Kluwer Mediation Blog

Planning to Settle Complex Employment Cases? Ten Tips to Increase Your Chance of Success

Jeffrey Krivis (First Mediation Corporation) · Wednesday, January 16th, 2013

Mediating complex employment cases is like rehearsing for a concerto. The conductor spends a substantial amount of time reviewing the score, while the musicians practice the piece both individually and collectively. Hours and hours of practice result in one concert. Malcolm Gladwell, in his recent book 'Outliers,' describes the phenomenon of hugely successful people and how they achieved their success through planning and preparation. For example, the Beatles rehearsed and played their music for at least 10,000 hours before they were ready for the Ed Sullivan Show. That's not to say it's necessary to spend that much time preparing for an employment mediation, but the potential for success or failure depends on your willingness to invest the time in planning.

The preparation process allows a litigator to anticipate mine fields that will occur in a mediated settlement, and provides for direction when it appears that the case might be at an impasse. This process brings you two-thirds of the way toward the finish line and is critical in the trial lawyer's toolbox. Getting to the finish line requires simple implementation of the planning process, which utilizes the strategies and tactics of a good negotiator. In addition to helping guide you through the implementation process, a good mediator will provide closing techniques that take the case into the end zone. This article focuses on the planning and preparation process and offers ten modest suggestions for success.

(1) **Financial Ability and Willingness to Pay** – Whether dealing with a class action or single plaintiff case, the first consideration should be whether the defendant has the ability to pay a settlement based on your expected value. This issue has become much more prevalent in times of economic recession, even in companies which appear on their faces to be successful, i.e., having numerous corporate locations and many employees. Some of these companies are surviving on a shoestring, hoping to get through difficult economic times by staying even with the game. Big payouts for litigation could trigger default obligations with lenders which are not readily apparent until you get into the mediation room. Small businesses count on cash flow in the same way that many in society live paycheck to paycheck. An asset check on the defendant is a good first step, but it is only the beginning of the story. A candid discussion with defense counsel might unearth additional information that is not available through conventional means. For example, defense counsel might provide some clues about their client which they couldn't say during the mediation — with the client sitting next to them – which would allow trial lawyers to manage their own expectations before getting into the mediation room.

(2) **Learn Their Constituency** – Many companies bring negotiators to the table who are not the

ultimate decision makers. An obvious example involves governmental agencies where board approval will be required. In those cases, when convening the mediation it is critical to make sure someone will be present whose recommendation has been accepted by the board on most occasions. When dealing with non-governmental cases, such as corporate decision makers or out-of-state insurance offices, having someone available by phone after hours is not the best option, but it is sometimes the only option to get the wheels of settlement spinning. If this is the case, make sure that the defense gives permission to the mediator before the case is heard to have direct contact with the decision maker.

(3) **Social Networking** – Before stepping into the mediation room, an investigation of both your client and the defendant should occur through not only an online search engine, but also through whatever social networks are accessible. There is no doubt that the defense will investigate a single plaintiff case through MySpace and Facebook type networks in order to gather negative information about an individual plaintiff. At the same time, individual defendants and their companies are likely to have an online presence with data that may not surface during discovery. The marketing departments of many companies control and manage the dissemination of online information. They rarely communicate with the risk management side of the house as they have different goals in mind. As a result, messages often appear online which are contradictory to defenses in a lawsuit.

(4) **Is Your Client Plaintiff-Worthy?** – In the old Seinfeld series, Elaine spent considerable time contemplating whether her boyfriend was 'sponge-worthy'. If so, he might get lucky. If not, she might as well dump him. The same holds true in employment cases. For wage an hour class action cases, sometimes the plaintiff had a limited job that precludes representation of all class members. In addition, many plaintiffs are simply not qualified to represent a class based on inappropriate background information and/or behavior. This should be determined before the case is filed, and appropriate backup representation should be enlisted. In a single-plaintiff case, it should be assumed that the defense will discover most of the negative information about a plaintiff, and a determination should be made early on whether to pursue the case or to get into mediation quickly before extensive discovery takes place.

