



Winning Your Mediation

October 23, 2014

The W's of Successful Mediation

- **Why mediate**
- **What do we hope to achieve**
- **When should we mediate**
- **Who should be the mediator**
- **Who should participate**
- **What type of preparation is needed**
- **What tone should be set in opening**
- **Willingness to listen**
- **What do I expect from the Mediator**
- **What signals am I sending the Mediator**
- **Winning the Mediator over**

Why Mediate?

- **Court Ordered**
 - If court ordered, only question is when
- **Voluntary**
 - Which party is asking for mediation
 - Why do you think the party wants to mediate
 - Will it be perceived as a sign of weakness
 - If you mediate, the plaintiff is going to be expecting \$\$\$\$; only question is how much

What Do We Hope to Achieve?

- **Resolution**
- **Learn about opposing party/case**
 - **Giving opposing party “day in court”**
- **Educate opposing party**
- **Obtain the thoughts/evaluations of a disinterested third party**

What Do We Hope To Achieve

- **Get the mediator to:**
 - **Serve as a go between (role of communicator)**
 - **Do the dirty work (convince the plaintiff)**
- **Can we achieve the same goal through alternative methods?**
 - **Old-fashioned negotiations**
 - **Another form of ADR**

When Do We Mediate

- **At the Charge stage**
- **Early in Lawsuit (before discovery)**
- **After discovery, but before motions**
- **After motions, but before they are decided**
- **After motions have been decided**
- **On appeal**

Mediation at Charge Stage

- **Who is mediator**
 - EEOC/State Deferral Agency
 - Private mediator
- **Success at this stage requires:**
 - Good mediator; and
 - Charging Party represented by attorney familiar with discrimination law; and/or
 - Charging Party that is not seeking the world.

Early in Lawsuit

- **Before discovery**
- **Saves substantial money in defense costs**
- **Facts are not developed**
- **Requires attorneys (for both parties) that understand law and can extrapolate case to the end**

After Discovery, Before Trial

- **Are there going to be motions filed?**
 - Filing of motion clarifies facts and arguments
 - Filing of motion costs \$\$\$\$\$\$
- **How will resolution of the motion aid mediation?**
 - Resolution will give one party advantage, only question is which one
- **Is there a Scheduling Order?**

Who Do We Want To Mediate The Case?

- **Need buy in by plaintiff**
 - **Often let plaintiff select**
- **What are the mediator's credentials?**
 - **How much and what kind of experience does the mediator have?**
 - **Does mediator's leanings (plaintiff vs. defense) make a difference**
 - **What is mediator's reputation as an attorney?**

Who Do We Want To Mediate The Case? (cont.)

- **Could gender/race make a difference?**
- **What kind of experience have we had with mediator before?**
- **Do we want a “strong arm” mediator?**
- **Does mediator have knowledge re: relevant factors, such as judge, potential jury etc.**
- **Does cost make a difference?**

Who Should Participate?

- **Attorney**
- **Client**
 - **Can client representative make a difference**
- **Person with ultimate decision making authority**
- **Is attendance by telephone okay?**
 - **Limits opportunity to view opposing party**

What Type of Preparation Is Needed ?

- **Mediation statement**
- **Meeting with counsel and client to fully explore parameters, issues, expectations**
- **Negotiating strategy**
 - **What will our initial offer be and what will it convey**
 - **What is the maximum amount I am willing to pay**

What Tone Should Be Set in Opening

- **Should we insist on a joint session**
- **What message do you want to send**
 - **Conciliatory**
 - **Hard line**
- **Use the opportunity to view the plaintiff**
- **Use the opportunity to view opposing counsel**
- **Listen and learn**

Where to Start

- **What do I say in opening**
- **Must the Plaintiff always start?**
- **Do we have to play the game?**

Willingness to Listen

- **Successful mediation is based on willingness to listen**
- **Implies a willingness to reconsider position**
- **Don't be surprised if bottom line changes**

What Do I Expect From The Mediator?

- **Someone who will listen**
- **Someone who shares experiences in similar type cases**
- **Someone who will give advice on negotiating strategy**
- **Someone who let me know who is calling shots in other room**

More Things To Expect From The Mediator?

- **Someone who share views on:**
 - **Facts;**
 - **Plaintiff's attorney;**
 - **Judge;**
 - **Potential jury;**
 - **Probability case will survive summary judgment;**
 - **Range of damages;**
 - **Ultimate outcome**

What Do I Want From Mediator?

- **Someone who can be an effective advocate**
- **Someone who can bluff and play poker**
- **Someone who is tenacious**
 - **Mediation is not for quitters**
- **You are paying for the Mediator so use him or her**
 - **Use to obtain information that will help with case if mediation goes nowhere**

Using the Mediator to Your Advantage

- **Use Mediator to Obtain Information for Mediation**
- **Who is Calling the Shots in the other room?**

Winning The Mediator Over

- **Being prepared**
- **Willingness to listen**
- **Be open with the mediator**
- **Be respectful of the other side**
- **Be diligent in presenting arguments and position, but not intransigent**

What Is My Body Telling The Mediator

- **The Mediator is always watching**
- **Body Signals**
- **Tone/Inflection of Person who is talking in caucus**
- **Who is doing the talking in caucus?**
- **What is being said (facts/arguments/dollars)?**

Winning At Mediation

- **Preparation, preparation, preparation!!!**
- **Knowledge**
- **Believability**
- **Negotiating strategy**
- **Willingness to walk away, if necessary**

Questions?

