2022 NJSBA Annual Meeting

Surfing The Waves of Conflict: Winning Strategies for Navigating Settlement Discussions in Mediations of Workplace Disputes
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Surfing the Waves of Conflict: Winning Strategies for Navigating Settlement Discussions in Mediations of Workplace Disputes

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INTRODUCTION

Whether it be from the perspective of the mediator or an advocate, most agree on what the toughest employment law scenarios are to resolve in mediation. The following are some of these examples, with suggestions for strategies to overcome them.

1. Individual Accused – "I Want to Clear My Name"

One of the more difficult situations in mediation for all parties, but particularly defense counsel and the mediator, is where an individual is either a defendant or even if not an individual defendant, is implicated in the alleged illegality involved in the case. This often is a human resources representative, a high-level manager or supervisor, company owner, officer or director, or the in-house counsel who gave the advice to terminate the employee who is now the subject of the lawsuit.

If that person is in a position to influence whether the case should, be resolved at all and, if so, on what terms (including what should be paid to settle the case), the involvement of that person in the mediation can make resolution extremely difficult. That person often is emotional about the case and has a strong incentive to show that wrongdoing did not occur -- both of which can be a barrier to settlement. If this emotion and incentive are powerful enough, insistence that the person's name be cleared, as opposed to paying a plaintiff money for claims the person is adamant are frivolous, may impede settlement. In many cases, while such persons may not expressly demand that their names be cleared, they approach the mediation process in a manner that makes it clear that this is a strong motivator. In either case, such a person's presence and involvement in the mediation can present a real barrier to settlement.

For this reason, some mediators not only do not require that individual defendants, or individuals involved in the underlying claims or facts, be involved in the mediation, but prefer that they not be involved. While it may not be appropriate for the mediator to specifically state that preference, an instruction to defense counsel that makes it clear that individual defendants or underlying alleged bad actors are not required to be participants does make it easier for defense counsel to gently avoid having those persons involved.[1]

While some of those persons may still need to be involved, particularly if they are decision-makers as to settlement (including human resources representatives or in-house counsel), it may be that this suggestion will prevent others from participating and make it much easier to resolve the matter. While those persons may still have to be consulted about settlement, especially if they are owners, officers or directors, it may be easier for them to be more objective, focus more on the business interests, and ultimately agree to a settlement when they have not sat through an arduous mediation in which the mediator has had to point out the problems with the allegations against them.[2] It is important to note that if an individual defendant or alleged bad

[1] Additionally, the mediator may consider asking the plaintiff's counsel what representative from the defendant will be helpful to attend the mediation.

[2] Plaintiff's counsel may want to consider these dynamics when deciding whether to name individual decision-makers or other alleged wrongdoers as defendants in the case. One could argue that since most cases settle, why make the task of settlement arguably harder than it needs to be by giving accused individuals more of personal stake in the outcome, and potentially adding more counsel to the defense side? On the other hand, naming individual

actor is not going to participate in the mediation, the mediator (or defense counsel) should communicate that to plaintiff's counsel in an appropriate way, to address any expectations plaintiff and plaintiff's counsel may have around the person's participation. The applicable rules governing the mediation also need to be considered, given that the rules in some states require that the mediator and the parties consent for someone named as a party in the litigation not to attend the mediation.

If the individual defendant or alleged bad actor does participate in the mediation, the role of defense counsel can be extremely difficult, as it may be impossible for counsel to agree with the mediator, even on issues counsel normally would agree create problems for the defense. The mediator also has to be particularly sensitive to present the "bad" facts of the case in a way that does not make it impossible to settle, as the individual who reacts badly may insist on going forward with the litigation, even though that is not in the best interest of the company.

Depending on the situation, especially in the case of a relatively sophisticated business person, the most effective approach for the mediator may be to talk to that person about how things might be perceived versus reality, pointing out that jurors do not always decide based on reality, but based on perception. Sophisticated business leaders often convince themselves that they have outstanding counsel who can help the jury adopt their version of reality. It may be helpful for the mediator to talk about the fact that, regardless of how skilled the advocacy, jurors often focus on facts or issues other than those that the advocate presents. Many judges and trial lawyers talk about their surprise at the end of jury trials by what ended up moving the needle for the jury.

