MEDIATING EMPLOYMENT CLAIMS

By Stefan M. Mason, Mediator

2102 Century Park Lane, Suite 405

Los Angeles, California 90067

(310) 286-7671

Fax: (310) 286-7519

e-mail: smason@masonmediate.com

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I. Introduction

I have mediated hundreds of employment claims since 1993. Prior to becoming a neutral, I specialized in representing both claimants and respondents in employment litigation and mediation for almost three decades. I have developed techniques which are effective and which can be used by other mediators to enhance their effectiveness. Counsel representing parties in mediation should also find this presentation useful in helping them to prepare for and participate effectively in employment mediations.

II. Pre-Mediation Concerns

Once the parties have calendared a case with my office, they are sent a copy of the confidentiality agreement they will be asked to sign at the outset of the mediation and instructions on mediation procedures and protocols. (Attachments A and B). I also request that each party submit a confidential mediation brief.

When the briefs come in I review them and any exhibits submitted by counsel and give some thought to the issues which will be raised and the persons who should be in attendance. In disability cases, my assistant will ascertain whether the claimant requires any special accommodations at the mediation. I may research legal points that will be important in my devil's advocacy at the mediation, and may seek assurances that the parties are attending with adequate settlement authority. In sexual harassment cases involving a denial or where the defense is consent, I prefer to have the alleged harasser in attendance. I draft notes about weaknesses I see in each side of the claim and questions I want to ask concerning what is "not mentioned" in the briefs, such as the history of settlement negotiations.

III. Separate Coaching Before The Joint Session

A. In General

Mediations have an extraordinarily high resolution rate because of the power of the face-to-face meeting between the parties in the joint session, in which everyone is encouraged to ventilate their pent-up emotions. The joint session is much more effective when I meet with the parties separately when they arrive to establish rapport, ease their anxiety and gently "coach" them on how they might conduct themselves in the mediation to maximize the probability that their needs and interests will be met. This approach also minimizes the frequency of parties reverting to name-calling such as "liar", "blackmailer", and "extortionist", which only triggers more heated emotions being

generated, a situation that is not conducive to settlement because emotional people cannot "hear" or assimilate the mediator's reality-check given later in the private sessions.

When the parties arrive my assistant greets them and escorts them to separate conference rooms. I usually meet with whichever side arrives first. I introduce myself and ask the parties to sign the confidentiality agreement which we earlier delivered to them. I indicate that I would like to discuss with them how I can be most helpful to them and that I would like to offer them a little "coaching" advice which they are free to accept or reject, but which is based on my experience concerning how they might conduct themselves in the joint session in a manner that will create the most value for them.

I state that one of my roles as a mediator is to give both sides separate reality checks on the risks, costs and delays involved in civil litigation. I say that while I cannot guarantee a settlement – and even though 90% to 95% of my mediations result in a resolution - I do promise that if I do my job as a mediator and there is no settlement, the parties will not experience any surprises in the months and years that may elapse before the litigation is resolved because I will have reviewed with them all of the possibilities that can occur during the litigation process. If the party has had no prior experience in mediation, I explain that part of my role is to give both sides a reality check, which means that after the joint session when I am in private session with them, they will feel that I am totally on the side of the other party. I promise them that when I am in private session with the other side, their adversary feels the same way – that I am totally sympathetic to the position of the other side.

I also state that during the joint session the parties should have a "thick skin" because they and their counsel want to hear everything they possibly can. I state that even though I cannot assure a settlement, I can promise that they will obtain value from the mediation, i.e., they may get a look at each other's witnesses, learn more about the facts and the evidence, learn the legal theories of the claimant and the defense theories of the respondents, discover perhaps the theme or spin each side might give the jury, develop a more efficient discovery plan, and obtain ideas for possible motions in limine to keep from the jury irrelevant or prejudicial information that might be disclosed at the mediation.

Finally, I usually state that patience is required and that parties frequently feel hopeless in the first hour or two following the joint session because of the size of the gap between the parties' respective positions. I point out that these feelings are fairly common, and that my experience is that if the parties persist, keep talking and making some movement to close the gap in their respective counter-proposals, nine out of ten times we get a resolution. These statements pay dividends later in the mediation because the parties will remain more calm when these feelings actually arise.

B. Coaching Claimant and Claimant's Counsel

1. Claimant's Counsel

Generally, I discuss with counsel the nature of their presentation in their opening statement in the joint session. First, I caution that personal attacks on the respondent or individual respondent are usually counterproductive. I suggest a calm, non-judgmental even-voiced presentation of the facts that will be presented to the judge or jury and that those facts will lead to a finding of liability and substantial exposure on damages. This approach makes the judge or jury the object of claimant's fears, not the respondent or respondent's counsel. Second, I remind counsel that employers generally defend by hoping to obtain summary judgment or summary adjudication, and that if counsel feel that there are clear issues of fact that will defeat summary treatment, they should say so. Third, I suggest that this is no time to hold back on a full delineation of claimant's damages.

