

Mediation, Judicial Settlement Conferences and Negotiation Skills

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Today's Roadmap

- Different kinds of mediation
- Whether to mediate
- When to mediate
- How to mediate



EEOC Mediation

- All parties to new EEOC charges are invited to participate in mediation
- Respondents have a choice: Mediate or file a position statement
- This kind of mediation is conducted by the EEOC, at their offices
- <https://www.eeoc.gov/eeoc/mediation/index.cfm>



EEOC Mediation - Pros

- Employer's Response to the charge is delayed, pending the results of the mediation (so if the case settles, that work/expense is avoided);
- The charge is mediated by an EEOC mediator, at no charge (no mediator fee)
- The Charging Party may have low expectations and may be willing to settle on modest terms; and
- The parties sign a confidentiality agreement

EEOC Mediation - Cons

- The employer may not be ready to mediate as soon as the Charge is filed
- Many EEOC charges are low impact events, so why waste time (or money) mediating?
- Agreeing to mediate at the EEOC may send the wrong message
- The confidentiality agreement may not be worth much

EEOC Mediation – Factors to Consider

- The Charging Party's expectations (if known)
- Whether the Charging Party will have legal counsel present at the mediation
- Whether to have your counsel present
 - Regardless, have your counsel prepare a settlement agreement and release for the Charging Party to sign

Judicial Settlement Conferences

- This kind of mediation happens only if a lawsuit has been filed
- May be court-ordered or voluntary (some courts mandate mediation in all cases)
- A judge who is not presiding over the case serves as the mediator
- Conducted at the courthouse



Judicial Settlement Conf. - Pros

- The Conference is conducted by a judge at no charge (no mediator fee)
- Can be easier to schedule than private mediation (especially if time is of the essence)
- Judges may have more credibility with plaintiffs than private mediators
- Courts often have strict confidentiality rules (*See* USDC M.D. Tenn. Local Rule 16.04(3) & 16.08)

Judicial Settlement Conf. – Cons

- Some judges are not enthusiastic about judicial settlement conferences
- Others are not very good at it
- Know your judges
- Many judges have time limitations or may need to interrupt the conference from time to time to address other court business

Private Mediation

- The most common form of mediation
- Private mediators are almost always lawyers or retired judges
- Some mediators are practicing lawyers, but others are full-time mediators
- Private mediations typically take place in the mediator's offices or at the offices of one party's lawyers

Private Mediation - Pros

- Many private mediators are very good at conducting mediations and proactively facilitating settlements
- Private mediators often devote more time to the process than EEOC mediators or judges
- Many continue to work on achieving a settlement even if no settlement is reached after a full day of mediation
- Most private mediators require formal mediation agreements with strong confidentiality language

Private Mediation - Cons

- Private mediation can be expensive, with good mediators often charging several hundred dollars per hour
- This cost may be divided between the parties, but as a practical matter whoever pays the settlement foots the bill

Whether to Mediate

- This is a crucial threshold question
- Not all disputes require mediation; they can be settled by direct negotiations between the parties or their lawyers
- Some disputes cannot be settled, and thus mediation is a waste of time

Mediate? - Factors to Consider

- Has a court required the parties to mediate?
- Will a neutral party help the parties achieve a settlement?
 - Are one or more parties being unreasonable and in need of advice from a neutral?
 - Is there too much animosity between the parties or their counsel for traditional negotiations to be productive?

When to Mediate

- Another important question is when to mediate
- Timing is critical because the parties:
 - May not be ready to mediate (emotional)
 - May need to suffer pain before they can be reasonable
 - May not know enough about their case to assess its strengths and weaknesses (practical)
- As a result, early mediation rarely works

Pre-Mediation Decisions

- Choose the right mediator
- Choose the right person to attend on your behalf
 - “Full settlement authority”
- Decide all settlement authority issues before the mediation starts
- Define your goals
- Set realistic expectations

Pre-Mediation Decisions (Cont'd)

Consider at least one round of pre-mediation negotiations

- Helps to define goals and set expectations
- Define important non-monetary stipulations:
 - “Defendant offers \$X, to be confirmed by a written settlement agreement and release with standard terms including without limitation, confidentiality ...”
 - How will the settlement payment be taxed?

The Mediation Statement

- Present a compelling narrative
- Attach key documents
- Argue important points of law
- Analyze damages and include likelihood of success discounts
- Emphasize your strengths, but downplay your weaknesses
- Define important non-monetary stipulations (such as confidentiality and tax treatment)

Attitude Matters

- Patience pays dividends
 - Relax and spend the day
 - Embrace the process
- Understand the psychology of mediation (and how to exploit it)
- Build rapport with the mediator (both attorney and client) – treat the mediator as your ally

Negotiate Well

Drive the numbers to your goal:

- Never lose sight of the “the mid-point”
 - Your last offer + your opponent’s last offer $\div 2$
= the mid-point
 - Make every move with the mid-point in mind
- Choose your incremental moves wisely
- Be stubborn, but reward large moves by your opponent

Brackets

- Brackets are commonly used when incremental moves are going nowhere
- They are designed to fast-forward the negotiations that are stalling
- Brackets should always be offered as hypothetical alternatives to incremental moves (as in, “if you move to X, we will move to Y”)
- Caution: Saying you might move to Y tells your opponent you will pay that amount

Brackets (Cont'd)

- Brackets often beget counter-brackets when your opponent rejects your bracket and proposes their own bracket
- As discussed above, never lose sight of the mid-points
 - the mid-point within each bracket, and
 - the mid-point of each side's "Y"
- If brackets don't work, then always return to your last incremental offer (because brackets are hypothetical unless they are accepted)

Beware the “Final Offer”

- Never say “final offer” unless you mean it
- Exception: Each side says “final offer” and then the case settles a day or two later, when the parties agree to split the difference
- In that case, saying “final offer” and not really meaning it is okay
- Saying “final offer” at any other time means the negotiations are over unless the other side accepts
- If you say “final offer” and then make a move in response to the other side’s next move, your **credibility is lost**

Confirm the Settlement in Writing

- Preferably, with the settlement agreement you prepared before the mediation, and
- That you advised the other side was coming in your opening offer
- Be prepared to negotiate these terms at the mediation
- But consider waiting to introduce the settlement agreement until late in the day, after the parties have agreed to the main terms of the deal

Questions?

