

Mediation of Employment Disputes: Key Issues and Considerations

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A Practice Note explaining the key issues parties should consider when mediating employment disputes, including the benefits and drawbacks of mediation, the mediation forum, timing for the mediation, payment allocation, determining who should be present and the mediation process as applied to employment claims. This Note applies primarily to single-plaintiff claims and is jurisdiction neutral, but is useful to any parties considering or involved in mediating any employment dispute.

Mediation is a process of alternative dispute resolution (ADR) where a neutral third party facilitates negotiations among adversaries and seeks, but does not impose, a settlement of the dispute. Parties may be compelled by agreement or by a court or administrative agency to mediate their dispute or may do so voluntarily.

Mediation is often an effective tool for resolving disputes between an employer and an employee because employment disputes are:

- Often more emotionally charged than a typical commercial dispute, given that:
 - the employee typically believes the employer acted unjustly; and
 - the employer believes itself blameless and unfairly attacked.

- Typically fact-intensive, frequently involving interpersonal and sometimes inflammatory allegations regarding incidents and conduct throughout an entire period of employment.

This Note addresses the key issues and considerations that are unique to the mediation of employment disputes. For more information on the mediation process generally, see *Practice Note, Complex Mediation: Key Issues and Considerations* (<http://us.p02edi.practicallaw.com/1-575-6667>). For a collection of additional resources to assist counsel with the mediation process, see *Mediation Toolkit* (<http://us.p02edi.practicallaw.com/1-505-0918>).

DECIDING WHETHER TO MEDIATE

MANDATORY MEDIATION

At times, employees may be compelled to mediate disputes with their employers by a:

- Mandatory dispute resolution procedure in:
 - an employment contract;
 - an employee handbook; or
 - a collective bargaining agreement (CBA).
- Court or administrative agency pursuant to a mandatory mediation program.

When parties are compelled to mediate, they must participate in good faith and bring an appropriate party representative with knowledge of the relevant facts and full settlement authority to the mediation. However, as in every mediation, the mediator is not empowered to impose a settlement involuntarily or make any binding factual determinations.



VOLUNTARY MEDIATION

Benefits of Voluntary Mediation

The parties also may voluntarily agree to mediate. There are many benefits of mediating employment disputes, including that:

- Mediation affords employees the opportunity to air their grievances and tell their side of the story:
 - directly to their employer; and
 - to an impartial listener (the mediator).
- The employee's sense of having been heard may have a powerful and cathartic effect fostering settlement efforts.
- Mediation may provide each side the opportunity to gauge the effectiveness and credibility of the other side's likely witnesses, and to learn the reaction of an unbiased individual (the mediator) to each side's particular facts and arguments, especially where:
 - the dispute involves conflicting accounts of one-on-one incidents without other witnesses (such as "he said/she said" sexual harassment claims);
 - there is little documentary evidence to support either side's claims or defenses; or
 - the outcome of the case may turn on witness credibility.
- Mediation is confidential and, when successful, allows the parties to avoid unfavorable or embarrassing publicity or the disclosure of private information, such as an employee's psychological treatment records (see *Practice Note, Mediation: US Privilege and Work Product Issues* (<http://us.p02edi.practicallaw.com/7-505-5461>)). In contrast, documents filed in court litigation are publicly available.
- Successful mediation saves the parties litigation costs and attorneys' fees, which may be particularly high if numerous emails and other electronically stored information must be reviewed and produced (see *Practice Note, E-Discovery in the US: Overview* (<http://us.p02edi.practicallaw.com/1-503-3009>)).
- If the employee prevails in a statutory discrimination case in court, the employer is obligated to pay the employee's reasonable attorneys' fees in addition to its own (see *Practice Note, Discrimination: Overview* (<http://us.p02edi.practicallaw.com/3-503-3975>) and *Remedies under Major Federal Employment Anti-discrimination Laws Chart* (<http://us.p02edi.practicallaw.com/3-518-0650>)).
- Even if the employer prevails in litigation, its attorneys' fees and costs are not generally recoverable, and they may far exceed the substantive amount at stake in the case or the amount for which the case can be resolved in mediation.
- Noneconomic alternative remedies may be available in mediation that are not available in court, such as:
 - neutral reference letters;
 - continued medical benefits; or
 - outplacement assistance.
- Successful mediation avoids the distraction from more productive pursuits and psychological toll that litigation inevitably inflicts on both sides, and allows the parties to move forward with their business and personal goals.

