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Settling Employment Cases Without the Mediation Dance

By Phil Horowitz

"They maintain private rituals, which they often do not really understand themselves."

Edgar Z. Friedenberg, Psychologist

In the olden days — about ten or maybe even fifteen years ago — lawyers used to negotiate directly with each other and settle cases that way. Generally speaking, with some exceptions, without mediation. Yes, you heard me right: without mediation.

And no, litigation was not peaches and cream in those days. Employment lawyers on opposing sides did not make "nicey-nicey" any more than employment lawyers battling each other do today.

But somehow way back then, almost too far back for anyone to remember, we used to be able to talk with one another.

Sure, we fought like cats and dogs to vigorously represent our respective clients the best we could. Sure, some of us (arguably) used sharp elbows ("it's an occupational hazard") at times. But somehow we managed to maintain a dialog at another level when push came to shove and it was time to settle the case.

And push does come to shove. Depending on which set of statistics you credit, anywhere from 90 to 95 to 98 percent of all civil lawsuits settle before trial. And yes, that does include wrongful discharge, sexual harassment, wage and hour, and other employment lawsuits.

So why have we become so dependent on mediation to settle lawsuits?

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Settling Employment Cases Without the Mediation Dance

By Phil Horowitz*

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Somehow in our society, and perhaps in all human societies, we love dance. We love the choreography, the predictable rhythm, the beat of the music and the ritual. We crave ritual, predictability and the sense of beginning, middle and end. Mediation gives us this ritual, this dance, this orchestrated minuet.

Like the minuet, mediation is a courtly dance. It is sedate and formal. It is dignified and polite. It is slow and ceremonious. Each step taken is small.

Such a courtly dance gives a sense of safety, security and tradition. Such a courtly dance is perfectly suited to our legal profession. That is why we have become addicted to it — to the minuet of mediation.

Don't get me wrong. I have nothing against mediation. There are cases for which mediation is very useful. I sometimes serve as a mediator. But mediation is not necessary for every case. Most of the time, we employment lawyers should be able to settle our cases ourselves, without the minuet of mediation. Here's how.

First Impressions Matter

We human beings tend to form impressions of one another from our very first interaction. First impressions often become lasting impressions. So make a good first impression. Then keep it up.

On one hand, do not be too meek or mild. That, of course, does not tend to be a problem for most litigators.

On the other hand, do be polite and professional. The person you are meeting is your opponent. You will be doing battle with them. But statistically speaking, it is almost certain that you will also settle your case with them after all is said and done. You should always keep this in mind.

Take Things Slowly

Don't rush to talk settlement.

There. I said it. Are you shocked?

Too often at the very beginning of litigation, one lawyer or the other starts trying to negotiate settlement right away. The employee's lawyer may make an early unsolicited settlement demand. If not, the employer's lawyer may make a settlement offer or ask the employee's lawyer to make a settlement demand.

Unless this is a very small employment case, talking settlement numbers early on is rarely productive and is often counterproductive.

One reason why early settlement negotiations tend not to succeed in employment cases is that neither side has yet proven itself. After all, settlements are negotiated as alternatives to trial. Until both sides have proven their willingness and ability to commit the time and resources necessary to litigate the case, the alternative of trial is only a chimera.

It takes some months and several (to tens of) thousands of dollars in expenses for both sides in an employment case to prove themselves willing, ready and able to litigate the case. It can take longer for both sides to prove themselves willing, ready and able to risk losing at trial.

Sometimes the time needed for the two sides to prove themselves can be cut short. If the lawyers on both sides of an employment case have had prior cases against one another or have good reputations for effectively representing their clients, this can help.

Another reason why early settlement negotiations tend not to succeed in employment cases is that there is usually not enough information available to either side at the very beginning of a case to realistically value it. At the very beginning of a case, positions are also usually still hardened.

It is generally not realistic to expect an employer to pay a large sum of money to settle a case without testing in deposition how the employee comes across. It is generally not realistic to expect the employee and the employee's lawyer to lower their financial expectations before testing in deposition how the employer's key witnesses come across.

It is possible to speed the exchange of the information that each side needs to realistically evaluate the case's value. Just schedule the key depositions as soon as possible after exchanging requests for production. This can be done unilaterally by sending out notices of

deposition, which will usually prompt notices of deposition in response. This can also be done by sitting down and talking with your opposing counsel and agreeing to a plan for early discovery.

In smaller cases, and in cases where opposing counsel get along well, it is sometimes possible to speed the exchange of information even more. This can be done by agreeing with your opposing counsel on an early "mini-discovery" plan.

