

Top 10 Tips for a Successful Employment Mediation

by [Frank Burke](#)

October 2020 – www.mediate.com

Introduction

Given California's strict Labor Code and discrimination laws, it is experiencing a flood of employment cases and mediations. A very high percentage of these employment litigation claims are resolved through the mediation process. Skilled advocates work with their clients to utilize the following ten best practices in planning, strategy, and mediation advocacy in that process.



1. Create an effective and comprehensive mediation memorandum.

Write a persuasive summary of the claims, facts and law relating to liability, causation, damages and collectability, including a chronology. These should be exchanged. A private letter can be given to the mediator to highlight confidential information, negotiation strategy, client issues or problems. The goal in the exchanged memos should be to tell your client's story and help the opposing party understand your position and support and thereby assess their risks.

Important documents, employment contracts and policies and e-mails should be included. Describe the evidence regarding alleged discrimination, pretext, retaliation or sexual harassment or underpayment of wages or denial of breaks. Charts, graphics and other visual aids can persuasively summarize chronologies, data or organizational relationships.

Explain the alleged damages and calculations, including unpaid hours, rates, overtime, meal and rest breaks, how alleged errors occurred, lost back and front pay, lost benefits, mitigation, emotional distress, punitive damages, lost commissions, stock options or deferred compensation, including the sales cycle, vesting periods, and contractual protections. Prior settlement demands or offers should be disclosed.

2. Make the most of your pre-hearing conference with the mediator.

Increasingly mediators conduct separate pre-hearing conferences with each party after the exchange of memoranda. Make this your start of the mediation discussions to jump start the beginning of the in-person sessions. Use your time to tell the mediator about

any backstories, obstacles to settlement, issues you perceive with your client and the opposing party, insurance coverage, and how settlement can be achieved.

3. Prepare yourself and your client for more effective oral presentations in mediation.

Plan client presentations, either for joint session or a private caucus. The clients can best describe the interpersonal or performance issues that preceded the litigation, and how they were impacted, with a level of granularity and emotional detail that cannot be matched by their lawyers. When lawyers describe the facts, they tend to overplay the rhetoric and repeat what they have written in their memoranda. The lawyers' roles should focus on the application of legal principles to the facts presented by the clients as well as the overall message. A civil, polite approach is advisable. An overly aggressive joint session presentation can easily backfire. Charts, graphics, or visual aids are highly effective in such a presentation.

4. Deal with emotion in the mediation.

Emotions should be expected and are natural in employment litigation. This is a forum for the participants to tell their story, and emotional catharsis can begin a healing process for the participants. If in a joint session, it is important for the opposing party to listen respectfully, with no overt negative responses, verbal or nonverbal. Many employers do not want their personnel to make emotional or negative counter-presentations in joint session, as they may be counter-productive. Depending on the circumstances, the parties may wish to look for an opportunity later in the mediation for the employee and an employer representative to have a face to face meeting to explain their feelings and actions and, as appropriate, to offer an apology. When an apology is heartfelt and spontaneous it can help bring emotional closure to the events.

5. Explore your best, worst and most likely alternatives to a negotiated agreement.

Parties should come to a mediation with realistic expectations about what will occur and the need for compromise. This requires advance consultation between the lawyer and the client, preparation, and planning. Counsel must learn what their client wants and frankly discuss whether that is realistic. To value the case, each party should explore its' best, worst, and most likely verdict results. Approaches include decision-tree analysis, jury verdict research, mock juries, and less formal approaches, impacted by fact developments, witness strengths and weaknesses, motion practice and court rulings, the venue and likely jury panel. This should be done prior to the mediation to avoid making important settlement decisions on the fly.

There are multiple factors that can impact this valuation in employment cases. The economic damages should be subject to calculation, but non-economic damages including emotional distress and punitive damages are more subjective and subject to dispute. In wage-hour cases, there is often a sharp dispute over whether meal and rest breaks were taken. Another factor is the availability of recovery of attorneys' fees by the

prevailing party. Finally, the cost of prosecution or defense will impact each party's positions.

Develop three numbers: your opening offer, the likely verdict range and your walk-away number and seek to anticipate your opponent's likely ranges. Each side's bargaining range is bounded by its opening offer and its walk away number. The overlap between the parties' ranges is the zone of possible agreement. If plaintiff's walk away number is higher than defendant's walk away number, a negative bargaining range exists. Unless one or both parties recalibrate, in such a case there will not be a settlement.

6. Take into account non-monetary considerations: apology, reference letter, reinstatement.

Employment settlements may include non-monetary interest-based concessions. The most common are an apology, a positive or neutral reference letter, or reinstatement. Other possibilities include re-employment in another capacity or extension of the termination date, to enable the vesting of benefits or continuation of healthcare, or to enable the employee to secure alternative employment. Tuition payments, training or retraining, outplacement assistance, and company stock buy-backs should also be considered.

7. Set the stage with your opening offer.

Given your case valuation, your opening offer should be selected as part of your overall settlement strategy and potential settlement moves and concessions. It should be accompanied by a rationale, so the opposition is not left guessing. There is no right or wrong strategy. The opening offer can send a message, good or bad, with an anchoring effect. The opening offer must also take into account prior offers. It is not advisable to backpedal from prior offers.

