ATLANTA BAR ASSOCIATION

ADVANCED EMPLOYMENT LAW: NEGOTIATE, MEDIATE, SETTLE

MARCH 18, 2010

FACILITATING EARLY SETTLEMENT OF LITIGATION

Penn Payne
Penn Payne, LLC
3586 Tuxedo Park NW
Atlanta, Georgia
(404) 841-3295
ppayne@pennpayne.com
www.pennpayne.com

TABLE OF CONTENTS

FACILITATING EARLY SETTLEMENT OF LITIGATION

Penn Payne
Penn Payne, LLC
Atlanta, Georgia

INTRODUCTION

Most litigation is resolved through settlement rather than through trial. Indeed, Eleventh Circuit statistics show that "nearly 95% of all federal civil cases settle before trial."[1] Experienced litigators can often make reasonably accurate judgments about whether a specific case will or will not settle. Sometimes, a lawyer is sure that a case will eventually settle, and the only genuine questions are "when?" and "for how much?"

In many cases, the settlement occurs shortly before trial or right before a summary judgment motion is due to be decided. By that point in the litigation process, the parties have already spent a great deal of money in attorneys' fees, expert witness fees, deposition costs and other out-of-pocket costs of litigation. If a company is one of the parties, it has also expended significant resources in the form of employee time spent producing documents, answering interrogatories, giving depositions and being available to the attorneys, as well as in the form of the lost productivity resulting from disruption to operations and distraction from the company's real objectives. If the plaintiff is also a business entity, it has expended similar funds and resources, and an individual plaintiff has usually had to take leave time to attend depositions and has had to endure the aggravation of litigation. Clearly, if a case that settles in the late stages of

[1] Shafton, Robert M., "The Pros and Cons of Mediation - A Random Survey," *Los Angeles Daily Journal*, November 8, 2000, reprinted with edits by the California Western School of Law's National Center for Preventative Law at HYPERLINK "http://www.preventivelawyer.org/main/?pid=adr.1.htm" http://www.preventivelawyer.org/main/?pid=adr.1.htm (quoting Mori Irvine, Circuit Mediator for the 11th Judicial Circuit, Atlanta Georgia as cited in The Journal of Appellate Practice and Process, Vol. 1, No. 2, 1999; Publisher: University of Arkansas School of Law).

litigation had been settled early in the process, or even before actual litigation was commenced, the parties would have avoided a substantial part of the burden that litigation imposes, and both parties may very well have reached a better net end result.[2]

What are the roadblocks which prevent a case from settling earlier rather than later? What can parties and their lawyers do to overcome these roadblocks in order to accelerate the settlement process? This article addresses these questions, and sets out specific tactics that will help bring the parties to a mediation or the settlement table as early as possible and will increase the odds that the case will settle before the parties' litigation costs begin to skyrocket.

EVALUATE THE EARLY SETTLEMENT POTENTIAL OF THE CASE

The first roadblock to early settlement is to attempt to settle a case that is an obviously poor candidate for this type of effort.[3] Some cases have characteristics that help to promote a successful mediation and an early settlement; others have characteristics that indicate the likely futility of early settlement. The parties' lawyers should therefore undertake an evaluation of the case in consultation with the client, to determine whether it is a reasonable candidate for early settlement.

The following are positive indicators for early mediation and settlement, and the more indicators that are present, the more likely the case is to settle early.

- The plaintiff is motivated more by money than by "principle" or "honor" or "revenge." Likewise, the defendant views settlement as a business decision rather than as a matter of "principle."

[2] See generally, Chvany, Barbara, "Using Mediation Effectively," Litigation and Administrative Practice Course Handbook Series, Practicing Law Institute, 2000 (found in Westlaw at 625 PLI/Lit 745).

[3] If a company has a standing policy that it will attempt early settlement of all cases, then this initial evaluation is not essential in making the decision to attempt settlement. The evaluation is, however, helpful in deciding the amount of resources and how much time to invest in an attempt to settle.