- Successful mediation provides finality and closure. The employer can "close its books" on a potential liability, and the employee can make plans for the future.
- The settlement terms are confidential, alleviating employers' concern that settling with one employee will set a precedent for other employees.
- Successful mediation compensates or otherwise satisfies employees without fear (whether founded or unfounded) that publicity or press coverage of their claims will hurt their future job prospects.

Potential Pitfalls of Voluntary Mediation

Notwithstanding mediation's many benefits, the process may have certain drawbacks. Counsel should consider carefully the following factors before agreeing to voluntary mediation:

- Particularly if engaged in too early (see *Deciding When to Mediate*), the employee may be negotiating without the ability to accurately assess her case's strength, especially if:
 - key information, such as a manager's personnel file or an investigative report, is exclusively in the employer's possession, or is claimed to be protected from disclosure by the attorney-client privilege or work product doctrine (see *Practice Note, Internal Investigations: US Privilege and Work Product Protection* (<http://us.p02edi.practicallaw.com/3-501-8418>)); and
 - the employer is reluctant to provide free discovery or highlight key potentially damaging information for the employee.
- If the mediation is unsuccessful, the parties incur the expense of the mediator's fees and their own attorneys' fees for preparing mediation submissions, preparing their clients and spending the day in mediation.
- The mediation may set a floor for the employer's negotiating position, or a ceiling for the employee's, in any future settlement discussions, especially if the mediation occurs early in the litigation.

In cases where the employee is unrepresented by counsel and appearing pro se, mediation is especially problematic, because the employee's ability to make a truly informed decision regarding settlement is limited (see *Deciding Who Should Attend the Mediation*). Although beyond the scope of this Practice Note, counsel should be aware that mediation with a pro se party raises serious ethical concerns for counsel and the mediator.

CHOOSING THE MEDIATION FORUM

Once counsel and the parties have agreed to mediate, they must select the mediation forum, with consideration of the following:

- **Mandatory mediation.** If the employer has a mandatory dispute resolution procedure in an employee handbook, employment agreement or CBA, that procedure specifies the mediation forum.
- **EEOC mediation.** If the dispute involves a statutory discrimination claim and a charge has been filed with the Equal Employment Opportunity Commission (EEOC), the EEOC offers mediation at no cost to the parties before the employee's charge proceeds to the agency's investigation phase (see *Practice Note, Responding to Equal Employment Opportunity Commission Charges: Early Resolution of the Dispute* (<http://us.p02edi.practicallaw.com/9-503-3939#a556325>)). Both parties must agree to participate.
- **FINRA mediation.** If the dispute arises involved a registered financial services representative and is subject to arbitration before Financial Institutions Regulatory Authority (FINRA), the parties may retain a mediator from FINRA's roster. FINRA mediators are permitted to set their own fees.
- **Court-annexed mediation programs.** If the employee has commenced a federal court lawsuit, most federal courts have mediation programs for employment disputes, some that are mandatory, some that offer mediation at no cost to the parties (see *Box, No-cost or Reduced-cost Mediation Programs*). Others maintain rosters of mediators but permit the parties to retain private mediators (see *NDNY: ADR Programs*). Some state courts also have mediation programs for employment disputes, or for commercial disputes that potentially include employment cases, such as those involving executive compensation or alleged breach of individually negotiated contracts (see, for example, the *Commercial Division of the New York State Supreme Court (NY County): ADR Overview*).
- **Private mediation.** If the parties elect private mediation, they choose a mediator from one of the ADR service providers, such as the American Arbitration Association's (AAA) mediation program, JAMS, or CPR rosters, or simply choose another individual who has been recommended to counsel. If using a service provider, the organization administers the mediation, meaning that it:
 - provides mediation rules;
 - collects the fees; and
 - if requested, may provide a physical space for the mediation.

If using an individual who is not affiliated with a service provider, the selected individual will handle the administrative aspects of the mediation directly with the parties.