A **reasonable** opening settlement offer would be in what each party sees as the likely plaintiff verdict range, which each may view quite differently. If a **reasonable** offer is met with a **reasonable** counter-offer, both sides should see the likely settlement range fairly quickly and be able to achieve a settlement in a few moves.

A plaintiff **aggressive** offer would be in the high end of its perceived likely verdict range, while a defendant **aggressive** offer would be in the low end of its view of the likely plaintiff verdict range. In this range each party's view of the facts, law and damage calculations should credibly support its offer, but a wider gap will make a settlement more challenging. First offers often lean towards **aggressive** due to over-optimism and a natural inclination to not leave money on the table. A party making an **extremely aggressive** offer must anticipate that it may become necessary to make substantial settlement concessions to achieve a settlement.

An **insulting** opening offer would be "over the top" or "pie in the sky" on the plaintiff side, and a waiver of costs or de minimis offer on the defense side. Rather than being an anchor, it often becomes a boomerang, provoking an equally **insulting** counter-offer. This can create a very wide divide which will require either significant patience and very

large conciliatory moves or lead to early impasse and termination of the mediation or walk-out.

8. Plan your settlement moves in mediation.

The “middle rounds” are the heart of the mediation, consuming the most time and where most of the movement occurs. Each party’s second move is often its most important in signaling its intentions, particularly if its opening offer was aggressive. The next few moves also send key strategic signals to the opposing party, either firmness or conciliation. It is important to have a negotiation plan regarding the end goal and the sizes of the concessions. Parties should think multiple settlement moves ahead, making the moves strategic and not emotionally driven.

In the first few moves, there is extensive information exchange, through the mediator, of each party’s positions. The mediator is working to keep the momentum moving, and the counter-offers flowing. An early stall, where one party refuses to counter unless the other party makes a double move, can lead to the response “I’m not going to bid against myself” and a potential impasse.

9. Work with the mediator to avoid or break impasse.

The best way around impasse is to avoid it by positive attitude, strategy and moves, making conciliatory moves at the right moment, and avoiding emotional responses to moves by the opposition. As impasse approaches or is upon you, it should cause each party to seek the mediator’s insights as the “angel of reality” to help re-evaluate the strengths and weaknesses of its position, to consider positions articulated by the opposition, the risks of achieving the litigation result it seeks, to discuss comparable discounts or results in similar matters, the remaining fees and costs, fee shifting, and the benefits of settlement and getting the matter behind them.

Upon re-evaluation, the parties may decide to make additional moves, may suggest conditional bracketed moves where both move in unison (though not necessarily in equal amounts), or may ask the mediator to suggest brackets. There are many other possible options such as late joint sessions, lawyer to lawyer or client to client or expert to expert discussions. The parties may request a mediator’s proposal which may either settle the case or scuttle the mediation. If the mediator’s proposal is not accepted, the parties may still use it as a basis for further proposals. In the case of a strong deadlock, a cessation may be advisable to allow a cooling off period which can cause re-thinking.

10. Close the deal.

If the parties have been exchanging offers, they will often reach a point where they sense that a settlement might be achievable but may take additional moves to reach closure. They often will revert to smaller reciprocal moves to try to reach a fair mid-point. They may offer to split the difference, suggest conditional bracketed moves, or suggest that conditionally one party would move to the mid-point if the other will move to the mid-point.

In contrast, in another scenario one party or both may be at or near their “walk away” number but there is still a gap between the parties’ positions. Either party may signal that it has little bargaining room left or has reached its final number. This creates a negative bargaining range. Parties often do find a way to bridge such a gap. The parties may recalibrate and move their “walk away” numbers. Another method is to “enlarge the pie” by exploring interests and issues that can be exchanged to create value to bridge the gap.

The parties may exchange further proposals, or a party’s last, best and final proposal may be accepted if the other party concludes that it is the best achievable result at that point in time. Sometimes this occurs through follow up calls, when the parties have had time to reflect on the totality of the circumstances. When the heat of the moment passes, parties often recognize that settlement is the best outcome in an uncertain litigation setting.

Once a settlement is reached, it should be memorialized in a written memorandum of understanding or generic settlement agreement, stating that it is enforceable and admissible in court, signed by the parties before they leave the mediation. This can be followed later by a more formal settlement agreement.

Conclusion

Following the ten best practices described in this article to carefully plan and make strategic moves throughout the early, middle, and late phases of the mediation process can help lead to successful results and durable settlement agreements.

Biography

Frank Burke is a full time neutral and handles mediation and arbitration matters on Zoom and in offices in San Francisco, San Jose and Oakland. He focuses on business, commercial, real estate, technology, trade secrets, patents, corporate governance, employment and personal injury matters.

He applies his 42 years of experience as a business trial lawyer in national law firms having handled a diverse range of business disputes involving varied business sectors in federal and state courts and administrative agencies in 26 states, China and Canada. His website is www.burkemediation.com and he blogs on mediation strategy and advocacy topics at www.adrconflictstrategies.com . He is a 1972 graduate of Cornell University (Magna Cum Laude in Economics) and a 1975 graduate of Harvard Law School