If emotional distress damages are being sought, my experience is that claimants frequently hold back on disclosing some symptoms even to their own counsel because of embarrassment, shame, wanting to be strong for their lawyer, etc. I usually relate a war story or two that serves as a catalyst for: 1) the claimant to be forthcoming to their lawyer if they have held anything back and 2) for the lawyer not to be worried about giving "free discovery", which only diminishes the potential value of their negotiating position. I frequently tell the story of the sexual assault victim who did not disclose to her lawyer until late in our mediation that she had slashed her wrists and had been committed to a mental facility for thirty days under a suicide watch and point out that she disclosed this only after I had related to her the story of a male claimant in an age discrimination case who had not told his counsel about his sexual impotence and penile implant after losing his high paying executive position because he wanted to be "strong" for his lawyer. (These detailed "War Stories" are found in Attachment C, which the reader is free to utilize). Next, I generally coach counsel not to mention punitive damages, and not to state the total dollar amount that is being demanded for settlement. Respondents are less inflamed when they hear this information through the mediator after the joint session.

2. Claimant

I next turn to the claimant and invite sharing, at the joint session, about the facts of the employer's alleged mistreatment and the consequences that arose there from. If claimant is resistant, I indicate that while claimant is not required to speak and may feel that this is why counsel was retained, they should seize this opportunity for several reasons. First, if they remain silent, the defense is likely to conclude that they are either afraid to litigate, including participation in a lengthy deposition, a possible mental examination and a public trial, or that they are not committed to see the litigation through, thereby diminishing their negotiating leverage. Second, I state that this is a wonderful opportunity to stand up for themselves and to help other employees by

attempting to transform the employer's treatment of employees by describing how that treatment led to painful consequences. I point out that if they show they can "present" as effective credible witnesses at trial at the joint session, I can comment upon this to the employer later in the private session. I tell them that I will give them all the time they need to prepare their statement with their counsel before the joint session.

Finally, I ask them to describe in detail their emotional distress symptoms, and not to hold anything back from me, their counsel or the participants in the joint session. I point out that if they cannot tell their story by way of narrative in the private protective setting of the mediation, then it is unlikely that they will be able to do so during the litigation process. I underline that if they wait until trial to disclose, they will deprive themselves of bargaining leverage at the mediation.

C. Coaching Respondent and Respondents' Counsel

1. Respondent's Counsel

I first state that it is usually counterproductive to make a personal attack on the claimant or claimant's counsel and that effective mediation advocacy involves presenting, in a matter-of-fact manner, the defenses that the employer has and the thinness of claimant's evidence. Second, I state that if respondent's counsel feels they have any reasonable grounds for seeking summary judgment or summary adjudication, they should say so. If emotional distress damages are being sought, I will ask counsel to indicate that claimant may be asked to submit to an independent mental examination, if that is the intent. While I know I will mention these possibilities later when I undertake claimant's reality check, I will do so with more effectiveness (credibility) if respondent's counsel has previously indicated an intention to engage in these defense tactics. Similarly, if respondent's counsel feels the case is extremely weak and likely to expose claimant to paying the defenses' costs and attorneys fees, I coach respondent's counsel to mention these possibilities. If viable counter-claims have been asserted by respondents, they should also be mentioned. If they have not been asserted, usually it is better for respondent's counsel to let the mediator raise these issues in private session.

2. Corporate Respondents

I then turn to the corporate respondent concerning the sharing of feelings it has about the litigation. I coach the corporate employer to consider acknowledging the contribution of the claimant to the business mission of the company during claimant's employment and to express empathy as one human being to another vis-à-vis claimant's upset or distress. I am amazed at the power such communications have during the joint session if they are made with sincerity, i.e., the whole tone of the mediation sometimes softens and such acknowledgements create an atmosphere that leads to quicker, more collaborative resolutions.

3. Individual Respondents

If individual respondents are present they are encouraged to ventilate their feelings about the litigation, but advised to avoid personal attacks on the claimant. It is more effective to simply state their view in neutral tones and express disappointment concerning claimant's interpretation of these facts. I suggest they say that, in any event, when the individual respondent tells his or her story to the trier of fact, he/she is confident that the trier of fact will accept their version of what happened. I counsel the individual respondent to state that any upset experienced by claimant was not the result of intentional behavior, if that is true.

IV. Conducting The Joint Session

Before the joint session starts, I usually have my assistant take a lunch order in the separate conference rooms so that I can continue working in private sessions after the joint session. If we break to go out to lunch, it usually takes two hours to get everyone back to resume.

A. In General

At the outset I acknowledge everyone for attending the mediation and making one last attempt to resolve the dispute on their own terms at a time when they have maximum control over the outcome, rather than losing control in the litigation process. I remind them that today is their best opportunity to come up with a resolution that satisfies to the maximum extent possible the needs and interests of the parties.