In addition, the mediator can talk not only about the cost and the impact on the business generally, but about the specific time and effort that it will take away from the business for that important person personally to participate in litigation which is likely to last many years, especially with the current court delays that have been significantly exacerbated by the COVID pandemic. These considerations may not necessarily sway the person towards settlement, but raising them may make it easier to allow settlement of the case, because the person can save face by latching on to these other reasons for settlement which have nothing to do with guilt or innocence.

2. Employment Practices Liability Insurance

Employment practices liability insurance can be a fantastic way to fund settlements that otherwise might not be possible and, of course, it is almost always a good thing for a defendant to have such insurance from the perspective of the mediator. There are few downsides to having the insurance (again from the perspective of the mediator), but the complications that may arise because of it, particularly in the context of settlement discussions and mediation, can make things difficult.

First, this is one area where, if the plaintiff's attorney has no experience whatsoever in the defense of employment claims, as is often the case, the plaintiff's attorney misperceives that the effect of insurance on settlement discussions. The plaintiff's attorney, and/or even defense

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defendants for strategic, financial, legal, and/or factual reasons may be beneficial to plaintiffs and encourage settlement. This complex decision is beyond the scope of this paper, but is raised as food for thought.

attorneys who are the company's outside counsel or personal attorneys and not the insurance company's designees, may not understand the dynamics of how insurance adjustors, versus the company-client representatives, versus designated insurance counsel may make things more difficult for settlement. Many plaintiffs' attorneys assume that the availability of insurance will make the matter easier to settle, and that is often the case. Many also assume that the matter will settle at a higher amount with the availability of insurance – and may overvalue the case as a result if not careful.

The insurance company may look at the matter purely from a financial and risk perspective, as opposed to the emotions that enter into the matter when individual and corporate defendants are accused of misconduct. However, insurance adjusters may well value the case much lower than the plaintiff's attorney (and perhaps even defense counsel) values it, depending on the experience of the adjuster with employment claims, and other variables. Insurance adjusters also do not have the same concern and focus on the business risks to the company, such as the public relations risks and the potential for damage to the company's business reputation or relationships (including with the company's customers, partners, stakeholders, and employee base). These business risks often are important drivers in settlement for the company representatives, but are not drivers at all for the insurance adjuster.

From the mediator's perspective, two difficult scenarios of "insurer versus insured" can occur. The first is where the insurer wants to settle the case and is willing to pay a good amount of money to do so, but the insured defendant company does not want to authorize the settlement. This is particularly true where the retention amount (or deductible is large, and all or most of the settlement (including any diminution of the retention by attorneys' fees) is going to be primarily or solely the responsibility of the insured. In that scenario, the insured does not necessarily have the incentive to pay the full amount of the retention to settle the case, while the insurer wants the case settled before it has to pay any money.

Moreover, as set forth above, the insured may feel strongly that it did not do anything wrong, and does not want to authorize the insurer to settle, even where the insurer is paying all or most of the settlement amount. In that case, there may be either a "soft" or "hard" hammer clause in the insurance policy which would allow the insurer to pressure the insured to agree, but in many cases, insurers are reluctant to lower that hammer, particularly with good repeat corporate clients. The mediator may be put in the difficult position of asking about these kinds of conditions under the policy in front of the insured, where it is clear that the insurer wants to settle and the insured does not.

The opposite problem also occurs: the insured wants the matter settled without any further cost or delay, and the insurer is not willing to settle for what it will take to settle the case. The mediator must then walk a fine line between encouraging the insured/defendant to utilize the insurance policy which it has purchased for this very reason, and not make it easier for the insurer to decline to settle, while at the same time preserving the relationship between the insurer and its insured. This problem is exacerbated when counsel which has been retained by the insurance company is in the difficult position of ethically representing his or her client, but at the same time is being told how to proceed by the insurance adjuster. While most defense counsel are able to navigate this difficult situation, it is not always clear that the instructions that are being given to counsel by the insurance adjuster are in line with the client's wishes. However,

that counsel cannot give any advice that involves coverage or insurance issues, without risking a conflict with the insurance company.