DECIDING WHEN TO MEDIATE

There is no one-size-fits-all ideal time to mediate an employment dispute. Selecting the optimal time to mediate depends on numerous factors unique to each case, including:

- **Emotional factors and early mediation.** The level of raw anger felt by either or both parties may dictate the appropriate timing. If emotions are intense, such as in a sexual harassment or hostile work environment case, mediating too soon after the precipitating event is less likely to succeed. Conversely, if the employee's allegations (often summarized in a demand letter) are potentially incriminating or embarrassing to the business or its executives, the employer may wish to mediate before litigation and any ensuing publicity.
- **Pre-discovery.** Whether one or both parties need information from the other to assess the case's value may affect timing. Information desired by the employee might include emails available only on the employer's server, personnel records, investigation reports and documents regarding complaints by other employees. Employers typically seek the employee's personal emails to friends or family sent contemporaneously with the relevant events, which might corroborate or contradict the employee's allegations, and records of medical treatment where relevant, such as in claims under the Americans with Disabilities Act (ADA) or claims of emotional distress (see *Box, Using Limited Discovery to Facilitate Mediation*).
- **Before producing key documents or witnesses for deposition.** Before expending significant sums on discovery, or risking exposure of key documents or witnesses for deposition, employers may decide to propose mediation. Similarly, plaintiff's counsel (who often works on a contingency) has not yet invested significant time or money in the case and may be more receptive to mediation.
- **Planned or pending summary judgment motion.** If a summary judgment motion by the employer is anticipated and potentially successful, mediating before the motion is made, or after it has been briefed but before it has been decided, may be ideal, since both sides are facing game-changing consequences based on the motion's outcome.
- **Eve of trial mediation.** Although it is not uncommon, mediating "on the courthouse steps" on the eve of trial generally is inadvisable, since by then both sides have incurred substantial attorneys' fees, devoted a great deal of time and energy to the litigation and endured the stress of preparing for trial and are entrenched in their positions.
- **Post-trial/pre-appeal.** After the hearing or trial, if the losing side has filed a notice of appeal (or moved to vacate an arbitration award), settlements are often reached before the appeal has been perfected or the motion has been fully submitted. Obviously, the prevailing party in the trial court proceedings has stronger negotiating leverage at this stage, but may be concerned about possible reversible errors.

DECIDING WHO SHOULD ATTEND THE MEDIATION

In deciding who should attend the mediation, the individuals with sufficient knowledge of the relevant facts and full authority to negotiate a settlement must participate. It is useful to know whose bottom line will be affected by the settlement.

FOR THE EMPLOYEE

The answer to this question is generally straightforward with respect to the employee. The employee must attend, together with counsel, and a relative or friend for support if desired, and allowed by the mediation agreement or program. In some cases it may be better for appropriate friends or family members to attend the mediation, rather than undermine the process behind the scenes or after-the-fact. If the employee is *pro se*, bringing a relative or friend is even more important, to counterbalance the employer's entourage and the employee's resulting sense of a power imbalance. Some court-annexed employment mediation programs, such as the Southern District of New York's program, appoint counsel for *pro se* plaintiffs solely for the purpose of representing them *pro bono* at mediation (see *SDNY: Mediation in Pro Se Employment Discrimination Cases*). This benefits both sides, as well as the mediator, in seeking a reasonable resolution of the dispute.

Cases involving multiple claimant employees or potential class-wide claims raise more complex issues relating to attendance, authority to settle, court approval of settlements and allocation of settlement proceeds among multiple employees. However, a full discussion of these issues is beyond the scope of this Note.

FOR THE EMPLOYER

Deciding who should attend for the employer is often more complicated, particularly if the employer is a large entity. The possible participants include one or more of the following:

- **In-house counsel.** Counsel knows the employer's business operations, the players and the law. A potential disadvantage is that in-house counsel may want to "be a hero" by saving the company money, and potentially bargaining too hard for a smaller settlement amount at the cost of reaching no agreement at all.
- **Outside counsel.** Sometimes in-house counsel may represent the company without hiring outside counsel, especially if the mediation arises in the context of an EEOC discrimination charge, prior to any court litigation being filed. However, once outside counsel has been retained, they generally take the lead in representing the employer at any mediation or other proceedings.
- **Supervisors and managers (potentially defendants) alleged to have mistreated the employee.** It is beneficial for these individuals to participate because:
 - they are most familiar with the factual issues and may be key to a reality check of allegations made by the employee during the mediation;
 - there may be an advantage to allowing the employee directly confront, and even accuse, the individual she perceives to have wronged her;
 - if the individual is a named defendant, this person's presence may be required to reach a full resolution.