I then ask for two agreements. First, I state that because everyone has gone to a lot of trouble to prepare for and attend the mediation, I would like everyone to agree that if they develop feelings of futility and uselessness and experience a desire to just walk out, that they will talk with me first and give me a chance to smooth things over and set things straight.

Second, I discuss the mediation privilege under the Evidence Code and remind the parties that anything that is said during the mediation, whether in a joint session or private session, cannot later be testified to in discovery or in trial, and that anything they tell me in the private sessions is between them and me and that it would be unethical for me to disclose anything to the other side without their consent. I then ask them to agree to a ground rule, i.e., because I am told so much in the private sessions, that I am free to communicate anything that I am told to the other side unless at the time they disclose the information they tell me it is confidential and for me only. I then assure them that I will take special precautions to preserve the confidentiality of that information, while warning them that if I feel that information is useful to closing the gap in the parties expectations, I may try to persuade them to agree to let me disclose it. I do remind them that they are in control of whether I am able to disclose or not.

Third, I request that all cell phones and pagers be turned off. Finally, I ask for common courtesy during the sharing - that no one interrupt the speaker and that everyone refrain from verbal utterances or body language that communicates disagreement or disbelief (nodding the head sideways, etc.)

B. The Moving Party

First, I call on counsel to make an opening statement and do not interfere. I then look to claimant and ask whether he or she would like to say anything. If they get stuck, usually their counsel will prompt them with a few leading questions. If not, I will ask how they felt when the conduct they are complaining of occurred, or how they felt when they had to tell their spouse or their children of the situation, etc. Frequently claimants get quite emotional, which means that a catharsis is occurring and claimant will be better able to "hear" my reality check later following the joint session.

C. The Responding Party

With respondents I follow the same procedure as with the moving party. First, I call upon respondent's counsel and then upon any member of the respondent's negotiating team that wants to share his./her feelings about the dispute. This is the time when individual respondents have an opportunity to ventilate and when operations managers from the respondent's side can acknowledge claimant's contributions and any feelings of empathy they may have for the claimant's upset.

Generally, I keep the parties talking as long as they are willing to keep sharing information and feelings. I then adjourn the joint session, having the parties return to their separate rooms, and I tell them that I will be sitting at my desk for a few minutes to decide whom I want to meet with first and that I will let the other side know whom it is.

V. Private Sessions

A. Who Goes First

I do not decide until the end of the joint session which side I am going to meet with first. The more I mediate, the more I trust my intuitive sense of what is appropriate. Generally, I visit the side whose court the ball is in concerning offers and counteroffers. I learn either from the briefs or from the separate coaching sessions what the history of negotiations has been, so that usually I know which side has made the last response.

My goal is to close the gap between the parties' positions as much and as quickly as possible. Therefore, I attempt to try to avoid "insult" zones because when you communicate a proposal or a counteroffer that "insults" the other side, that side mentally shuts down and is much less willing to "hear" my reality check. For instance, if

claimant's proposal has increased since the last pre-mediation proposal to the employer, I sometimes meet with claimant first to try to get them to reduce it to or below their previous proposal, or to give me a persuasive rationale or explanation of why it has increased. I tell the claimant side that if they were to reduce their proposal to a more reasonable ("lower") range, I would gain credibility with the respondent's side, which will put me in a better position to get the respondent's side to be more forthcoming on their reasonable ("higher") counter- proposal, thereby avoiding the claimant's "insult zone." If there is a refusal to reduce the proposal because the party does not wish to "negotiate against themselves", the time that I have spent with claimant will still pay dividends some time later when I come back with the respondent's counterproposal.

Sometimes I sense that it is more appropriate to meet with the respondent first after the joint session, which I do if I have a feeling that they will put enough on the table to enable me to get the claimant to come off of a high proposal, i.e., sometimes the gap in the parties' expectations starts out smaller if the respondent goes first rather than starting with a very high and unrealistic proposal from the claimant. For instance, if a claimant proposes a sky-high eight figure proposal and the employer has told me in very strong terms that it does not think that the case is worth more than low five figures, I will sometimes encourage the respondent to put as much as possible in an opening offer and I will deliver it with a statement that this offer is not a bottom line, but that it really leaves only a little bit of "wiggle room" for the employer. I then encourage the claimant to come down substantially. This is risky, however, because if claimant does not come down substantially, the probability of an impasse is quite strong. Negotiation is an art, and I have learned to trust my intuition, which, hopefully, has been tempered by my experience!