Ordinarily, there will not be personal counsel for the insured involved, but if there is personal counsel, that counsel may be at odds with insurance counsel. However, personal counsel also may be helpful in advising the client as to the potential problems with a possible conflict with the insurer. This is even more important where there is a reservation of rights with respect to coverage, and/or clearly uncovered claims, as well as where the attorneys' fees reduce the amount available, not just for the retention (deductible), but for indemnity. In addition, some policies only cover counsel fees, but not any indemnification, which creates an incentive for the insurer to want to settle the case before it pays a substantial amount of counsel fees, while at the same time disclaiming coverage for any settlement or verdict which might be obtained in favor of the plaintiff, if the matter does not settle.

Finally, the existence of two or more insurance policies which may cover the claims also has the potential for both good and bad. If the carriers are aligned and working together to resolve the matter, obviously, it is smooth sailing for all -- the parties and the mediator. However, if the carriers are in conflict, substantial legal, strategic and factual disputes between them may result in rocky waters, if not a shipwreck. The mediator must be prepared to deal with these intricate insurance issues as an additional overlay to an already difficult underlying dispute, if there is any hope for the mediation to succeed.

For all of these reasons, while insurance may be extremely helpful, especially for a smaller company that otherwise would not be able to pay a substantial settlement or verdict, if counsel and the mediator are not fully familiar with the permutations of these difficult conflict and other issues, mediation problems can mount. Plaintiff's counsel and mediators who have never dealt with insurance issues on the defense side not only may not be aware of these potential issues, but may misperceive the insurance-related issues during the course of a mediation, which can derail the process. It is important for both counsel and the mediator to understand and prepare for any insurance-related issues at play in advance of the mediation.

3. When it Really Isn't About Money . . .

How many times has counsel for a party or a mediator heard that it really isn't about the money? Of course, 99 times out of 100, or maybe more, it is about the money. And, as we all know, money is one of the most important things a plaintiff can achieve in bringing litigation. However, there are times when it really isn't all about the money. Sometimes, it's a desire for vengeance, which is impossible to grant. Most plaintiffs' attorneys will explain to their clients that they cannot achieve vengeance (such as having the individual defendant/harasser fired), and that a judge or a court cannot even grant them the remedies necessary to achieve the vengeance the plaintiff seeks. However, despite understanding this fact, at an emotional level, some plaintiffs' desire for vengeance really is what motivates them; it truly is not about the money. Or, if it is, there is a significant amount of money that the plaintiff feels is necessary to make up for the fact that the defendant still has his or her job and cannot be required to lose it. This obviously can create emotional as well as practical impediments to settlement.

Another situation in which it really isn't about money is where the plaintiff feels that many years of loyalty and effort put into the job were completely brushed aside with a sudden termination. A plaintiff may or may not need money after losing a job; however, the plaintiff's pride, ego, and entire self-image as a working person often has been destroyed by the termination from employment. An apology rarely will be issued by a defendant but, in the few times when it's been requested and granted, in the authors' experience, it has gone a long way towards advancing settlement and replacing/supplementing other settlement terms.

Plaintiff's counsel, as well as defense counsel and the mediator, need to understand when what is actually motivating plaintiffs is not so much the money lost, but a sum that is recompense for the loss of their self-image and pride. This situation can be extremely difficult, because what is really at stake has to be translated into money, and may not have anything to do with hard economic damages, or even other possible buckets of economic recovery. This type of scenario is extremely frustrating for defendants and defense counsel, and difficult for a mediator, because what is really being "negotiated" is trying to restore some sense of a person's self-worth.

A slight variation on this theme are plaintiffs who wants to have their day in court. One way for the mediator to approach this impediment to settlement is to discuss the protracted litigation process, outline the hurdles plaintiff will encounter during the litigation (many of which could be fatal to the plaintiff's claims), and cite the statistics about how few civil cases actually get tried to verdict (roughly 2-3% in federal court). The mediation may be the closest many plaintiffs will get to a "day in court" – for better or worse.

