EMPLOYMENT MEDIATIONS DEMYSTIFIED

NAPABA CONVENTION 2016
Introduction

- Panelists
- Panel format: Hypothetical and Interactive Q&A
- Informal poll of audience perspectives.
Agenda

- Goals of mediation.
- Mediator selection process.
- Effective preparation.
- Client management issues.
- Dealing with pressure points.
- Negotiating key settlement terms.
Hypothetical

- Refer to handout.
Goals of Mediation

- Resolution of case.
  - Timing of mediation (pre-litigation, early litigation, eve of trial).
  - Which party initiates mediation?
- Client management.
- Gathering intelligence/informal discovery.
- Anchoring/setting the tone.
- Setting the table for resolution in the future.
  - Significance of multi-party litigation and multi-carrier insurance coverage.
Mediator Selection Process

- Who gets to choose the mediator?
  - Plaintiff or defense counsel?
  - How important is client input?
  - Mediator fee splits.

- Finding the right fit.
  - Gender
  - Retired Judge v. Subject Matter Expert
  - Mediation style.
  - Cultural sensitivity.

- Does the mediator even matter?
Effective Preparation

- Managing client expectations.
  - Nature of discussions between attorney and client.
  - Role of the insurance carrier.
- Discovery, dispositive motions and trial prep.
- The mediation brief.
  - What is its purpose? How important is it?
  - To share or not to share with the other side?
- Mediator’s expectations of the parties?
  - Pre-mediation conference with counsel and/or mediator?
  - Mediator prep essentials.
Day of the Mediation

- Who will attend?
- The joint session.
- Caucuses with or without the client present.
- Dealing with client control issues.
- Reaching an impasse.
  - Impact of a “take it or leave it” or “best and final” offer.
  - Use of settlement brackets.
  - The Mediator’s proposal.
  - Effective follow-up by the mediator.
Day of the Mediation

Pressure points:

- Adequacy of employer’s response to complaint.
- Longevity of employment with company.
- Disparate treatment and “me-too” evidence.
- Timing of termination and retaliation claim.
- Post-termination mitigation of damages.
- Previously undisclosed information and evidence.
- Insurance coverage.

Hypothetical:

- ABC hired third-party investigator;
- Vicky a 7-year employee;
- Promotion of Vicky’s male colleagues;
- Vicky terminated two months after complaint about Sam;
- Vicky gets a new job as CEO;
- ABC obtains a declaration from Vicky’s former colleague regarding her affair at another job;
- ABC in coverage dispute with EPL carrier.
Negotiating Key Settlement Terms

- Payment plans.
  - Proof of financial condition.
  - Stipulated judgments and/or personal guaranty upon non-payment.

- Wage allocation and related tax issues.
  - IRS enforcement position on taxation of lawsuit settlements.
    - Wages = Taxable income and subject to payroll deductions.
    - Physical injury = Non-taxable income.
    - Emotional distress = Taxable income, unless attributed to physical injury.
    - Attorneys’ fees and costs = Taxable income.
    - Fines and civil penalties = Taxable income.
Negotiating Key Settlement Terms

- Confidentiality clauses.
  - Liquidated damages upon breach of confidentiality.
  - Worth less than the paper they are printed on?
- Neutral employment references.
  - Scope of non-disparagement obligation on Defendant.
  - Advising employers on compliance.
Negotiating Key Settlement Terms

- **Older Workers Benefit Protection Act of 1990 (29 CFR § 1625.22).**
  - Applies to waiver of age discrimination claims under the Age Discrimination in Employment Act (ADEA) (employees 40 years of age or older).
  - Such waivers must be knowing and voluntary.
    - In plain language geared to the sophistication of the parties.
    - Without fraud, duress, undue influence or other improper conduct by employer.
  - Must specifically reference the ADEA by name.
  - Must advise the employee to consult with an attorney.
  - Must give the employee 21 days to consider the offer (may be waived by employee).
  - Must allow a seven-day revocation period (may not be waived).
  - May not include waiver of future rights and claims.
Negotiating Key Settlement Terms

- Additional requirements for group layoffs.
  - 45-day consideration period (as opposed to 21 days for individuals).
  - Must disclose “decisional unit,” eligibility factors, applicable time limits and job titles and ages of individuals selected and not selected for layoff.
Negotiating Key Settlement Terms

- Miscellaneous “magic words.”
  - Establish jurisdiction to enforce the settlement.
    - California Code of Civil Procedure Section 664.6: Parties must explicitly agree to have the trial court retain jurisdiction to enforce the settlement after dismissal is entered.
  - Stipulate to admissibility of settlement for enforcement purposes.
    - California Evidence Code Section 1123: Parties must agree in writing to admissibility of settlement agreement for enforcement purposes.
Questions?
Vicky Venture Capitalist was employed by ABC Partners, a venture capital firm based in Silicon Valley, California. Vicky began her employment as a junior partner reporting to Sam Senior Partner.

Vicky and Sam, who is married, had a brief affair, after which Vicky complained to ABC’s HR Director that Sam pressured her into it. ABC hired an independent investigator who concluded that the affair was consensual, but nonetheless violated ABC’s conflicts of interest policy. As a result, Sam was disciplined for poor judgment, and Vicky started reporting to another senior partner on a different team.

Early on Vicky was told that she would be on track for a promotion to senior partner within a few years, but she was never promoted. During this period, several of Vicky’s male colleagues were promoted. After seven years at ABC, and two months after Vicky complained about Sam, Vicky was terminated for poor job performance based on several years of declining performance reviews.

Soon after her termination, Vicky filed a lawsuit against ABC alleging gender discrimination and retaliation.

A few months later, Vicky found a new job as CEO at an internet startup.

ABC has employment practices liability insurance, but it is in a coverage dispute with its insurance carrier over whether ABC gave timely notice of Vicky’s claim.

After several months of litigation, Vicky and ABC have agreed to participate in a mediation.