B. In Claimant's Room

In general, I speak with the claimant about the risks and costs and delays involved in litigation. I tell war stories about the unpredictability of juries and remind claimant that they are suing in the same geographic area where different criminal and civil juries found O.J. Simpson "innocent" in downtown Los Angeles but "guilty" in Santa Monica. I will talk about cases that I have been involved in, like the Martin v. Texaco failure to promote gender discrimination case which took over ten years to resolve after one jury trial, claimant's bankruptcy, her waiver of her right to a second jury trial after losing her appeal of the new trial ordered in the first trial, and a resulting settlement on the 14th day of the second trial that represented pennies on the dollar of the original jury verdict. I also indicate that the claimant aged in appearance much more the ten plus years it took to resolve the litigation.

I apprise claimants of their very real exposure to paying respondents' litigation costs if claimants do not prevail, and, if attorney's fees are an issue, the possibility of having to pay respondent's attorneys fees as well. I then tell war stories about actual cases which members of the employment bar felt were meritorious but in which claimants who lost were required to pay hundreds of thousands of dollars in attorneys fees to respondents.

I talk about the lengthy deposition claimant will have to undergo and, if emotional distress is at issue, describe the burdens of the independent medical examination that may be requested by respondents to limit their exposure. I tell claimants that if they are able to obtain a verdict, if it is in excess of low six figures there will probably be appeals that will require two to four years to resolve and then perhaps a new trial will be required. Then, if they choose to litigate again, it will take two to three years to get to trial and another two to four years to resolve any appeals of the second trial and that they may end up back where they started for a third time, ad infinitum.

I ask the claimant to think about any non-monetary requests they might make to the employer that would help them satisfy their needs and interests, including remedies they could not obtain from a judge or jury. For instance, if the claimant was a former employee who is still looking for work, employers can agree to sanitize personnel files, provide a letter of recommendation and outplacement counseling, etc. Occasionally really creative resolutions occur. I find they are precipitated if the mediator tells one or two war stories to prompt people to think about the special needs and abilities of the parties. The war stories contained in Attachment D describe settlements that were achieved by the award of frequent flyer miles and by an acknowledgement of the claimant's contribution to the employer hospital by having her name placed on a plaque on the donor's wall in the lobby of the hospital where other substantial hospital contributors are acknowledged. You can use these stories effectively in your own mediations.

I tell parties I do not want to hear their "bottom line", at least at the outset. I find that disclosure of bottom lines just creates problems, i.e., they draw a line in the sand that the mediator is required to move or they lead to impasses that should never have occurred. Stating a bottom line too early tends to preclude the parties from thinking about more creative remedies. Later, I may ask for a settlement "range" and express optimism that the case "will settle" to diffuse impatience and create hope if I believe the gap may close.

One of the most powerful tools I utilize is taking claimant and counsel through a decision-tree analysis of the probability of prevailing on their claim and a discount model analysis on what they would have to achieve by way of judgment at trial to recover the equivalent in today's dollars of the amount they are seeking in settlement. I go through these analyses only when the amount of money the respondent has put on the table gets significant. For instance, if $50,000 to $90,000 is being offered, I can show claimant through a quick pencil and paper analysis that this is better than risking recovering $200,000 to $400,000 at trial, including costs and attorneys fees and fully litigated to a judgment, premised upon a fifty-fifty decision tree (risk of loss) analysis and a 5% discount model analysis assuming 5 years from inception to collect the judgment. See Attachment E.

C. In Respondent's Room

I repeat many of the same considerations in the respondent's room that I do in the claimant’s room. I talk about the risks and costs of litigation and tell war stories that are designed to precipitate thinking about creative remedies the employer can offer. See Attachment D. I discuss the difficulty in collecting costs and attorneys fees from most claimants. I emphasize the wasted resources in diverting energy from the mission of the business enterprise to defending protracted litigation.

Most importantly, I encourage respondents to undertake a cost of defense analysis with their counsel. Generally, respondent's counsel estimate defense costs and legal fees in the $100,000 to $250,000 range even if they prevail in the litigation. Of course, if they lose in a statutory costs and attorneys fees case, one dollar in liability awarded to the claimant usually means that the respondents have to pay claimant’s costs and attorneys fees as well. This can effectively double respondents’ exposure to $200,000 and $500,000 exclusive of the amount of the damages awarded.

While I am usually told that respondents will not settle for the costs of defense because if they settled every case on this basis they would soon be out of business, my experience is that in the individual case respondent employers will seriously consider a settlement demand that is somewhat less than their costs of defense, particularly if claimant will agree to an effective confidentiality clause. Why pay to litigate when you can settle confidentially for less than what it would cost you to litigate and win?

VI. Using The Mediator Effectively

It is the duty of every advocate in mediation to give the mediator enough information to settle the case for the maximum and minimum amounts possible, depending on which side of the table counsel is on. The mediator’s job is to operate in the tension between those two extremes, going back and forth in an attempt to close the gap. The following are some effective tools available to close the gap early, which I utilize when appropriate.