- The parties' attorneys are either experienced enough with the applicable area of law or have done the research necessary to be knowledgeable, so that they can give their clients a preliminary and realistic evaluation of the case.
- One or both parties have signaled, even obliquely, a willingness to develop a bargaining strategy and to think about positioning the case for early mediation and settlement.
- One or both of the parties see some value in preserving the relationship with the opposing party.
- The opposing attorneys know each other and have some measure of respect for each other, or if they don't already know each other, they are able to establish a reasonably civil, professional relationship quickly.
- The attorneys' fees to defend the case through summary judgment could be more than the monetary damages that the plaintiff could reasonably expect to receive in settlement.
- An individual plaintiff's claims for emotional distress, punitive damages, pain and suffering, or other "soft" damages are not supported by substantial evidence.
- The opposing attorneys are familiar with the process of formal mediation, having either mediated cases as advocates or served as mediators themselves.
- The clients have a measure of trust in their attorneys' judgment about the valuation of the case and place a fair amount of discretion and authority in their attorneys. This factor is particularly important with respect to an individual plaintiff and his or her attorney. It is not a positive indicator of

early settlement, however, if the attorney himself or herself proves to be a roadblock to settlement.

- The clients (not only the attorneys) understand through experience that the attorneys' fees will escalate rapidly once discovery begins.
- In a contingent fee case, the plaintiff's attorney understands that the investment of time necessary to litigate may escalate so much once discovery begins that it will quickly become impossible to settle the case for a reasonable sum without sustaining a loss and that there will be a very real risk of losing everything at summary judgment. In addition, early successful mediation and settlement are more likely when the plaintiff rather than the attorney is paying the costs of litigation, especially the deposition costs and expert witness fees, and the plaintiff understands that the cost of doing the necessary discovery will be substantial on an individual's budget.

Some cases are not good candidates for early mediation and settlement, and it is a waste of resources to try to settle them. Moreover, the failure to settle might undermine a company's dispute resolution policy and practice. The following characteristics identify cases that are unlikely to settle early:[4]

- One party or one lawyer does not have a business point of view and/or is extremely irrational and emotional.
- One party or one lawyer genuinely believes that his case is so strong that a large judgment or settlement, or an unequivocal defense verdict or summary judgment, is likely if the case moves through discovery and toward trial. Unless the other side agrees that its position is weak and that it urgently

[4] See also Chvany, 625 PLI/Lit 745.

needs to settle, the parties will almost certainly be too far apart in their evaluation of the case to make progress toward settlement early in the litigation.

- One party wants to make an example of the opposing party in order to "send a message" to other vendors, consumers, customers, employees, members of the same industry or the public at large.
- One party is using the litigation to obtain a competitive advantage.
- One party has a substantial economic advantage over the other party and is willing to spend the money to litigate extremely aggressively in order to exhaust the other party's resources.

ROADBLOCKS TO EARLY MEDIATION AND SETTLEMENT AND WAYS TO OVERCOME THEM

Once the parties and their lawyers decide that a case has a reasonable chance of settling early and that it is in their interest to accelerate the settlement process, what are the typical roadblocks that the lawyers should analyze? What steps can the lawyers and clients take to overcome those roadblocks and to maximize the odds that early settlement efforts will be successful?

Lack of Information

The single most important factor necessary for dispute resolution which is generally missing in the early stages of litigation is information about the case. When the parties have not yet undertaken discovery, their knowledge of the facts of the case is incomplete, and at least some of the information that they do have may be unreliable. Having information about the claims and defenses is key to the parties' willingness to resolve a dispute. Without basic information about the dispositive issues in the case, the

parties cannot evaluate their respective strengths and weaknesses and are therefore extremely reluctant to place a dollar value on the claims. A critical component in the success of early mediation or settlement, then, is to accelerate the exchange of information relevant to the dispositive issues in the case, whether that exchange is formal or informal.[5]

A party who wants to engage in early mediation or settlement discussions may have already done some preliminary, internal work investigating and developing the facts of the case. The party should accept the fact that it must budget for additional early fact investigation in order to prepare for early settlement. The party's attorney can then propose to opposing counsel one or more of the following: an informal exchange of a limited amount of information about the important aspects of the case; taking one or more depositions; allowing counsel for each side to interview a particular witness; a settlement meeting with the parties present; responding to a limited number of interrogatories; producing certain documents; or any other method for conveying information that the attorneys can devise.