4. Multiple Plaintiffs/Class or Collective Actions

Multiple plaintiff cases, even if they are not class or collective actions, create numerous potential issues for the plaintiffs' attorney, as well as the mediator and defense counsel. First, if there are multiple plaintiffs, either because several cases have been joined together for the purposes of mediation, or because the case itself involves multiple plaintiffs, potential conflicts of interest and other difficulties for plaintiffs' counsel may spill over into the mediation and how it is conducted. If all of the plaintiffs have agreed in advance that they will equally split any settlement, (assuming plaintiffs' counsel has handled that issue appropriately), and thus have agreed that all demands will be made as a lump sum, this method of proceeding may be acceptable to defendants. Most defendants probably prefer to settle a case with a global sum, and may not care how that sum is divided up. However, multi-plaintiff mediations can prove very challenging for everyone, especially the mediator, particularly when plaintiffs have very different claims as to the merits and/or damages sustained, and/or where there is insurance coverage for some of those claims or damages, while others may not be covered. Some defendants also will choose to take a "divide and conquer" approach by offering different settlement amounts to the plaintiffs. If plaintiffs have not agreed in advance how they will split a settlement, defendants may make different offers to the plaintiffs, who are all in the same "room" -- sometimes driven by different values to their cases, sometimes merely as a strategic move.

In addition, if the plaintiffs have not properly agreed on how they will handle the matter, and each plaintiffs' claim has to be negotiated separately, because they have different claims and different damages, the plaintiffs' attorney has to be very careful not to discuss those the offers

and demands in front of the other plaintiffs, except as permitted and agreed by the clients and defendant.

The mediator must be very careful in navigating this minefield. In this scenario, Zoom is probably more practical and helpful than an in-person mediation, as with the advanced Zoom program, almost indefinite number of breakout rooms can be utilized. The mediator can make the plaintiffs' attorney a co-host, which gives him or her the ability to move in and out of the breakout rooms without the mediator having to do so. Having said this, however, when there are multiple claims and multiple plaintiffs, the plaintiffs' attorney, as well as the defense attorney, need to be very careful about how the matter is handled and, ultimately, make sure that each plaintiff individually signs off on the settlement, while upholding the confidentiality of the amounts being paid to other plaintiffs, as some defendants will require. This can be very challenging.

These challenges may be multiplied if the mediation is of a class or collective action, including in the wage and hour context. Wage and hour claims in and of themselves are in a different category as far as how they may be negotiated. For a wage and hour action, the discussion is more likely to be about documents as to time worked, overtime, and other types of mathematical calculations, as opposed to discussions about events that happened at work. In this way, it can be easier to mediate wage and hour cases, if parameters for the numbers involved are discussed or, in a misclassification case, a legal discussion ensues about the factors that would be reviewed by a court to determine whether plaintiffs are independent contractors or employees.

In wage and hour collective actions, there will often be variables that impact the economic damages to which a class participant may be entitled. The mediator often works with counsel for both the defendant and the class to develop a template of the variables from which an accurate calculation can be made. From this template, the negotiation can then be more focused on risk-related discounts based on the relative strength of each side's position. If there is no agreement on how to perform the calculations, coming up with a settlement is infinitely more difficult, if not impossible.

One problem the mediator may encounter in settling wage and hour collective actions is the negotiation of attorneys' fees. Class counsel is frequently worried about negotiating fees in the context of the overall settlement, due to the ethical problem that creates for obtaining court approval. By contrast, defense counsel do not want to settle without a sum certain for all settlement costs, including fees. One way the mediator may deal with this dilemma is by getting a preliminary agreement of counsel on a statement along the following lines:

> The parties will commence negotiations in this mediation regarding all components of plaintiffs' claims, except for attorneys' fees and costs. Any agreement reached on plaintiffs' claims, however, shall not be final and shall be contingent on agreement with respect to plaintiffs' attorneys' fees and costs. Plaintiffs acknowledge that no settlement has been reached or is final unless the parties have mutually agreed on both plaintiffs' claims and attorney' fees and costs.

For all the reasons noted above, settlement discussions in wage and hour class and/or collective actions may be easier, but they also may be full of landmines if not handled appropriately.

For class actions not involving wage and hour claims, the status of the matter (i.e., whether class certification has already been granted or if it is still uncertain whether class certification will be granted) may influence the complexity of the mediation. The more people involved in the mediation on the plaintiffs' side, obviously, the more complicated the discussion. Again, if many of the issues that influence the attorneys in giving advice to clients in a class or collective action are primarily legal or "mathematical," it may be that that mediation is conducted differently than most, as the parties themselves do not have as much input or discussion with the mediator, as would be the case when discussing specific allegations.