(5) **Timing** – It is no accident that when children ask for raises in their allowance or money for some unnecessary item, they are clever enough to not ask during a family feud, when their parents have just come home exhausted from work or there is some type of pressure in the house. Instead, they wait for a special time like Sunday morning when the family sleeps in and has coffee and bagels and everyone is relaxed. They know there is a higher likelihood of getting an acceptance on the request under those conditions. The timing for negotiating a settlement has the same characteristics. Oftentimes the defense will want to have an early mediation before expenses are incurred in litigation. While this is a good opportunity to settle the case, it is also code for compromise. Compromise is the raw material of mediated settlements that may not necessarily produce an optimum outcome for your case. By agreeing to mediate early, simply recognize that the case will be discounted off the potential value which occurs closer toward trial.

(6) **What Does the Data Tell You?** – In wage-and-hour class action cases, oftentimes the negotiation is driven by the financial documentation, such as paystubs and clock-in data. This information should be gathered before formal discovery occurs through informal means such as client information as well as friendly co-workers. The data could then be compared against what is provided by the defense in formal discovery. When convening mediation, if the data has not been provided, it is absolutely critical to success that there is a commitment to provide the data at least

one month before the scheduled mediation so that your forensic experts can analyze the case. In fact, sometimes it is a sign of weakness to schedule mediation without having evaluated the data in advance.

(7) **Reverse Engineer the Numbers** – Throughout the course of the mediation, particularly in wage and hour class action cases, it should become clear what the financial opportunities might be. If that opportunity is below the plaintiff's expected value, consider reverse engineering the numbers so that both sides can achieve their objectives. For example, if the employer in a class action has a budget of $500,000.00 in cash to settle the case, break it down into its component parts, including attorney fees, class representative enhancement, costs, administrative expenses and other miscellaneous costs. Subtract that number from a higher settlement number such as $750,000.00 and propose a hybrid claims-made process such as the type that involves a guaranteed payout of at least 50% of the net value. This works well in cases where it is not anticipated that there will be a large claim turnout. Through reverse engineering, you can demonstrate that the employer achieves their objectives of a $500,000.00 payout while documenting a $750,000.00 settlement.

(8) **Embrace the Legal Issues** – Oftentimes mediation occurs in the shadow of a motion for class certification or summary judgment. The defense will want to discount the case based on the likelihood of success on these motions. How an appropriate discount is determined in such a situation is a matter of justifying legal theories in relation to financial data and risk. Assuming the parties are unable to find common ground on the discount value of the case, a settlement can occur contingent upon the outcome of the motion. Similar to a 'high-low' binding arbitration, the defendant can cap its exposure if it loses the motion, and the plaintiff can obtain guaranteed money if it loses the motion. This can be an attractive option for some employers who are uncertain about the anticipated court ruling. Even if it is an option that is not desirable by the defendant, the simple conversation about this option will lead to a more reasonable discussion of settlement numbers that could result in a fair outcome.

(9) **Exchange the Settlement Outline in Advance** – Whether the case is a single plaintiff or class action, exchanging the proposed terms of the deal in advance will serve to identify the minefields that occur late in mediation. To this end, in a wage-and-hour class action case, consider sending the defense a one page bullet point outline that includes consideration of: (a) injunctive relief for overtime, rest and meal break issues; (b) definition of the class; (c) class period commencement and end dates; (d) class members to be paid on cash or claims made basis; (e) pay period for failure to pay overtime; (f) pay period for failure to provide meal period – rest breaks; (g) pro-rated claims if they exceed the amount of monies available; (h) notice and claim form to be sent / attached to paystubs to class members; (i) notice and claim form to appear on claims administrator's website; (j) notice, claim form and settlement papers to appear on class counsel's website; (k) notice to be in English and Spanish; (l) identification of the claims administrator; (m) common fund to pay all claims; (n) cost of notice and claim administrator to be paid from common fund ; (o) possible cy-près of unused portion of common fund; (p) defendant has option to blow up if more than a certain amount of objectors; (q) defendant will not object to a separate award of the court of a certain percentage of common fund to cover class counsel's fees and costs; (r) class representative enhancement award; (s) dates for preliminary approval, claim form, objections / opt outs, final approval, payment of attorneys fees and payment of class members.