The specifics of the proposed sharing of information will be dependent on the type of case and the facts that are actually known to one party or the other at the time. The methods that the attorneys use to exchange information will be limited only by their own creativity and flexibility. For example, even if the case is complex, information can be exchanged in more than one wave or round, and the parties will still be positioned to develop their bargaining strategy at far less expense than if they engaged in full-blown discovery.

[5] See generally, e.g., Benien, Ruth M., "When to Initiate Settlement in Employment Cases (Winning Without Trial)", cover story of 6/1/96 TRIAL-MAG 34 (found in Westlaw at 1996 WL 13323029).

If one side balks at providing information that the other side believes it needs in order to settle, or if other potentially fatal disputes develop during the course of the exchange of information, the parties can ask the mediator to work with them for the purpose of resolving these disputes. Alternatively, if the case is complex, or if the information disputes are anticipated to become especially acrimonious, the parties can ask the mediator to work with them from the very beginning of the information exchange to its end in order to facilitate the process.

Litigation Has Not Yet Become Protracted and Expensive

In the early stages of a lawsuit, or before it is filed, the unpleasant realities of protracted litigation often have not yet settled in on one or both of the parties. They have not yet had the actual experience of being worn down by the process; they have not yet had to expend substantial resources; they have not yet experienced the frustration of adverse court rulings on motions which they firmly believe they should have won. Even though their lawyers may tell them at the outset to expect frustration, delays and the pain of paying out a large amount of money to attorneys, the parties may regard these factors only with a theoretical understanding and not at a more visceral level. Later, however, by the time the parties have been though a year or two or more of litigation, their understanding is no longer theoretical, and they are more likely to be ready to stop the outflow of resources and to end the warfare.

In the situation where one party, typically the plaintiff, is an individual or a small business managed by a few individuals, and where those individuals have not experienced business-related litigation before, this roadblock is especially difficult to overcome. These parties often have unrealistic expectations about the outcome of the case, about the way their opponents will react to a lawsuit, about the pace of the

litigation process, about the financial costs, and about the personal costs in the form of anxiety, anger, frustration, attacks on their character or business judgment, and invasion of their privacy. When the dispute is between two or more large companies, with no individual parties involved, this factor may be less important because the company representatives may already know through experience what protracted litigation is really like and know that they would prefer to avoid it if there is a viable alternative.

Simply telling an unrealistic party that he or she will eventually become so frustrated with litigation that settlement will look like a good alternative usually does not register with, and is not persuasive to, that unrealistic party. Subjecting an unrealistic opposing party to a dose of reality, however, at the earliest point in the litigation by means of taking his or her deposition, for example, or serving a particularly burdensome set of document requests or interrogatories, sometimes causes the party to begin to understand the unpleasant aspects of litigation. Similarly, if it is your own client who is unrealistic, he or she may be more amenable to settlement when forced to begin spending money. Another method for injecting reality into the litigation process is to have both your own client and the opposing party hear an evaluation of the case from an "early neutral evaluator," as discussed below. These tactics may then cause the reluctant party to agree to mediation or settlement discussions earlier than he might have otherwise, thereby initiating the settlement process at a point when there have been only minimal discovery costs.

Fear of Appearing Weak

Some parties are reluctant to initiate early mediation or early settlement discussions because they are concerned that doing so will make them appear weak or

overly anxious to settle. On the other hand, an opposing party may believe that anything the other side proposes, particularly at an early stage, is sure to be a bad deal.[6]

Companies can address these concerns if they develop and consistently apply a policy regarding early settlement of cases. A company that is serious about settling cases early can establish and implement a standing policy that, as a matter of sound business practice, it will attempt early settlement of all cases of a certain type or with certain characteristics, such as all non-class action product liability cases or all cases brought by or against suppliers. If such a policy is in writing and is uniformly applied, then in any particular case, the company is not acting from weakness or from a desire to lure the opposition into a bad deal, but simply from its standard policy.[7]

The company's counsel can then articulate the policy to opposing counsel and state with credibility that the company is serious about obtaining an "early reasonable disposition" of the case and is acting in good faith. Counsel can also describe other cases that have settled early as a result of the company's policy, if appropriate and helpful under the circumstances, and can emphasize that the company will actually invest some resources in investigating the facts of the case, as long as the opposition will do the same.