Either way, the parties need to be prepared for multiple sessions of a mediation, whether they are consecutive or not, in a multi-plaintiff, class or collective action mediation. In general, while it can be exhausting, scheduling multiple day mediations for these types of matters consecutively, without a long period of time between (assuming there is not a substantial amount of "homework" that has to be done by the parties to make another session productive) normally is the best way to handle them, as the momentum gained can be lost if there is a significant delay before the mediation is resumed. Obviously, though, practical considerations will override these suggestions.

5. Multiple Defendants.

In addition to the individual defendant/corporate defendant issues discussed above, there are other types of multi-defendant cases which can create challenges for counsel and the mediator. One obvious example is where the plaintiff has made joint employer/co-employer allegations, such as in the case of a franchisor/franchisee, parent/subsidiary, staffing company/staffing company's client (to which the employee is assigned to work), employer/professional employer organization or other human resources company which handles employment matters for employers, or other types of joint employer/co-employer relationships.

In some of these cases, the two or more entities which are sued as joint employers are aligned, in that they have an existing relationship which makes it easier for them to work together to settle a case. However, in many cases, there are conflicts between the alleged joint employers and/or indemnification agreements that may make it more difficult to resolve the matter, as one alleged joint employer may take the position that the other is solely responsible to the plaintiff, either because of the factual and legal situation, or because of an indemnification agreement.

These conflicts can be extremely difficult. Obviously, separate defense counsel are involved when the defendants are not in alignment, and it can be extremely challenging for the mediator to get everyone on board with respect to contributing to settlement. In addition, normally, numerous legal issues will be raised by the plaintiff, as well as the alleged joint employers, that need to be discussed. The mediator frequently is in the position of mediating not only the dispute between the plaintiff and the defendants, but also the disputes among the defendants.

This situation can become even more complicated where the defendants are an employer and an outside party defendant, such as a security company whose personnel allegedly harassed the plaintiff, an outside vendor, or some other combination of employer and an additional defendant. One approach the mediator may consider in cases where both or all defendants must contribute to a settlement to reach a sufficient settlement amount is leveraging the parties' ongoing business relationship to obtain the contributions needed. In some of these cases, one of the parties will have such an important contractual relationship with the other that it will take care of the settlement for the co-defendant. Hospitals that employ physician groups is one example. That contractual relationship may be so important to one side or the other that it takes care of the settlement, regardless of whose fault the lawsuit is deemed to be.

However, serious impediments to settlement occur when powerful persons or entities are fighting about the cause of plaintiff's lawsuit. Where the parties are arguing that one or the other put the other in the position of being sued, and needs to take care of the matter, neither defendant wants to assume responsibility for paying to settle the case.

In sum, many plaintiffs' counsel seem to believe that suing more entities (and individuals) makes it more likely that the matter will be settled. In some cases, this assumption is correct, because there are more entities contributing to a settlement. As set forth above, however, this is not always the case. Multiple defendants can make it much more difficult to settle a matter.

6. Serial Plaintiffs/Defendants/Plaintiff Law Firms.

Plaintiffs who have sued more than one employer, have sued the same employer more than once, and plaintiff's law firms that have represented the plaintiff more than once or sued the same defendant more than once, can create some unique impediments to mediated settlements. Similarly, defendants who have been sued more than once, even if not by the same plaintiff or the same plaintiff law firm, also may be wary of settling a case.

A serious impediment to settling a particular plaintiff's case may occur if the plaintiff's law firm is deemed to be a "serial suer" on behalf of plaintiffs against an entity. The defendant may dig its heels in, especially if it is a well-heeled larger company and decides that it is not worth it to settle, or to settle for more than nuisance value, because that is perceived as encouraging a plaintiff law firm to sue them again.

Similarly, if the defendant has been sued more than once, it may feel that it cannot settle the matter, but must fight it all the way, because of other potential lawsuits down the road. Obviously, this is a concern that must be addressed by the mediator.

