Serious consideration should be given to not deceiving the mediator. The mediator will zealously guard your confidence and admire your courage.

• *Be patient.* Mediation can be a tense and emotional experience for the parties. In all likelihood, the mediation is the first opportunity that a party will have to talk about the case in a confidential setting with an objective third party, and the first time that the party has heard anything negative about the case. Emotions will be high as sensitive issues are being addressed that affect a party's livelihood or business. There is no question that a successful mediation usually results in a monetary settlement, and there are some who believe that the discussions should focus solely on the money. However, ignoring the emotional aspects of the case could prevent any meaningful dialogue about a monetary resolution. Through patience and respect, a mutually satisfactory settlement can be realized.

• *Memorialize any settlement reached*. If a settlement is reached during mediation, be sure to memorialize the deal before the mediation ends. In August 2013, the New Jersey Supreme Court rendered its decision in *Willingboro Mall Ltd. v. 240/242 Franklin Ave. LLC,* and established a bright-line rule that a settlement reached as a result of mediation must be memorialized in a signed, written agreement prior to the conclusion of the mediation session, in order to be enforceable. The court also suggested that an audio or video recording could meet this requirement. If the settlement is too complex to be memorialized prior to the conclusion of the mediation, the mediation should be continued for a brief, reasonable time. ■