However, the obvious disadvantage to their presence is the likelihood that they may be defensive and angry about the employee's (in their view, false) allegations, and unable to consider objectively the mediator's feedback and the litigation risks. Moreover, the presence of these individuals may further inflame the situation, especially in a sensitive case involving alleged sexual harassment or other discrimination. If they attend, the joint session should be as brief as possible (see *The Joint Session*).

- **Department head whose budget will be affected by a settlement or potential judgment.** This person is a good choice to represent the employer, and usually is able to weigh in a dispassionate manner the alternatives presented without her judgment being tainted by emotion.
- **Company owner.** Where a small business is involved, this individual generally should attend the mediation, as the potential settlement will directly affect the company's finances. The owner also may be the only individual with sufficient authority to negotiate a full settlement.
- **HR representative.** This is the person most often in attendance, frequently accompanied by in-house counsel or another business person. The HR representative is very knowledgeable about the circumstances giving rise to the dispute, the employee's past performance and the conduct of those alleged to have acted unlawfully. Another advantage is that she usually has had dispute resolution training or experience and can listen actively to the employee and respond effectively. One possible drawback is that if the HR representative made or recommended the disputed adverse decision, such as a termination or demotion, she may be defensive and unwilling to acknowledge potential challenges to the decision that are raised in the mediation or litigation.
- **Insurance carrier representative.** If there is or may be insurance coverage for any claim involved, then ideally the claims adjuster or other insurance carrier decision-maker should attend the mediation. However, this is often not feasible due to scheduling difficulties. If so, the carrier's representative should be available by telephone to hear the opening statements and to participate in the private caucus sessions (see *Separate Caucuses*).

ALLOCATING MEDIATION COSTS

In comparison to the cost of litigation, mediation is a relatively minor expense. Nevertheless, unless the mediation is administered by a mandatory court program or the EEOC, mediators typically charge a fee similar to an attorney's hourly billing rate (see *Box, No-Cost or Reduced Cost Mediation Programs*). Determining who pays the mediator's fee is usually a matter of negotiation when the parties agree to mediate, unless previously specified in the employer's mandatory dispute resolution procedures or the parties' employment contract. In some cases, the mediation forum provides a default arrangement for the payment of fees (see, for example, *FINRA Mediation Rules, R. 14110*). The fee may be shared equally by the parties, or the employer may pay the entire amount. Many attorneys believe that sharing the fee equally promotes commitment to the process and makes resolution more likely. If the mediation succeeds, the employee's share is sometimes reimbursed as part of the settlement.

THE MEDIATION PROCESS

Mediation is a multi-stage process, including:

- Mediator selection.
- Mediation preparation and pre-session tasks.
- In-person sessions.

This Note focuses on the unique aspects of employment mediation at each stage of the process. For a more comprehensive discussion about the stages of the mediation process in general, see *Practice Note, Complex Mediation: Key Issues and Considerations* (<http://us.practicallaw.com/1-575-6667>).

MEDIATOR SELECTION: KEY QUALITIES OF EFFECTIVE EMPLOYMENT MEDIATORS

Mediators have varied styles and tactics for helping the parties resolve their disputes in mediation. Because of the personal nature of the claims involved, the key qualities of an effective employment mediator are:

- **Empathy.** The mediator's ability to create a rapport with the employee and cause her to feel heard and understood is essential for the mediation's success. The employer must also feel that the mediator understands the realities of running a business and its financial constraints.
- **Knowledge of employment law.** For the mediator's input to be respected by both sides and for the mediator to gain credibility with the parties, the mediator must have a solid grasp of the relevant legal issues, which may be quite complex (see, for example, *Practice Notes, Discrimination: Overview* (<http://us.practicallaw.com/3-503-3975>) and *Employment Litigation: Single Plaintiff Employment Discrimination Cases* (<http://us.practicallaw.com/6-521-2819>)). The Southern District of New York recently recognized this need by providing intensive training in employment law to its employment mediators. Although substantive knowledge is generally considered essential, counsel on both sides of an employment dispute are often reluctant to choose mediators who exclusively represented either management or employees in their prior litigation careers, fearing that such mediators will be biased in favor of that side in the mediation. While this concern is sometimes well-founded, such mediators also may be most familiar with the vulnerabilities faced by that side, based on their own previous experience, which may result in more pointed reality-testing and ultimately increase the likelihood of settlement. Seeking feedback from other attorneys who have worked with the mediator is probably the best way to address the bias concern.
- **Persistence.** Surveys conducted by the American Bar Association have shown that the mediator's persistent efforts to achieve resolution are highly valued by employment counsel (see *ABA Section of Alternative Dispute Resolution: Task Force on Improving Mediation Quality Final Report*).

- **The other party's choice.** Allowing the other party to choose the mediator can be a wise strategy, assuming that the individual is competent. If one party is confident that an objective person will appreciate the weaknesses of the other side's case, then working with a mediator chosen by the other side enhances the likelihood that the mediator's input will be respected rather than distrusted. This is especially true of an employee who is likely to feel an imbalance of power in the process. Employees may be more likely to accept a negative assessment of their case when they have selected the mediator.

PRE-SESSION PREPARATION

In employment cases, it is vital to prepare the parties thoroughly for mediation. Unlike commercial cases, where the parties are often sophisticated business people and the issues unemotional, employment cases are frequently highly charged and the employee typically has not previously participated in a mediation or other legal proceeding.

Mediation Statements

Parties typically prepare a pre-mediation statement outlining the legal theories and facts supporting their positions. The mediator may request that the statements include information about prior settlement discussions, the parties' respective views about their respective case's value and acceptable settlement terms. Sometimes these statements are presented only to the mediator. Alternatively, the parties agree to share their statements with one another in advance of the mediation.

In employment cases, it is worth considering a hybrid mediation statement, in which compelling facts and legal arguments are shared with the other side, while settlement goals and potentially sensitive facts or circumstances are shared only with the mediator. This approach may be particularly beneficial in situations where one side believes that its adversary is failing to appreciate key facts or legal principles.

Parties generally should attach compelling documentary evidence as exhibits to their pre-mediation statements. Providing favorable evidence to the other side in advance allows the other side time to digest it and hopefully begin to adjust its settlement posture accordingly. However, counsel sometimes prefer to withhold key evidence for strategic reasons, especially if the mediation occurs at an early stage of the litigation.

Additional Pre-mediation Considerations

Exchanging concrete settlement proposals prior to the mediation has pros and cons. The advantage is that such proposals anchor the negotiations and provide some insight into how each side values the case. The disadvantage is that an outlandish proposal from the employee may provoke further ire. Similarly, a meager response from the employer may be seen as insulting by the employee. It then becomes the mediator's job at the mediation to coax the parties to make more reasonable proposals on both sides (see *Separate Caucuses*).

THE JOINT SESSION

Most mediations commence the in-person proceedings with a joint session attended by the mediator and all parties and their counsel in a conference room. In employment mediations, the joint session is particularly valuable for both sides. Before hearing the parties' opening statements, the mediator makes introductory remarks describing the process, highlighting its confidential and voluntary nature, and promoting a problem-solving mood among the participants. Excessively aggressive advocacy during a joint session could drive the opposing party away from the negotiating table. When that happens, mediators often cut short the joint session. Good mediators caution counsel in advance to avoid a highly adversarial approach.

The Employee's Opening Statement

The employee's opening statement allows her to present a powerful narrative directly to the employer. This unique opportunity should not be squandered by a long, convoluted, or unfocused litany of minor grievances against the employer; rather, the statement should focus on the most egregious conduct of the employer and how the employee has been harmed. While sometimes counsel makes the initial opening statement, the employee may be encouraged to speak as well, especially if she is an articulate or sympathetic witness. The employee's attorney must therefore take the time in advance to coach the employee on how to present herself most effectively, emphasizing the negative impact the employer's actions have had on her life, health and future.

