Ten Tips on Maximizing Success in ERISA Mediations

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Laying the Groundwork for Success…

ERISA disputes present unique and specific challenges in large part due to the statutory limitations imposed on scope of discovery, standard of review and plaintiff's recovery. "It's just not fair!" is the response most often heard from plaintiffs after they are reminded at the mediation that the upside of their recovery is limited to the extent of contractual damages available under their disability policy, that a "win" in court means receiving back benefits and being reinstated, and that their "day in court" will amount to no more than a hearing over the administrative record at which they cannot testify. The tips below maximize the likelihood of success by laying the groundwork and staging the negotiation in a manner that encourages closure and enables the plaintiff to understand and appreciate the parameters within which a settlement may be reached.

Tip #1: Prepare Early By Exchanging Benefit Calculations

Take the time and initiative to exchange benefit calculations and set-offs with plaintiff's counsel prior to the mediation to ensure that discrepancies can be discussed and potentially resolved before the negotiation takes place. Being proactive in this manner allows counsel to identify and alert the mediator to significant discrepancies likely to present a barrier at the outset of the mediation. The process has a much greater chance of success if the parties arrive well-prepared and have previously exchanged information key to the negotiation.

Tip #2: Every Plaintiff has a Story … Let them tell it

When a person is deeply upset about something, they really *need* to get their story out. This is a basic principle of mediation, and one that's important to remember when trying to resolve a conflict with a disability claimant. Plaintiffs in ERISA cases inevitably feel wronged and have a deep-seated sense of entitlement to the disability benefits at issue. Unlike other litigated cases however, an ERISA plaintiff will never have the opportunity in court to tell their story because the evidence is limited to the administrative record. Does this mean that taking the time to bring the parties together to listen to the plaintiff's story is a waste of time and an exercise in futility? Absolutely not. Although the information that comes to light from the plaintiff's story is not admissible in court, it serves the larger purpose of allowing the plaintiff to feel that he or she has finally "been heard." Providing this cathartic moment where they are no longer "just a file" can dramatically change their outlook, invite closure and even lower the purchase price of the settlement. This opportunity can occur either in a plenary session or privately with the mediator. However, it has more impact when the plaintiff feels the insurer has heard their perspective.

Tip #3: The Mediator is an Ally … Collaborate Together in Caucus

Generally the mediator will use this time to talk to counsel about their evaluation of the strengths and weaknesses of the case, their assessment of the judge, and their prior negotiations, if any, with plaintiff's counsel. During the initial caucus, it is not uncommon for the mediator to discover that this is the parties' first attempt at any kind of settlement negotiation. As one might expect, each side wants to know where the other is coming from and whether the mediator thinks this negotiation is going to prove productive at the end of the day.

We find ourselves often being asked by the defense, "How should we respond to plaintiff's demand … where should we start?" We welcome this conversation because ultimately deciding where to start depends entirely on where one wants to end up. This is an ideal time to collaborate with the mediator about the client's goals and objectives without engaging in any kind of bottom line related discussion. Having the benefit of gauging the temperature in the other room, the mediator can provide insight into the plaintiff's

mindset without disclosing any confidential information. More specifically, the mediator can assess and anticipate the reaction likely to be received in response to the defendant's offer and make suggestions to either increase or decrease the offer to obtain the desired result.

For example, if the plaintiff opens the negotiation with a demand of $300,000 when the past and future contractual benefits amount to $150,000 should the defense offer zero and ask for a revised demand, offer $5,000 to send a signal that they're out of the ballpark, or offer $20,000 with the message that they want to negotiate in good faith and are looking for a substantial drop in the demand if the negotiation is to continue. The answer will depend in large part on the mediator's assessment of the parties and which of the above three responses is most likely to impact the negotiation in a positive way for both sides.

Approaching the negotiation in a collaborative way with the mediator actually allows one to become more objective and therefore more effective as a negotiator and as an advocate. Rather than sit back and simply instruct the mediator to relay X dollars to the plaintiff, engage the mediator in a discussion by asking what he or she thinks is the best approach to achieve the company's goals. Decide together what might be the most effective technique for the case at hand, realizing it may call for flexibility in the approach.