A. Split The Difference

Frequently toward the end of a mediation when the gap between the parties’ expectations has been narrowed significantly and when the parties have gone back and forth three or four times, I develop an intuitive feeling that the parties will agree to settle the case at 50% of the difference between their last stated monetary positions if I propose it. When this happens and I feel confidant about the outcome, I will suggest that the case be resolved on a “split-the-difference” basis. I am astonished at the high resolution rate that results. This tool frequently cuts 2–3 hours off the end of the mediation. However, all other negotiating points must have been resolved except the money for this strategy to work well.

B. Mediator's Proposal

A Mediator's Proposal is a mediator's best guess at the magic dollar number and other terms that have the highest probability of being accepted by both parties following an impasse in negotiations. I strongly resist Mediator's Proposals for several reasons. First, a resolution is much more satisfactory to the parties if they arrive at a resolution that reflects their own settlement terms. Second, mediators who have developed a practice of always making a mediator's proposal when there is an impasse are undermining their own effectiveness because, in my opinion, they are lowering their settlement rates. Clearly, settlements occur less frequently when the parties are negotiating with a view to the inevitable mediator's proposal rather than trying to close the gap themselves because they hold back more knowing the mediator will make a proposal.

Usually I will not make a mediator's proposal unless it has been suggested by one of the parties and is consented to by all parties and then only when I am comfortable that there exists a high probability of it being accepted by all sides. Once I make a mediator's proposal my effectiveness in subsequent settlement negotiations is impaired by my stance in the mediator's proposal if it is rejected.

C. Discovery Negotiations

When counsel is reluctant to proffer potential impasse-breaking evidence because it may educate a party before depositions are taken, I will suggest that the anticipated deponent sign a declaration attesting to the truth of the facts stated in the demand or counter-demand letters or other statements of position.

If an impasse seems to be developing, I will also offer my services to help negotiate an expedited discovery procedure, wherein the parties can stipulate to a limited number of deponents for depositions with time constraints, and to an exchange of documents to help them obtain the information they really need to properly evaluate their exposure and settlement values.

D. Mediator Follow-up

I follow the policy of federal mediators in calendering telephone follow-up in impasse cases wherein I call the parties at intervals to see if there is anything I can do to be useful to help resolve the case. If any party wants to institute further more settlement negotiations before I have called, they call me on a confidential basis and I then call the other side without disclosing that I have been called to get the settlement negotiations going again.

VII. Closure

To avoid buyer's and seller's remorse, once a settlement has been reached it is important for the parties to draft a document memorializing the agreement which will be enforceable in court. Usually I sense when an agreement is going to be reached about an hour before there is a final agreement. When this occurs, I usually recommend to counsel in claimant's or respondent's room to begin preparing a skeletal interim agreement that can be used if the settlement occurs. This usually saves the hour or two it takes to draft and negotiate the document after agreement has been reached.

I prefer that the parties draft a short one or two page skeletal settlement agreement with bullet points on the main issues such as the amount of money, confidentiality, mutual release of claims, dismissal with prejudice, age discrimination waivers if appropriate, and non-disparagement, with simple provisions that the document is admissible in a proceeding to enforce it and that the parties intend to be bound by the settlement terms. This document can be superseded by a more formal document containing the boilerplate which can be drafted by counsel after the mediation. To be enforceable, the document should contain the signatures of the parties.

Finally, I always invite the parties to meet with me together so that I can congratulate them on their achievement and provide emotional closure on an important chapter in their lives. This way, if they see each other at a convention or conference or just in a movie line, they will not feel like they have to avert their to eyes or cross the street to avoid each other.

ATTACHMENT A.

Mediation Confidentiality Agreement

CASE NAME:____

IN ORDER TO PROMOTE COMMUNICATION AMONG THE PARTIES AND THE MEDIATOR AND TO FACILITATE SETTLEMENT OF THE DISPUTE, ALL PARTIES AGREE THAT THE MEDIATOR HAS NO LIABILITY FOR ANY ACT OR OMISSION IN CONNECTION WITH THE MEDIATION, AND FURTHER AGREE AS FOLLOWS:

THE MEDIATOR IS ASSISTING AS A NEUTRAL INTERMEDIARY AND IS NOT ACTING AS AN ADVOCATE OR ATTORNEY FOR ANY PARTY TO THE MEDIATION. NO REPRESENTATIONS BY THE MEDIATOR SHOULD BE CONSIDERED LEGAL ADVICE AND THE PARTIES ARE FREE TO CONSULT WITH LEGAL COUNSEL OF THEIR CHOICE SHOULD THEY WISH TO DO SO.

ALL STATEMENTS MADE DURING THE COURSE OF THE MEDIATION ARE PRIVILEGED SETTLEMENT DISCUSSIONS, ARE MADE WITHOUT PREJUDICE TO ANY PARTY'S LEGAL POSITION, AND ARE NON-DISCOVERABLE AND INADMISSIBLE FOR ANY PURPOSE IN ANY LEGAL PROCEEDING.