In addition to helping their clients to make powerful opening statements, counsel should prepare carefully their own opening remarks. An effective technique is to underscore the client's desire to resolve the dispute while also speaking confidently about the likelihood of prevailing in the litigation. For example, showing key clips on a laptop from video-taped depositions or blowing up key documents or contract language can be extremely compelling. However, it is important to tell the mediator in advance if counsel intends to use such visual aids, so that the other side does not feel sandbagged or embarrassed by an imbalance in the opening presentations.

The Employer's Opening Statement

The employer's opening statement is typically given by counsel, although sometimes a persuasive lead witness also makes a brief statement. The employer should not use its opening statement to launch a full-throttle attack on the employee or present a laundry list of every failing the employee suffered in her employment, as such an approach can easily backfire. Rather, the employer should take this opportunity to gain credibility with both the employee and the mediator, and:

- Thank the employee for presenting her side of the story.
- Act empathetically, but not apologetically, so the employee feels as if she has been heard.
- Present the factual justifications and legitimate business reasons for its actions.
- Dispel the employee's unfounded assumptions or hearsay and set the record straight as to the facts.
- Educate the mediator as to the strength of its legal claims.
- Demonstrate the strength and credibility of any key witnesses.
- Highlight any key areas of weakness or sensitivity in the employee's case, as long as it is relevant to the claims raised (see *Ethical Obligations of Counsel in Employment Mediation*).
- Convey the constraints on its financial resources available for settlement.

SEPARATE CAUCUSES

During the mediation, most of the time is spent in separate meetings, commonly referred to as caucuses, with the mediator shuttling between private discussions with each side. During these caucuses, each side speaks confidentially with the mediator about the case and develop settlement proposals. In employment mediation, the caucuses' confidentiality is often critical, since extremely sensitive matters may be discussed. The mediator may speak with counsel alone or may ask permission to meet directly with the client (without counsel present), depending on where the obstacles to settlement are perceived to lie.

The employee generally makes the first proposal. The employee or her counsel may already have sent a demand letter with a settlement amount, and the employer may or may not have responded to it (see *Pre-session Preparation*). If a prior proposal is considered irrational, sometimes the process becomes bogged down by debate over who makes the next proposal. An effective mediator convinces the parties to move past this stalemate, sometimes by encouraging a conditional response of some kind or by changing the topic to discuss other nonmonetary issues.

CONCLUDING THE MEDIATION

If the parties, counsel and the mediator have prepared thoroughly for the mediation and have listened thoughtfully to the other side's version of events and to the mediator's input, the likely result is a settlement proposal that each side considers more favorable than going forward with litigation. In fiscal year 2013, the EEOC's private sector national mediation program resolved more than 77% of the cases it mediated, with 96% of participants reporting confidence in the program (see *2013 EEOC Performance and Accountability Report*).

COMMON SETTLEMENT TERMS

While an employment case settlement usually includes a payment of money by the employer, it may also have nonmonetary components, such as:

- Reinstatement or transfer to another position.
- Training and job placement assistance.
- Medical benefits.
- Tuition payments.
- Categorizing the monetary payment to achieve the most favorable tax treatment for both the employee and employer (see *Practice Note, Settlement Payments for Employment-based Claims: Taxation and Reporting*).
- Providing references (although most employers are willing only to provide a neutral reference).
- If the case involves a FINRA registered representative in the financial services industry, agreeing on language reflecting the change in employment status on the employee's Form U-5 (employment record available to the public).
- Transferring certain intellectual property to the employee.
- Waiving or shortening the duration of noncompete or non-solicitation provisions.
- Issuing a joint press release about the employee's departure if not too much time has passed.
- Agreeing not to disparage each other; however, this provision often presents difficulties for a large employer because its actions cannot be fully controlled and it is reluctant to bind the entire organization (see, *Standard Document, Settlement and Release of Claims Agreement: Single Plaintiff Employment Dispute: Drafting Note: Non-disparagement* (<http://us.practicallaw.com/3-521-1350#a642438>)).
- An apology.