Tip #4: Timing is Everything … Be Strategic About the Pace of the Process

In mediation, the early bird does *not* get the worm. When we talk about the mediation *process* we do so for a reason. It is just that, a *process,* something that takes time to build momentum and requires an organic evolution for it to be successful. Parties are often tempted to arrive at early conclusions within the first couple moves in the negotiation about the productivity of the mediation. Resisting this temptation will allow the process to unfold at a tempo that is not forced and that everyone can follow. If one party wants to cut to the chase and the other party is not ready, someone is bound to get left behind which can prove costly.

To demonstrate, imagine a situation where *both* sides come to the mediation intending to settle the case for $20,000. Within the first half hour, the defense offers plaintiff $18,000 and in their next move increases the offer to $20,000 with the message that they're tapped out. The plaintiff then reasons that there is no way the defense would give their best dollar this early in the mediation, which means they must have more money. By short circuiting the process, the defense has unintentionally caused a hike in the price tag because the plaintiff will want to make sure that he has not left any money on the table.

Proper timing is equally important when disclosing information at the mediation and can make the difference between success and failure. Just because ERISA disputes do not have the allure that plaintiffs believe embrace bad faith cases does not mean that there aren't hidden gems of information within the administrative record that have yet to be discovered by the plaintiff. This is especially true of cases with significant exposure that have a voluminous administrative record. Assuming the defense has gone through the record with a fine tooth comb and identified information harmful to plaintiff's case that plaintiff has not yet discovered … do we dump the bad news all at once or use the slow drip approach and ease them into it? We propose the latter.

It is important for the mediator to deliver bad news with pacing and patience. If the mediator is likely to take the "dump" approach with whatever negative information they are provided, it may be wise to take the slow drip approach with the mediator as well so that the pacing of information remains in your control. Most people will actively resist accepting new or difficult information that is unceremoniously dropped on their heads. When giving the plaintiff news that will negatively impact the value of their case, it needs to be parceled out slowly so they have time to absorb and process the information. Once again, it all boils down to timing.

Tip #5: Read In Between the Lines

Realize that the mediator is sworn to secrecy and will not divulge information from the other side without their permission. On the other hand, the mediator uses other communication means in order to encourage

you to think about and consider information he or she just learned from the other side. Listen for the clues and examine their meaning, while respecting the confidentiality of the process.
Consider the example where the mediator has just been told *in confidence* by the plaintiff that if the defense increases their offer by $5,000 to a total of $50,000, they will settle the case. Upon the mediator's return, the defense inquires whether plaintiff will settle the case if they increase their offer from $45,000 to $50,000. Clearly, the mediator cannot disclose that the plaintiff would accept $50,000 because this information was provided in confidence. We might say something along the lines of, "I don't know if the plaintiff will take $50,000 but it is certainly worth a shot." Those who read in between the lines likely got the gist of what we were trying to communicate without us having actually said anything about the plaintiff's intentions.

Reading up on the basics of body language is another way of gathering information that is left unsaid. Most people give away a wealth of information about themselves without even realizing it based on what they do with their hands, eyes, and body in the course of everyday conversation. Find ways to read in between the lines, verbally or otherwise.

Tip #6: Know When to Stop Picking the Flyspecks out of the Pepper

Often in ERISA disputes, parties are so focused on the minutiae contained in the administrative record that they lose sight of the big picture and all its implications. One could spend all day going line by line through the record, picking the flyspecks out of the pepper, or we can engage in a fruitful but limited discussion on the merits of the case and then shift focus back to the objective that brought everyone together … finding a solution. Keep a finger on the pulse of the negotiation and when the discussion begins to seem counterproductive, find a way to redirect everyone's attention away from the grain of sand and back to the whole beach. Doing so may help resolution arrive at a startling speed.

Tip #7: Identify and Remove the Non-Monetary Road Blocks

Currency is definitely tangible and measurable however, it is not always the driving force behind the negotiation. As we stated earlier, plaintiffs in ERISA cases often feel wronged and insulted that the "insurance company" doesn't believe they are disabled and cannot work. The plaintiff's *feelings*, whether based on fact or fiction, may be the very road block causing "client control" issues and preventing the case from settling. If unattended to, these intangible needs of the plaintiff, such as recognition or understanding, will manifest in a failed negotiation. Taking preemptive action by diagnosing the problem and responding in kind will unlock the negotiation process.