Finally, while the serial plaintiff who has sued more than one employer normally is a concern for the plaintiff's counsel, it also concerns the mediator, especially when defense counsel brings it up as a credibility issue, even assuming that the same law firm did not previously represent that plaintiff.

These issues must be discussed, and hopefully resolved, by convincing both parties, but especially the defendant, that there are reasons to resolve the particular case, regardless of these other concerns.

7. The Current Employee Dilemma

A related difficult issue is mediating a case with current employees. If the plaintiff is a current employee, it is extremely difficult to settle a case without the plaintiff agreeing to leave employment, which many times is a condition of settlement on the part of defendants. This is particularly difficult where the plaintiff has public employment with extremely good benefits, such as a pension or lifetime medical insurance, or any other employment where the salary is not the main benefit of employment, and the benefits cannot be replicated, if the plaintiff leaves the job. If the plaintiff is close to retirement age, this may be more palatable, but for a younger plaintiff, it is an extraordinarily difficult decision, and raises additional problems.

On the defense side, it is extremely difficult to convince any employer to settle a case with a current employee for anything more than nuisance value (if any money at all), if that employee remains employed. It is understandable that an employer would feel this way and plaintiffs and their counsel need to acknowledge that reality.

These types of cases thus require a high level of creativity and willingness to work with the parties and counsel to try to find a way to make it palatable for an employee to leave current employment (assuming, of course, that no other job is waiting for the employee).

On the defense side, the employer must be made to realize that what it is paying for is not the value of the claim (although the release obtained and costs avoided are valuable), but the peace of no longer having that employee in its employ. That peace has to be paid for, and has a value totally separate (and often much greater than) the value of the underlying claim. How willing the plaintiff is to leave, and how much defendant wants the plaintiff gone, will govern how this uniquely difficult mediation will proceed.

8. Small Defendant/No Money/Payouts

Small defendants that do not have insurance and either do not have the money to pay a settlement, or at least represent that they do not have the money, have some of the hardest cases to settle. If the plaintiff and plaintiff's counsel agree that the defendant does not have a substantial amount of money, or may not have any money by the time the case comes to trial if it is not settled, they may be more realistic about it, and work out a settlement that can be done practically. That may include a payout schedule, with appropriate protection. (This option seems to be proposed more frequently in the last few years).

However, many times, the plaintiff does not believe that the defendant does not have significant money, and/or defendant is not able or willing to prove its dire financial straits. In this situation, the mediator is extremely important in attempting to get the parties to look at objective evidence, including financial statements, profit and loss statements, or anything else that may show the plaintiff that there is a legitimate concern, while at the same time explaining to the defendant that if it doesn't have the money, it is not going to be able to pay its lawyer to go through all of the time and expense necessary to get to trial.

In addition, many of these defendants mention bankruptcy as a possibility, either to be accomplished at the time of mediation if the case does not settle, or down the road if there is a bad verdict. However, bankruptcy is not always a solution for a verdict in an intentional

discrimination or retaliation case. A person inexperienced in bankruptcy law should not be giving this advice, and the refrain "we will just go bankrupt" needs to be carefully reviewed before anyone thinks that that is a solution for the defense. However, the plaintiff also needs to be realistic about the possibility of going all the way down the road and collecting nothing.

Clearly, these issues have to be thoroughly discussed, and payouts explored, with the appropriate protections to give the plaintiff the necessary comfort that the settlement will be honored. Creative solutions are possible to resolve cases with these kinds of challenges, including payouts over time, acceleration of payments and other penalties if the defendant is delinquent in paying, and personal guarantees. The mediator needs to assist with these creative solutions.

9. Large Damages/Shaky Liability Case.

Perhaps the most difficult cases to resolve are cases where the damages are extremely large, including very high wage earner plaintiffs who have lost their jobs, but have numerous issues with the merits of their case. In those situations, the defendant is concentrating on the fact that liability is shaky, while the plaintiff is foreseeing an extremely large damage award, if the plaintiff should win, including high wage earners who were terminated when they were older and have no prospects of getting another job. In addition, the very dangerous situation may arise where the allegations are such that even the emotional distress award (which in many states does not have a cap) can be astronomical, although conversely, it is possible that a jury may not believe the allegations that would lead to such an award.