Here's a classic "mini-discovery" plan for employment cases. Both sides agree on a limited number of categories of key documents to be promptly exchanged. Next, the employer begins taking the deposition of the employee for a half day or a day, without finishing it. Then, the employee begins taking the depositions of a couple or a few main employer witnesses and decision makers for an hour to a few hours each, without finishing them. Then both sides talk settlement.

Talking With Each Other

Discussing settlement with your opposing counsel is a process and not a one-time event. It begins with foreshadowing.

Early on in your discussions with opposing counsel, there is nothing wrong with mentioning that, at some point down the road after some discovery, the two of you will talk about settlement. If your opponent mentions this fact first, just agree in a matter-of-fact way.

When the time is right to begin direct settlement talks in earnest, it is time to move from foreshadowing the fact of settlement to foreshadowing the amount of settlement.

Is this a five-figure case, which should settle for less than $100,000? A low six-figure case? A middle six-figure case? An upper six-figure case? A low seven-figure case, which should settle for one to a few million dollars? Whether or not you explicitly mention ranges of numbers, in some way let your opposing counsel know what you and your client think about the strength and settlement value of the case.

Next, it is time to make the opening move. The usual way is for the employee's lawyer to make an opening settlement demand. In a few cases, the employer's lawyer makes an opening settlement offer first to get the ball rolling.

Exchanging settlement demands and offers, often with a few days or more between each offer and counteroffer, can be slow going. A measured pace during early settlement negotiations can help both sides absorb the reality that neither side will get what it wants. Later, quicker progress can help convince each side that it might just get what it needs.

One way to make quicker progress exchanging settlement demands and offers is to schedule a settlement day when lawyers and decision makers from both sides will be available all day by phone.

This can also be done at breaks during deposition (such as during last-minute expert depositions just before trial) or in person after a court appearance, such as an unsuccessful judicial settlement conference. This can also be done after a failed mediation.

How much time should you spend during settlement negotiations talking about the facts with your opposing counsel? It depends. In some cases, when the relationship between counsel is frosty, you both may simply agree to disagree about the facts and talk instead about money.

When your relationship with opposing counsel is better, it usually does make sense to talk some about the evidence, while recognizing that you will never agree about what actually happened. If you do discuss the evidence, present the evidence in a low-key, matter-of-fact way. Do not demonize the other side. It will be counterproductive.

Listening to our opponents is often a challenge for litigators. Listen carefully to your opposing counsel's arguments and convey them to your client. If you fear your opposing counsel is not fully conveying your arguments to their client, embedding a settlement offer or demand in a letter calmly outlining those arguments usually gets your message through.

You can build your credibility by frankly admitting weak points in your case. As every experienced litigator already knows, each side in every case has weak points, just as each side in every case has strong points. And nothing said in settlement discussions can be admitted into evidence if settlement discussions fail.

Beyond Settlement Demands and Settlement Offers

Making continued rounds of settlement demands and settlement offers is only one way to narrow the gap between employer and employee and settle an employment case.

A second way to negotiate settlement is by using "indications." An indication is an informal suggestion that a certain settlement amount would likely be acceptable, but it is not an actual demand or offer. Indications are also usually much closer to the amount for which a lawsuit might settle than are offers and demands.

Sometimes indications are used simultaneously with demands and offers to try to settle a lawsuit. For

example, an employee might make a settlement demand of $200,000 with an indication of $130,000. The employer might respond with a settlement offer of $10,000 with an indication of $75,000. The two sides could then negotiate back and forth to try to bridge the gap.

A third way of trying to settle a lawsuit is by using "targeting." This is when lawyers for both sides agree to try to "target" a final settlement figure and do their best to convince their clients to accept that amount. Targeting is often used when the demands and offers are approaching each other, but there appear to be obstacles to closing the gap.

For example, an employee might begin with a settlement demand of $200,000, and little by little go down to $120,000. Let's say the employer then begins with a settlement offer of $10,000 and gradually increases its offer to $80,000. Assuming the employer and the employee both say they are not willing to move further, the lawyers for both sides might agree to "target" $100,000. If both employer and employee agree, the case settles.

Don't forget to negotiate non-monetary terms, such as converting a termination to a resignation, giving the employee a letter of recommendation, or awarding liquidated damages to the employer for any breach of the confidentiality agreement. Sometimes non-monetary terms can be the sweeteners that sell a settlement.

There is much to be said for negotiating directly with each other. Mediation is not necessary in every case. For hundreds of years, we lawyers have settled lawsuits without mediation by negotiating directly with each other. Let's not let that become a lost art — at least among California employment lawyers.

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