Three often overlooked keys for a successful mediation

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"Millions for defense, but not one cent for tribute."

That slogan became a rallying cry for Federalists during the XYZ Affair in 1798.

Way back then, France and England were at war. What a surprise.

The fledgling United States did not want to choose sides in a war between the reigning heavyweight champs of the world, so it negotiated a neutrality pact with England. Part of the deal permitted British war ships to raid American merchant vessels with goods bound for France, as long as England paid for the goods it seized.

I kid you not. That was part of the deal.

The French were a wee bit miffed about that arrangement and began to raid American merchant vessels. Hoping to keep the peace, President John Adams sent a diplomatic team to France to negotiate a resolution.

The French government refused to meet with the American envoys until certain conditions were met. Among them was a demand that America pay a bribe of $250,000 to the French Foreign Minister. *Sacré bleu!*

When word of the demand reached the U.S. Congress, Maryland Sen. Robert Goodloe Harper helped set American policy by exclaiming, "Millions for defense, but not one cent for tribute."

This story has a point. Stick with me.

What is your policy for resolving employment lawsuits?

According to the Federal Judicial Center, more than 20,000 employment-related lawsuits have been filed in federal court each year since 2015.

Add to that the thousands of other cases filed each year in federal and state courts, and you're talking about an annual avalanche of litigation. Thus, it should come as no surprise that many courts have adopted rules requiring mediation of all civil actions at some point before trial.

There are no exceptions for cases a defendant believes will be dismissed by the judge before trial. Nor are there exceptions for cases a plaintiff believes will result in a favorable jury verdict.

The good, the bad, and the ugly all get submitted.

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Regardless of whether your approach to employment litigation is "not one penny for tribute" or something more pragmatic, if you get sued, you are likely to be required to submit the dispute to mediation.

When that happens, here are three simple but often overlooked rules for being successful.

Rule No. 1: Settlement is not surrender

If you approach mediation with an expectation that the plaintiff is going to surrender, say "I'm sorry," and dismiss the lawsuit, you will set yourself up for failure.

A mediated settlement is like a tie game in soccer. Each side gets a point in the standings, but neither one is overjoyed with the result.

Rule No. 2: Define your victory

Once you accept Rule No. 1, you need to accentuate the positive and define what victory means to you. It could mean any of the following:

- Settling for a fraction, either big or small, of the remaining cost of defense.
- Settling for a fraction, either big or small, of the damages you think a judge or jury is likely to award the plaintiff.
- Avoiding the interference with business operations that invariably occur when time must be devoted to engaging in written discovery, searching for materials, preparing for and attending depositions, and preparing for and trying the case.
- Avoiding the lost profits and lost opportunities that litigation-related activities can cause.
- Avoiding negative publicity.
- Avoiding negative impact on employee morale.

There are many ways to define victory in mediation, and you should know what yours are before you walk in the door. (Or, nowadays, before you get on Zoom.)

Rule No. 3: Declare your victory when you see it

Once your defined victory has been presented to you by the mediator, take it. Don't waver. Don't overreach based on the transient events of the day.

Even if you think the plaintiff is showing weakness, you may be misreading the tea leaves. Delay may let the plaintiff rethink or, worse yet, talk to a spouse or friend about it.

If you have defined your victory and can see it in front of you, hesitation or delay could cause it to slip away.

The end of the XYZ Affair

Despite the outrage directed at France for its extortionate demand, a little pride was swallowed by both sides, negotiations ensued, and a settlement was reached.

Not every employment-related lawsuit can be resolved via mediation. For various reasons, some need to be litigated to a conclusion, either by way of a dispositive motion or trial.

But when the case is sent to mediation – as it is almost sure to be – following the three simple rules described above will give you better than a puncher's chance of knocking it out.