In every conflict, ask yourself, "*What is the true motivating factor here?" What is* really *keeping the plaintiff from agreeing to a solution?* Once the impediment is identified, educated predictions can be made about how the plaintiff will respond to certain ideas and the negotiations can be shaped accordingly. Then return the focus of the discussion on the substance of the dispute, which is usually defined as "fair compensation" The plaintiff will be far more likely to assess the monetary issues realistically once the emotional barriers have been cleared away.

Tip #8: When Needed, Ask to Talk to Plaintiff's Counsel Directly

It would be ideal if parties always had positive things to share about their mediation experiences. Unfortunately, we have to acknowledge that on occasion there will be times during the mediation when you wish you had chosen a different mediator for whatever reason, be it skill, personality, patience, ingenuity, etc. There are two ways to respond in this situation: Plan A (the conventional choice): Stay the course and if the case doesn't settle, try the case or mediate again with another neutral or Plan B (the unconventional choice): Take hold of the reigns and request to meet directly with plaintiff's counsel. Granted, Plan B is definitely not the usual approach but it is the one we would opt for and we'll explain why.

When in a less than desirable situation such as the one described above, staying the current course (Plan A) is very likely to keep us in the status quo. Since the goal is to change the progress and direction of the negotiation, something must be done differently to precipitate the movement desired. The underlying

notion, derived from cybernetics, is that when one element within a system changes, the whole system must change in order to adapt to that changed element. Therefore, by changing one's own behavior we are automatically changing the behavior of those around us and therefore the direction and outcome of the process.

ip #9: "Make Nice" with the Folks Next Door

Practicing in the area of ERISA is like growing up in a small town and being able to name everyone in your high school graduating class. This is an important point to consider because what goes around comes around and is not easily forgotten. In stark contrast to general practice areas where an attorney may come across an adversary only once or twice during the course of their career, it is not uncommon for ERISA attorneys to have multiple cases going on at the same time with the same adversary. Therefore, it goes without saying that small niche areas of the law, such as ERISA, require more tact and delicacy in building and maintaining positive working relationships with the opposite bar.

To build rapport with an adversary, engage in cooperative gestures such as granting an extra extension, providing copies without asking for reimbursement, extending a courtesy one normally would not and picking certain battles to fight and others to forego. Doing these "favors" before the start of the negotiation sets the stage for the mediation. Having received something unexpected from their opponent, he or she will feel obligated to repay the favor and champion your cause, making success at the mediation that much more likely.

Tip #10: When All Else Fails … Find Ways to Keep the Dialog Open

When a settlement cannot be obtained at the mediation, shift your goal to strive for the next best option … keeping the dialog open for future settlement talks. There are a variety of ways to promote continued negotiations, most of which involve the mediator taking an active approach to engage the parties after the mediation is over.

The techniques employed to achieve this end do not need to be forceful to be effective. In fact, it can be as subtle as having the mediator inform the parties that he or she is "adjourning" rather than "terminating" the mediation. This simple but clever choice of words implies that the parties will reconvene in the future and that the negotiations have been *temporarily* suspended. "Terminating" the mediation on the other hand, has a definite sense of finality and makes the idea of reconvening or receiving follow-up phone calls from the mediator less organic and natural.

At the other end of the spectrum, are more direct approaches such as 1) structuring a conditional settlement that is subject to the approval of a party not in attendance; 2) entering into a settlement contingent upon plaintiff providing specific medical or off-set documentation within a certain number of days; and 3) requesting a mediator's proposal which remains open for a certain period of time to allow both sides the opportunity to complete their necessary due diligence.

Regardless of the approach employed, the objective for the outcome is the same … to encourage the parties to remain open to the possibility of settlement and continue working towards bridging the gap by finding the common ground between them.

Taking the Show on the Road…

The next time you're getting ready for mediation, reflect on these tips and utilize the ones that work best for your style and approach. In the final analysis, only you know the methodology that has succeeded for you in the past. What we offer here are some additional tools and insight that you can add to your repertoire and draw from in the future.

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