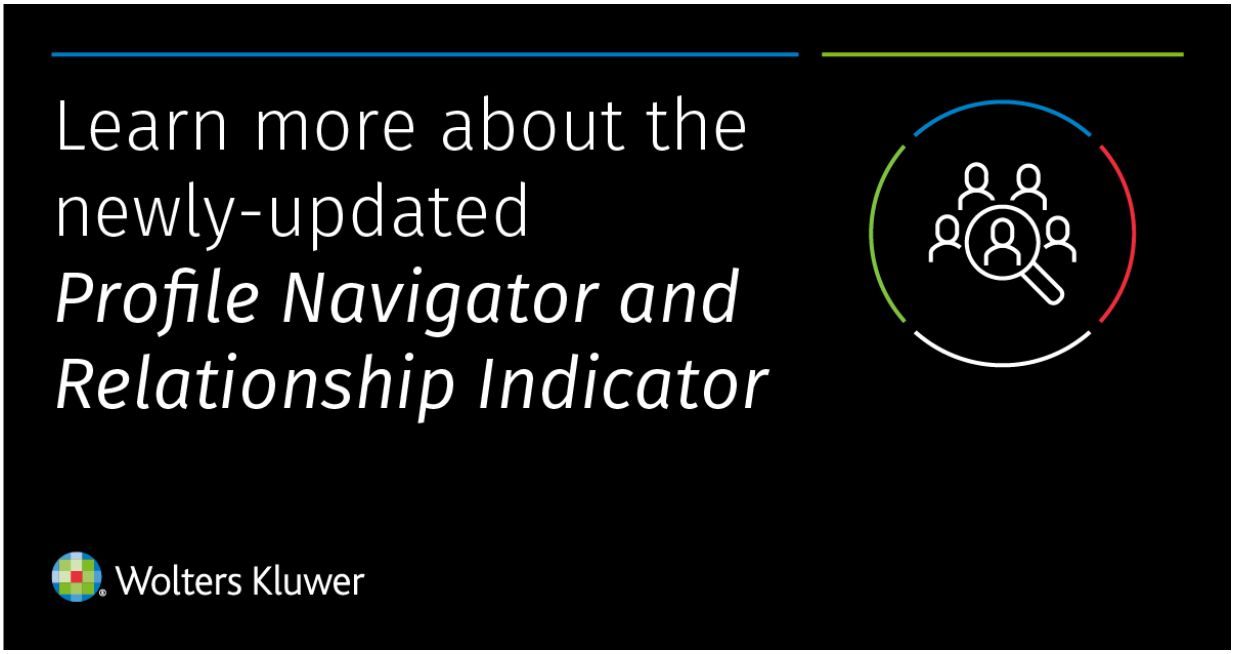
In a classic single plaintiff case, the proposed memorandum of understanding should take into consideration (a) Who the check is made payable to including a breakdown of separate checks for

attorney and client; (b) whether a 1099 with Indemnity or W-2 is requesting or a combination of both; (c) date and characterization of termination i.e. resignation, layoff or termination; (d) additional payments due by statute or personnel policies such as vacation, sick pa, personal days, etc; (e) dismissal of lawsuit with or without prejudice and whether it involves entire action; (f) unilateral or mutual releases with Civil Code section 1542 language; (g) confidentiality and/or non-disparagement agreement; (h) reemployment or no reemployment; (i) job references; (j) any additional terms.

(10) **Anticipate Objectors and Judicial Review of Fairness** – The trend in the courts is towards strict scrutiny of complex employment settlements, particularly in the class action area. As a result, when planning for a negotiated settlement of a class action, anticipate what will be included in your declaration which justifies the amount per employee assuming every employee files a claim. If that amount is too low, all the effort leading up to the judicial fairness hearing will be wasted. On the other hand, there may be sufficient risk factors involved in the case such as inability to obtain class certification, outstanding legal issues, financial ability to pay and so on which justify a range which would empower judicial officer to endorse the settlement.

SUMMARY

It is no surprise that baseball teams spend six weeks before the season practicing their skills in the grapefruit league before they go to the big show. Even Bruce Springsteen and the E Street Band rehearse the same songs they have been playing for 35 years before they go out on tour. Lawyers who are planning on attending a mediation should not limit their planning to submitting a legal brief to the mediator the night before the mediation. Instead, the brief should be the icing on the cake and the cake should be in the oven long enough so that it is fluffy and ready to eat. Remember, the Beatles had been performing for 7 years before they stepped foot on American soil. Now that’s preparation!



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