Both of these situations, whether it is a high economic damage possibility or potentially large emotional distress damage award, but where liability is uncertain for a variety of reasons, are often very difficult to settle. Mediators should consider talking to plaintiffs about how to properly factor risk of success or failure into their huge damages expectations, while talking to the defendant, particularly where there is a potential for a large emotional damages award, about the risks of "runaway juries." Effective mediation in this cases requires creativity in discussing with both sides the all or none aspects of these types of cases.

10. The Most Sensitive Cases.

Some of the most sensitive cases obviously involve sexual assault and, if a minor is involved, the sexual assault of a minor. These cases are psychologically extremely difficult for plaintiff. If minors are involved, the parents may be the true motivators in bringing the case in the first instance, and the minor has no desire to pursue it, or is so psychologically fragile that it is not necessarily in the best interest for the minor to have the matter pursued. On the other side, individuals accused of sexual assault (assuming that there was no criminal conviction) can have their lives destroyed by false allegations.

These cases are by far the most difficult, especially those involving minors, and are one of the instances in which it may be more productive to have the mediation on Zoom rather than in person (even aside from COVID concerns). The ability for a plaintiff to switch off a camera to get a break, without being in the mediator's office, and even to be separate from his or her

own attorney, seems make the resolution of these difficult matters a bit easier and less emotionally charged (as compared with attending in person).

However, a mediator who is not fully proficient and familiar with all of the issues that might be involved in an allegation of sexual assault, particularly where there is a defense contention that a sexual encounter was voluntary at work (assuming a minor is not involved), can step into a minefield of an incredibly difficult situation. In cases where aggressive defense counsel is making arguments about whether the alleged sexual conduct in the workplace was "welcome," it is often useful to point out that such an argument can be counterproductive before juries (even if it is true). The mediator may also consider talking to defense counsel in advance of the mediation to try to determine how defense counsel intends to approach this issue and the negotiations more generally.

For all of these reasons, the defense attorney, as well as the plaintiff's attorney and the mediator, must look at these cases not from an economic point of view. They must understand that there are other issues to be considered in how the mediation is approached, including the format of the mediation (as noted above), whether an opening is conducted, and the arguments that are made by defense counsel directly versus points that are better conveyed by the mediator.[3] These cases can be resolved if proper consideration is given to all of these issues.

11. <u>Special Concerns.</u>

In some states now, confidentiality of allegations of harassment, discrimination or retaliation are not permitted, and plaintiffs cannot be required to make such allegations confidential as a condition of settlement. It is important to review and consider applicable state laws that have been passed that impact confidentiality and nondisclosure covenants that were previously viewed as standard clauses before the #MeToo era.

In addition, other nonmonetary terms may present specific problems, and need to be carefully negotiated. For example, the allocation of the settlement amount and the discussion of any tax consequences arising from the settlement allocation can pose problems. Parties may not understand the tax implications and taxability of settlement. Allocation of the settlement amount is a term that often is saved by the parties for the end of mediation – which can prove to be a mistake. If those discussions are not had, as appropriate, between plaintiff and plaintiff's counsel, defendant and defendant's counsel, and between the parties, allocation of the settlement amount may be a real barrier to settlement. One approach the mediator may take is to raise the subject of settlement allocation earlier in the mediation (even if it is only within the private caucus) to understand the extent to which allocation of the settlement amount may prove to be a problem.

Another issue that may arise is when an employer wants to include confidentiality and/or nondisparagement provisions that have monetary consequences in the form of liquidated damages (or repayment provisions). Depending on the predilections of plaintiff's counsel, mediators can sometimes get agreement on such provisions by moderating the liquidated damages to a modest "per violation penalty" and by requiring the violation be found by a court

[3] Some mediators never utilize opening statements, and do not permit any arguments directly from one side to the other, particularly in these highly sensitive cases.

of competent jurisdiction and not just based on the defendant's determination of a breach or violation.

An additional difficulty is where there is not participation or "buy in" by the proper parties on the defense side, which clearly makes settlement more difficult. In addition, on both sides, inexperienced or interfering counsel, who either don't understand or are not experienced enough with their own side of the case to understand the good and bad aspects of the case and properly advise their client, can be a problem. Counsel who has never handled the other side of employment cases truly may not understand the issues encountered by the other side, including some of the issues set forth in this paper.