The policy can also provide that if early settlement negotiations fail, the company will proceed with aggressive litigation and will not engage in further settlement

---

[6] See Fitzpatrick, Robert B., "Non-Binding Mediation Of Employment Disputes: An ADR Method That Is Consistent With The American Promise Of Fairness," © 1994, 1995, 1996, 1997, published by the American Law Institute - American Bar Association Continuing Legal Education program on Civil Practice and Litigation Techniques in the Federal Courts and incorporated in the ALI-ABA Course of Study Materials, February 25, 1998 (found in Westlaw at SC57 ALI-ABA 615).

[7] For a discussion of the value of such a policy, see Aronson, Peter, "How Not to be Sued," found at http://www.privatedisputeresolutionservices.com/nottobesued.html. For suggestions on setting up an in-house policy and/or ADR program, see, e.g., http://www.mediate.com/workplace/woodrow.cfm; http://www.acca.com/infopaks/adrcont.html; http://www-hr.ucsd.edu/~employeerel/complete.html (describing University of California San Diego's internal ADR policy and procedure).

discussions until at least the close of discovery. The company will thereby communicate the message that now is the time to settle, not six months or a year down the road, after company resources have already been expended. It is absolutely essential to implement this part of the policy in order to provide an incentive for opposing parties to engage in settlement negotiations in good faith. They must understand that there is a price to pay for failing to settle early. In this way, the company will develop the reputation for being reasonable, yet tough-minded.

The Reluctant Opposing Party or Lawyer

Sometimes, in the best case scenario, both parties recognize the benefits of early mediation or settlement discussions and mutually agree that they will seriously discuss settlement using an agreed-upon settlement facilitation procedure. On the other hand, if the opposing counsel and/or client is reluctant to engage in settlement discussions, the following points may help to persuade them that settlement efforts are appropriate and in the best interests of both parties.[8]

Early settlement allows the parties the flexibility to look for creative solutions to the dispute that are not likely to be achieved in litigation and to do so in the context of the business realities of the parties. For example, in a product liability claim the defendant manufacturer could offer solutions that address an injured consumer's desire to make sure that the injury does not happen to other consumers, such as setting up a consumer safety advisory council. In an employment discrimination case involving termination of employment, the company could offer to pay for job retraining. In a

[8] See also Barry, Nelson C. III, "MEDIATION: Getting Your Client and the Other Side to the Table," found at http://www.mediates.com/drsprcnb.html.

sexual harassment case, the company could offer to pay for counseling or therapy for the alleged victim. In short, the company can make offers that are consistent with its business operations and can address personality conflicts or miscommunications between its representatives and its customers or suppliers, among its employees, or among its business partners or joint venturers.[9]

If the parties have an interest in preserving their relationship in some form or another, early mediation increases the likelihood that they will do so. Cutting short the highly adversarial, possibly bitter and certainly anger-producing process of litigation makes it possible for parties to resolve a dispute quickly, remain amicable, and continue to work together for mutual benefit.[10]

The attorney representing a defendant company can point out to an individual plaintiff's counsel that money that would otherwise be used for attorneys' fees and costs of litigation may be available, in whole or in part, at the outset of the case for settlement purposes. Once the company has started down the all-out litigation path, however, that money will be gone, along with the company's incentive to settle.

The confidentiality that is available in the early mediation context may serve the interests of all parties. Often, individual plaintiffs believe that they have damaging information that will force the company to settle rather than risking the revelation of that information. These individuals may fail to understand, however, that the defending company may well unearth equally damaging information about them. Countervailing

---

[9] See Levy, Jerome S. and Prather, Robert C., Texas Practice Guide, Alternative Dispute Resolution, Ch. 3. ADR Strategies, Sec. III Establishing Overall Strategy for ADR Process § 3:17 (found in Westlaw at TXPG-ADR CH 3.III § 3:17); Kasperzak, R. Michael Jr., "Using Mediation To Reduce Litigation Costs," http://www.mediates.com/drsusingmed.html.