THE PRIVILEGED CHARACTER OF ANY INFORMATION IS NOT ALTERED BY DISCLOSURE TO THE MEDIATOR. DISCLOSURE OF ANY RECORDS, REPORTS, OR OTHER DOCUMENTS RECEIVED OR PREPARED BY THE MEDIATOR CANNOT BE COMPELLED. THE MEDIATOR SHALL NOT BE COMPELLED TO DISCLOSE OR TO TESTIFY IN ANY PROCEEDING AS TO (I) ANY RECORDS, REPORTS, OR OTHER DOCUMENTS RECEIVED OR PREPARED BY THE MEDIATOR OR (II) ANY INFORMATION DISCLOSED OR REPRESENTATIONS MADE IN THE COURSE OF THE MEDIATION OR OTHERWISE COMMUNICATED TO THE MEDIATOR IN CONFIDENCE.

SINCE THE PARTIES ARE DISCLOSING SENSITIVE INFORMATION IN RELIANCE UPON THIS AGREEMENT OF CONFIDENTIALITY, ANY BREACH OF THIS AGREEMENT WOULD CAUSE IRREPARABLE INJURY FOR WHICH MONETARY DAMAGES WOULD BE INADEQUATE. CONSEQUENTLY, ANY PARTY TO THIS AGREEMENT MAY OBTAIN AN INJUNCTION TO PREVENT DISCLOSURE OF ANY SUCH CONFIDENTIAL INFORMATION IN VIOLATION OF THIS AGREEMENT.

ANY PARTY BREACHING THIS AGREEMENT SHALL BE LIABLE FOR AND SHALL INDEMNIFY THE NON-BREACHING PARTIES AND THE MEDIATOR FOR ALL COSTS, EXPENSES, LIABILITIES, AND FEES, INCLUDING ATTORNEYS' FEES, WHICH MAY BE INCURRED AS A RESULT OF SUCH BREACH.

WHILE THE CALIFORNIA EVIDENCE CODE SHALL APPLY TO THIS MEDIATION, FOR PURPOSES OF CONFIDENTIALITY UNDER THE EVIDENCE CODE THE MEDIATION DOES NOT END UNLESS AND UNTIL ONE PARTY NOTIFIES IN WRITING THE REMAINING PARTIES AND THE MEDIATOR THAT THE MEDIATION HAS ENDED. THIS CONFIDENTIALITY AGREEMENT AND ANY WRITTEN SETTLEMENT AGREEMENT RESULTING FROM THIS MEDIATION ARE ADMISSIBLE IN ANY SUBSEQUENT PROCEEDING TO ENFORCE THAT VERY AGREEMENT.

DATED ____________, 20__, AND SIGNED BEFORE COMMENCEMENT OF THE MEDIATION BY EACH OF THE PERSONS WHOSE SIGNATURES APPEAR BELOW.

PARTIES:

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ATTACHMENT B.

Mediation Procedures

INITIATING MEDIATION

If all parties have already agreed to mediate, simply call us to discuss preferred dates and locations. If you wish our assistance in obtaining the agreement of others to mediate, call or send to us the name, address, and telephone number of the attorney or other representative of each party whose participation is necessary for a comprehensive resolution.

PRIOR TO THE MEDIATION

The following issues should be addressed:

1. Parties who must be represented at the mediation for productive negotiations to occur.

2. Participants on behalf of each party. Everyone whose decision is necessary for settlement should participate. Personal attendance is strongly preferred, although telephone participation can be accommodated.

3. Information to be exchanged in advance of the mediation session to assist all parties in making realistic settlement decisions during the mediation.

4. Submission of briefs summarizing the facts, claims asserted, defenses, litigation history and settlement negotiations is encouraged. Briefs should not exceed ten typed pages (plus exhibits) and should be received by the mediator at least five business days in advance of the mediation. Briefs can be exchanged, or submitted in confidence.

AT THE MEDIATION

Generally, the mediation will begin with the mediator visiting with each party separately, followed by a joint session attended by all participants. Please come prepared to summarize your position during the joint session. You may utilize whatever presentation you believe most effective, including charts, audio-visual, and oral presentations by counsel and principals. Bear in mind that the goal is not to prove a case but to clarify your views for decision makers among the other parties while educating the mediator.

The joint session is followed by private confidential caucuses between the mediator and each party. In caucus, you can discuss information which may assist in working

toward a resolution, but which you would prefer not to disclose in direct negotiations. The mediator will play devil's advocate to help all parties gain the most balanced possible evaluation of the matter. Finally, the caucuses provide an opportunity to assess realistic options for resolution, without endangering any party's negotiating posture.

Caucusing will generally continue until an option has been developed which all sides feel is acceptable. You may then wish to draft and execute a short memorandum of the settlement agreement stating the key terms.