MEMORIALIZING THE SETTLEMENT

Before leaving the mediation, counsel should memorialize the settlement in a writing that is signed by the parties. This creates a binding agreement that prevents either party from reneging on the deal, and avoids second-guessing by the parties, family members or colleagues. One practical approach is to summarize briefly the material terms of the settlement in a term sheet that states that the parties intend to be bound by their agreement pending its replacement by a more detailed and formal settlement agreement. Another strategy is for one of the parties, typically the employer, to bring a prepared form of a settlement and release agreement to the mediation, leaving only the financial and specifically negotiated terms to be added (see *Standard Document, Settlement and Release of Claims Agreement: Single Plaintiff Employment Dispute* (<http://us.practicallaw.com/3-521-1350>)). If the dispute involves an age discrimination claim under the Age Discrimination in Employment Act (ADEA), the settlement agreement must have specific language for a release of those claims to be enforceable (see *Practice Note, Age Discrimination: OWBPA Requirements for Waivers of ADEA Claims* (<http://us.practicallaw.com/0-507-0926#a560271>)).

WHEN MEDIATION ENDS IN AN IMPASSE

When the parties are unable to bridge the gap between them, or time does not permit concluding the mediation to conclude in one day, settlement nevertheless frequently occurs at a later date.

For example:

- A good mediator follows up with the parties and persists in trying to broker a settlement, either over the phone or by arranging a follow-up mediation session.
- The parties may reach a settlement themselves, once the mediation process has shifted them from adversarial to problem-solving mode.

ETHICAL OBLIGATIONS OF COUNSEL IN EMPLOYMENT MEDIATION

Virtually every state's rules of professional conduct impose a duty of candor on attorneys, not only in their written and oral statements to tribunals (which do not include mediations) but in all their dealings with others in all settings. While it is well-recognized that puffery in negotiations does not constitute a breach of counsels' duty of candor, false statements of fact are unethical (see *Model Rules of Prof'l Conduct R. 4.1* and *ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-439 (2006)*). Counsel also should beware of conduct that may cross ethical boundaries, such as:

- Employees in mediation sometimes allude to unlawful conduct of the employer, such as tax or other financial irregularities. Similarly, employers may be aware of skeletons in the employee's closet. Counsel for both sides must avoid using such information as leverage to coerce a settlement agreement, since to do so may be considered extortion, unless those facts bear directly on the elements of a claim or defense (such as in a whistleblower case).
- If a client makes representations to the mediator that counsel knows to be false, counsel is not suborning perjury because the client is not testifying under oath. Nevertheless, it is unethical (and unwise) to leave the misrepresentations uncorrected. If material and discovered later, misrepresentations may destroy credibility with the mediator and provide grounds for voiding the settlement as having been fraudulently induced.

Counsel should also be mindful of the mediator's ethical obligations (see, for example, *ABA Model Standards of Conduct for Mediators* and *JAMS Mediators Ethics Guidelines*). If a mediator is violating ethical rules, for example by giving legal advice to a pro se party, counsel should terminate the mediation.

NO-COST OR REDUCED-COST MEDIATION PROGRAMS

Several mediation programs provide mediation services for free or at a reduced cost to the parties. For example, the EEOC offers free voluntary mediation services at the pre-investigation stage if both parties agree to participate (see *EEOC: Mediation*). Similarly, several courts, including the Southern District of New York, provide mediators without cost to the parties as part of their mandatory mediation referral programs for certain employment disputes (see *SDNY: Mediation/ADR*). The Northern District of New York caps mediators' fees as part of a pilot mandatory mediation program that runs through December 31, 2015 (see *NDNY: Mandatory Mediation Program Announcement*). Other courts also have mediation programs that provide mediators at no cost for a fixed period of time, such as the Commercial Division of the New York State Supreme Court, where the first four hours of mediation are free (see *Commercial Division of the New York State Supreme Court (NY County): ADR Overview*).

USING LIMITED DISCOVERY TO FACILITATE MEDIATION

The parties may agree to exchange certain key documents prior to mediating rather than engaging in full-blown discovery. Another option is to take key depositions before mediating to allow each side to gauge the effectiveness of key witnesses. In "he said/she said" cases where credibility is critical, this option, while costly, may be especially effective.

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