[10] See Kasperzak, http://www.mediates.com/drsusingmed.html; see also Cooley, John W., "The Use of Alternative Dispute Resolution In The Settlement of Attorney Fee Disputes" (found in Westlaw at 609 PLI/Lit 829).

threats of disclosure may create an equilibrium that brings the parties to the bargaining table. The earlier in the process that the parties can agree on confidentiality as an aspect of settlement and settlement negotiations, the more likely that sensitive information can be protected and negative publicity can be avoided.

Troublesome Personality Traits of the Opposing Lawyer or Party

"Listening, patience, candor, empathy, balance and creativity are more effective in achieving settlement than argument, detail, aggression or inflexibility."[11] If a lawyer for any party to the dispute has only one style for all occasions – a style that is argumentative, aggressive or inflexible – that lawyer will be a roadblock to early settlement. The same is true if one or more of the clients has those same traits. Unfortunately, one side's intransigence can prevent early mediation or settlement discussions from getting off the ground at all or can seriously undermine them during the process.

If the opposing lawyer or party is unyielding, argumentative and unreasonable, a party may be able to overcome this roadblock by selecting as its attorney a person who has a wide range of characteristics and skills to call upon as the situation demands. An attorney who has a reputation as a tough litigator, but who also has negotiating skills and a personal style that is not unduly antagonistic or inflammatory, can be the antidote to the unreasonable opposition. Such an attorney can be rational, analytical, and flexible enough to work around problems rather than allowing problems to call a halt to the settlement process. This person can also be firm and unyielding when it is important not to compromise, but not merely as a matter of ingrained personal style

[11] Chvany, 625 PLI/Lit 745.

and habit.[12] That attorney may then outflank the opposing attorney through persistence, reasonableness and creativity.

IDENTIFY AND IMPLEMENT THE BEST PROCESS FOR CONDUCTING SETTLEMENT NEGOTIATIONS

Once the parties have agreed to come to the bargaining table, they must identify and agree upon the structure for the settlement process that best fits the case and the parties. While there are a number of different processes that may be used productively, either alone or in combination, it is essential that the structure is well-defined and agreed-upon by the parties in advance.[13]

Settlement Negotiations Conducted by the Lawyers and Clients

In some cases, the lawyers and their clients can work out a settlement without outside intervention or neutral assistance, especially where the potential damages do not justify the cost of a mediator or other neutral person. The following procedure is essentially a mediation without a mediator, and it is one way to structure this type of negotiation.

- The parties and their lawyers must agree in advance on the ground rules. These ground rules include:
    - The attorneys agree to do a preliminary fact investigation in preparation for the settlement meeting, and further agree to disclose the basic facts without waiting for formal discovery requests. Either in addition to or instead of this basic fact investigation and disclosure, the attorneys agree to do a very

[12] Levy & Prather, TXPG-ADR Ch.3.III at § 3:24.

[13] For an in-depth discussion of the phases of mediation, suggested terms of an agreement to mediate, and keys to success, see Fitzpatrick, SC57 ALI-ABA 615.

limited amount of specific discovery, and ensure that each side has enough time to absorb the information obtained by that discovery prior to the opening meeting.

- The attorneys agree to commit at least a minimum amount of time to the opening meeting; the amount of time depends on the case. All people present at the meeting agree to be civil to one another and to listen to the other side's version of the facts.
- Each attorney agrees to avoid bombast, personal attacks, insults and inflammatory rhetoric, and to stick to the facts and reasonable inferences from the facts. For example, defense attorneys should avoid using a phrase like "nuisance value," which can be interpreted by a plaintiff to mean that he or she is personally being labeled as having little value. [14]
- Each attorney agrees to provide at least one case citation to support each dispositive point of law.
- The attorneys prepare in advance of the opening meeting a candid checklist of the strengths and weaknesses of their case, which they do not share with the other side, but which they use to understand their own case and to communicate that understanding to their clients.
- The attorneys agree to come to the opening meeting prepared to identify their client's "interests" as well as their positions, to anticipate the opposing party's interests, and to develop responses

[14] Levy & Prather, TXPG-ADR Ch.3.III at § 3:18.

to the opposing party's interests. The attorneys and parties agree to think in advance about possible non-monetary elements of a settlement. In appropriate cases, the parties may begin the meeting by identifying their interests rather than their positions.