FOLLOW-UP

If a resolution is not reached in the initial mediation session, the parties may elect to authorize follow-up. This can consist of telephone caucusing, further investigation or information exchange among the parties, and/or an additional mediation session.

CONFIDENTIALITY

Unless the parties agree otherwise, all statements made in the course of joint sessions are privileged settlement discussions. All parties **must** agree that any statement made or information disclosed to the mediator in private caucus is privileged and that disclosure cannot be compelled under any circumstances. All records, reports, or other documents prepared by the mediator or submitted to the mediator in confidence by any party are confidential, and disclosure cannot be compelled under any circumstances. Mediation files are sanitized after a mediation is concluded.

ATTACHMENT C.

Inducing Claimants To Disclose All Of Their Distress Symptoms

(When the briefs or joint session do not disclose any significant emotional distress symptoms, I tell the following story in claimant's caucus room because it opens up claimant's to disclosing every symptom they have experienced as a result of the employment situation. I tell claimants that they may have experienced symptoms that are embarrassing or shame-based that they are reluctant to disclose even to their own counsel, that it is much easier to talk about the details in the private confidential setting of a mediation, and that they will come out in a public trial. I am continually amazed at how many reticent claimants open up after I tell this story.)

Claimant, a woman, had been sexually harassed, assaulted, raped and sodomized by a male supervisor in an isolated unpopulated company warehouse on a Saturday afternoon. Six hours into the mediation I noticed that neither she nor her counsel had described any significant emotional distress symptoms experienced as a result of this alleged vicious, forcible sexual attack. Without consciously knowing why, my intuition compelled me to tell the story of a man I had represented years ago in an age discrimination case who had been peremptorily terminated for his alleged failure to meet sales goals after he had gone from an annual income of $100,000 a year to $500,000 a year in a short period of time. He had bought a multi-million dollar home in an exclusive community, had joined the country club and his wife had joined several women's clubs. Upon his termination, he became severely depressed. His wife left him and he lost his home. Ultimately, he had been forced to file for bankruptcy. After representing him for six months, my client finally disclosed to me that he had become sexually impotent and had had to obtain a penile implant to enable him to achieve and maintain an erection.

When I finished telling this story to claimant in the sexual assault mediation, there was a long silence. Claimant then asked me to leave for a few minutes. When I was called back into her caucus room, her lawyer, looking embarrassed, told me that his client had something to tell me. She then proceeded to thrust her exposed wrists toward me, which where badly scarred from a razor blade suicide attempt that she had made the day after the sexual assault. She further disclosed that following the suicide attempt, she had been involuntarily committed to a mental facility where she was placed on suicide watch for thirty days. When I asked her why she had neglected to tell her lawyer this, she said that she wanted to be "strong" for him and that her suicide attempt was very shame-based and embarrassing to her because she was a Catholic.

The case settled shortly after obtaining her consent to disclose this information to the employer respondent. Respondent, of course, substantially increased its offer after this information became known. Respondent's counsel appreciated receiving this information - which had not been elicited in her deposition - because it would have been much more expensive for the respondent had it been disclosed for the first time at trial.

ATTACHMENT D.

Storytelling In Employment Mediation Encourages The Parties To Create Their Own Settlement Terms

Parties in mediation are often more knowledgeable than the mediator concerning how their needs and interests can best be met. Storytelling early in the mediation often serves as a powerful catalyst in encouraging the parties to engage in their own creative brainstorming. The following are creative settlements that have actually arisen in recent employment mediations, the telling of which has led to creative settlements in subsequent mediations.

The Plaque On The Hospital Lobby Wall

Claimant had been the lead registered nurse in the emergency room at a large metropolitan hospital. She had worked for the hospital for thirty years and was terminated when the hospital brought in a new emergency room manager who wanted his male assistant from his former employment to replace claimant. While there existed very thin evidence of sex and age discrimination, enough circumstantial evidence was available to allow claimant to survive summary judgment. Claimant was in her early sixties and highly sympathetic. She felt unappreciated, unacknowledged and betrayed. She demanded $1.6 million because of her anger and difficulty in finding other comparable employment. After several hours, her $1.6 million demand had been reduced to $1.2 million, while the employer's response had gone from $100,000 to $250,000. With such a wide dollar gap, we seemed to be at impasse. The respondent employer negotiating committee wanted to walk out.

Desperate to keep the parties talking, respondents were again asked to review what claimant had expressed about her emotional needs. Earlier she had said she felt angry and hurt because she had never been acknowledged for her many contributions to the hospital during her thirty years of employment. When claimant was asked to tell us more, she remembered that when she was in her fifth year, she had founded the hospital's highly successful monthly employee newsletter. She said the chairman of the board of the hospital had said, "Thanks Jane, we appreciate that." This was the only time she could remember being acknowledged and she felt unappreciated.