All of these issues can be serious impediments to settlement, and need to be dealt with gingerly by the mediator, in order to attempt to tactfully get all counsel and all parties on board with using their best efforts to get the case settled.

12. Techniques When All Else Fails.

If all else fails, and the mediation does not appear to be successful, some techniques that can be employed to attempt to get the parties closer to settlement and hopefully settle the matter are the following: a technique often used by mediators is the use of "brackets," in which one party agrees that if it goes to "X" dollars, the other side will go to "Y." So, for example, a plaintiff can propose that the demand will be reduced from $300,000 to $200,000 if the defendant, who is at $25,000, moves to $75,000. This can be done by either party at any time. The other party can accept or reject the bracket, can propose a different bracket, or can say that they don't want to use a bracket at all, in which case it would be the party proposing the bracket who would have make the next move. That party also would be required to make the next move if the bracket is accepted, as it was that party's turn when the bracket idea was proposed. While some attorneys scoff at the use of brackets, and they can be unproductive if they go back and forth for a significant period of time, the technique has been used very successfully to narrow the gap between the parties, and to continue to narrow it, while keeping the parties engaged in the settlement discussion.

Many parties and mediators attempt to look at nonmonetary issues in order to narrow the gap between the parties. Generally, there is not going to be a nonmonetary issue (unless reinstatement truly is an option) that is going to get a party to settle a case when the money is not sufficient. However, sometimes, a positive written reference, or payment for items that are not necessarily out-of-pocket, or are not a significant cost for the employer (for instance, tuition for education or the provision of outplacement services), can be used to help narrow a gap.

When the parties are close, but cannot close a smaller gap, a technique that often succeeds, instead of declaring the mediation to be over and a failure, is where the mediator proposes a "stay put." This means that for a limited period of time, perhaps a week or two weeks, the parties agree that the plaintiff will not pull the demand off of the table, and the defendant will not pull its offer off of the table. During that period, the parties have the opportunity to accept each other's demand or offer, and the mediator can, and probably should, reach out to the parties and attempt to find a middle ground (or another ground) that might work for the parties. This may mean "splitting the difference," if the parties are close enough to each

other, or suggesting other back and forth discussions that may work. These further discussions with the attorneys on the telephone often work, as one or both of the parties will reconsider, especially when they are close and they have had time to think about the alternatives, including many more years of litigation, expense and aggravation and emotional distress.

Finally, if requested by the parties, the mediator may make a mediator's proposal. Generally, this is not something that the mediator should suggest (although perhaps some mediators do so). One or both of the parties may request that the mediator do a mediator proposal; if both parties agree, the mediator can do it. Most mediators are more inclined to want to do a mediator's proposal when they have a feeling for what may succeed, but if the parties ask the mediator to do so, normally when there is not a huge gap to be bridged, but still a significant difference in opinion on settlement, the proposal certainly can work.

The way the mediator's proposal works is the mediator makes the proposal, either during the mediation or after the mediation day is over, by email to both parties, and gives a number that the mediator believes is a fair number to settle the case. Some mediators' proposals also involve proposals as to other terms, while others simply are a number which, if accepted by both parties, would result in further discussion by the parties on any other terms, as well as how that number would be paid and for what it would be paid.

The mediator normally will give a certain period of time for the parties to respond confidentially to the proposal. If both sides accept the proposal, obviously, there is a settlement. If one side accepts the proposal, but the other side does not, the party that accepts will know that the other side did not do so, obviously, because there is no settlement. However, the party that did not do so accept would not know that the other side accepted. This is to make it more palatable to the parties to attempt this option, as they know that the other party will not know that they were willing to take or accept a certain amount, if the other party was not willing to take or accept it. In most cases, the parties generally accept the mediator's proposal; even if it is not accepted, it sometimes leads to further negotiation, which can also result in settlement.

CONCLUSION

It is hoped that this paper raises some of the more difficult issues involved in employment mediations but, more importantly, suggests possible ways to resolve the toughest issues faced in these cases. The most important rule to remember is no matter how bleak the situation looks, never give up!