  - The attorneys agree to identify as part of their opening discussion the reasons that an early settlement is mutually beneficial, so that their clients hear those reasons.
  - The attorneys agree in advance that they will either (a) make reasonable opening offers, or (b) will not become indignant about the opposing party's totally unacceptable opening numbers, but will recognize the offer as the posturing that it is and strive to get to real numbers in the next round.
  - The attorneys agree in advance that they will make at least three rounds of offers in good faith before adjourning.
  - The attorneys agree not to walk away from the process of settlement, but to continue it by telephone or email if necessary, or to continue it using a mediator.
  - The attorneys agree that they will play out the negotiating process to its conclusion without trying to circumvent the back and forth of offers and counteroffers.

- The negotiations begin with an in-person meeting of the attorneys and the clients, including individuals with authority to settle. In some situations, it may be counter-productive to have the clients present, but if it is not counter-productive, their presence speeds up the progress toward settlement. The

attorneys agree to give honest consideration to whether their client's presence is helpful or detrimental to the settlement process. If one client's presence is highly likely to be disruptive, that client should not attend, and it is then difficult to exclude one client without excluding all. But the attorneys can work to find the best solution to the situation: persuading the disruptive client not to attend even though the other clients do attend; allowing the disruptive client to attend but neutralizing him or her, such as by having him attend by telephone; or as a last resort, excluding all the clients. In the case of a corporate client, someone with decision-making authority should attend. If insurance is involved, the insurance adjustor should attend. If a client is not present, he or she should be available by phone.[15]

- At the opening meeting, each attorney presents his/her client's side of the story, beginning with the plaintiff's side. The purpose of these presentations is to lay out the persuasive features and educate the opposing side. They ask questions to gain relevant information from each other.
- Once each party has set forth its side of the story and/or presented its interests, and after all mutually beneficial reasons for early settlement have been identified, the parties move to separate rooms. Each group of attorneys and clients then has the opportunity to confer and discuss the information that has been shared by the opposing side.

[15] See Brand, Norman, Importance of Bringing the Right People to the Mediation, © 1996, found at http://www.mediates.com/drs-sfdaily.html.

- The plaintiff's attorney next makes a demand addressed to the defendant's attorney, for a specific amount in damages, if he/she has not already done so, with itemizations to back up the demand.
- After conferring with his/her client, the defendant's attorney makes a counter-offer, with itemizations. The offer and response continue for at least two additional rounds, or more, if the parties are willing to stay engaged in the process.

If the parties come to an impasse on an important issue, such as disclosure of certain evidence, then they should consider asking for assistance from a mediator on the specific point of contention, and continue negotiating in that context. If the nature and magnitude of the litigation warrants it, they should consider having a mediator on tap and ready to respond quickly in the event the mediator is needed. (In other words, the parties should agree in advance on the selection of the person to be their mediator and not interrupt the settlement negotiations for a lengthy period of time while they find an acceptable person.)

If the parties succeed in narrowing the gap between the demand and offer, but become unable to close the gap, they should also consider bringing in a mediator or neutral evaluator, or even an arbitrator who is given binding authority. That ADR professional would then mediate, evaluate or arbitrate in the space between the most recent offer and counter-offer.

Early Neutral Evaluation

Early neutral evaluation occurs when the parties invite a neutral person, experienced in the area of law at issue, to hear and/or read about the facts and the governing law and then to express an opinion about the strengths and weaknesses of the

parties' respective cases. If requested to do so, the evaluator will also express opinions about the likely outcome of the case if it were to stay on a litigation track, and about the value of the claims. This outside opinion can help to bring a dose of reality to parties who have unrealistic assessments about the strength of their case and can break an impasse, particularly if the impasse has been created by the client rather than the lawyer.

This procedure can also be used as the initial process for attempting an early settlement, before an impasse arises. In order to be effective, however, it must be coupled with some of the features of lawyer- and party-conducted settlement negotiations listed above, especially the exchange of information or limited discovery.