The employer committee was again pressed for ideas about what they might do to acknowledge her. After a long caucus, they could not think of anything other than offering

to insert a paragraph in the next issue of the newsletter thanking her for her contribution. When this proposal was made to her, she said that she would appreciate this gesture, but she would not reduce her dollar demand further.

The employer committee was again pushed to think of other ways they might acknowledge her. They had no ideas. Finally, when asked what they did, if anything, to acknowledge substantial non-employee contributors to the hospital, one member blurted out, "Well, if you make a contribution of $10,000 or more, you get your name on a gold plaque on the beautiful marble donors' wall in the hospital lobby." After a long caucus, they said they would be happy to put claimant's name on the wall.

When asked "What if the hospital was willing to do this for you?", claimant's entire demeanor changed. Her frown lines and facial grimaces softened and she said "God, that would be wonderful. I could bring in my husband, my children and my friends to show them and my name would be up there forever." The case settled shortly thereafter, for much less than her last stated dollar demand, but with her name on the lobby wall!

The Frequent Flyer Mileage Settlement

Claimant had worked for 20 years for an international airline, initially as a sales ticket representative working behind the reservations counter at the airport. Following a severe stroke, claimant had been transferred to perform back-office clerical work because she was considered "cosmetically unacceptable," i.e., the airline was afraid that if customers saw her disabled body, they might think that the airline was using similarly disabled pilots. Claimant had spent the last fifteen years undergoing rehabilitation and was fully recovered except for a slight tremor in her right hand. When claimant's bid for a transfer to her original ticket selling position was denied for the same reasons, she filed a disability discrimination lawsuit.

Claimant demanded over $2 million in settlement. The airline and its counsel acknowledged there could be a substantial punitive damages award because of the sympathy claimant would engender from a jury. We met in five mediation sessions over a two month period. The airline would not settle for anywhere near claimant's demand. We spent the second and third sessions discussing the possibility of the airline, as part of a lower cash settlement, producing a disability discrimination videotape for all of its employees, with claimant as one of the actors. The airline's negotiating committee members were excited about this possibility, but ultimately could not obtain approval from their superiors.

By the fourth mediation session, everyone felt hopeless. However, during private caucusing claimant disclosed a long history of her and her family working for airlines. Her mother and father, brother and two sisters were or had been airline employees. They all loved to travel and employee travel perquisites were very important to them. When claimant was asked why she was not budging from her $2 million demand, she disclosed that this was the amount that would allow her and her husband to be able to travel during their actuarially predicted life spans after deducting costs and attorneys fees. A light bulb

went off in my head. The airline was then asked to consider offering her frequent flyer miles rather than a large cash settlement to allow her to satisfy her needs and interests.

Shortly thereafter, the case settled for several million frequent flyer miles and a six figure cash sum sufficient to cover her costs and attorneys fees. Claimant now has sufficient frequent flyer miles to fly anywhere in the world without limitation, to utilize the airline's airport lounges, and to obtain upgrades. The airline is happy because it did not have to reserve for this liability or draw a large cash settlement check, which, of course, would have to have been disclosed to shareholders in government securities filings.

Telling these stories inspires parties to think creatively about their own circumstances and empowers them to resolve their disputes with their own solutions. For instance, telling the stories about the plaque on the hospital wall and the frequent flyer mileage settlement during a recent sex discrimination mediation involving a large national jewelry store chain led to a settlement wherein claimant obtained the right to walk into a member store with a gift certificate entitling her to select an item from each of the chain's last two catalogues!

ATTACHMENT E.

Decision Tree and Discount Model Analyses

If the case is worth $200,000 to $400,000 at trial, including costs of $40,000 and attorneys fees of 45% ($90,000 and $180,000, respectively), it is worth less than $50,000 to $90,000, respectively, if settled today based upon a 5% discount model analysis (assuming 5 years to collect on the judgment) and upon a 50-50 decision tree analysis vis-à-vis the probability of prevailing at trial.

Decision Tree & Discount Model Analysis	**CASE A**		**CASE B**	
	If Litigated & Won	If Settled Today	If Litigated & Won	If Settled Today
	$200,000	$50,000	$400,000	$90,000
Less Costs	-$40,00	-$3,000	-$40,000	-$3,000
	$160,00	$47,000	$360,000	$87,000
Less Attorney's Fees	-$90,00 (45% of $200k)	-$16,666 (33% of $50k)	-$180,000 (45% of $400k)	-$27,997 (33% of $90k)
	$70,000	$30,334	$180,000	$57,003
Less State & Federal Income Tax	-$28,000 (taxed at 40%)	-$9,100 (taxed at 30%)	-$90,000 (taxed at 40%)	$19,951 (taxed at 30%)
	$42,000	$21,234	$90,000	$37,052
Less 5% Discount for 5 Years	-$10,500	$0	-$22,50	$0
	$31,500	$21,234	$67,500	$37,052
50/50 Probability of Winning/Losing	= $15,750	=$21,234	= $33,750	= $37,052