After the neutral evaluator has expressed an opinion, the parties may consider requesting that the evaluator serve as a mediator and continue working with them to mediate the case to settlement. If the parties anticipate that they may want to use the evaluator as a mediator, they probably should not request an opinion on the value of the claims, because the evaluator may then be perceived as no longer neutral, once he or she has weighed in that issue. The parties should also be certain that the evaluator has the skills and experience of a mediator before assigning him that additional role.[16]

Early Mediation Structured Using the Features of Lawyer- and Party-Conducted Settlement Negotiations

In order to increase the odds that an early mediation will be successful, the parties should agree in advance to more procedural points than they might otherwise if the mediation were taking place after motions practice, after the close of discovery or

[16] For additional discussion of evaluative mediation, see ADR information and glossary of terms © 2000 by Bickerman Dispute Resolution, PLLC, found at http://www.bickerman.com/process.shtml; ADR glossary of terms © 2000-2002 by Suretec Financial Corp., found at www.suretec.com/glossaries-dispute.htm.

after a ruling denying summary judgment or granting only partial summary judgment. Most importantly, they should agree to the exchange of information or to limited, specific discovery, as discussed above. The mediator can be used to help the parties agree on the nature of the information exchange or discovery. Further, it is essential that all the parties and decision-makers with authority to settle be physically present at the mediation.[17] Again, the mediator can help to enforce this point.

Virtually every other item on the procedure outlined above for lawyer-conducted negotiations, or some variation on it, will translate into an early mediation, with two notable exceptions. First, the negotiations should not necessarily be continued by telephone or email after the mediation session. Because the mediator is physically present and able to facilitate the offers and counter-offers, it is preferable to conduct all the negotiations during the mediation session. There may be some situations, however, where a cooling off period of a day or so is productive, but it is also risky because it may derail the progress that has already been made at the in-person session. Second, it is not necessary to mandate a certain number of rounds of offers and counter-offers, because the mediator can keep the process moving for as long as it seems to be productive.

One item that is not on the list of procedures for lawyer- and party-conducted negotiations but that is extremely helpful in mediation (and has become the standard practice) is a brief, written, confidential statement from each lawyer to the mediator

[17] Unlike the lawyer- and client-conducted settlement negotiations, where in a limited number of situations the presence of a particular client may be counter-productive, it is rarely a good idea in mediation to allow any client or decision-maker to be absent or to attend only by phone. If a difficult client is present, the mediator will be more able to perceive that the person is creating roadblocks to settlement and to exert some control over his counter-productive behavior. Furthermore, it is generally more productive in mediation, on balance, to have even a difficult client present in order to go through the process with the other parties than it is to isolate a potentially disruptive person.

setting forth the facts as they believe them to be and their theory of the case. This statement jump-starts the mediator's education about the case and makes the mediation session more efficient. Each party can designate certain facts that are in the statement as information that the mediator is or is not authorized to convey to the opposition. Moreover, forcing the parties to commit the facts and legal theories to paper at an early stage of the dispute makes them think critically about the strengths and weaknesses of their respective cases.

CONCLUSION

If a case has some of the characteristics that, objectively, make it a realistic candidate for early settlement, if the parties and attorneys subjectively have at least a minimal interest in settling, if the parties and attorneys give serious thought to the settlement procedure that is appropriate for the particular case and then implement it with at least a minimum of good faith, the odds are that the case can be settled earlier rather than later, thus conserving the resources of the parties and the judicial system.

Penn Payne serves as a mediator and arbitrator for employment, restrictive covenant and commercial disputes and conducts independent investigations of employee complaints for corporations and government entities or their outside counsel. She has broad experience in employment and restrictive covenant law, and her proficiency as an arbitrator, mediator and investigator is based on 28 years of litigating disputes for both plaintiffs and defendants and providing sound business judgment and common sense solutions to her clients. Over the past several years, Penn's expertise has been recognized by her peers through her inclusion in The Best Lawyers in America; Who's Who Legal USA - Management Labour and Employment; Who's Who Legal USA - Arbitration; Georgia's Legal Elite published by *Georgia Trend Magazine*; and The Guide to the Best Attorneys in Georgia published by *Atlanta Magazine* (as a Georgia "Super Lawyer" in employment litigation). She is on the Employment and Commercial Arbitration Panels of the American Arbitration Association and conducts arbitrations and mediations throughout the Southeast. Penn received her undergraduate degree from Stanford University and her law degree with distinction from Emory University School of Law, where she was a member of Order of the Coif.