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Mediation Insights From a Professional Mediator: Part 2

Podcast Transcript

Prevention and Protection

a United Educators Risk Management Podcast

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KIMBERLY: Hello, and welcome to *Prevention and Protection,* the United Educators (UE) risk management podcast. I'm Kimberly Cole, risk management counsel, along with Heather Salko, senior risk management counsel. Hello, Heather.

HEATHER: Hi, Kimberly. I'm happy to be here.

KIMBERLY: Joining us today is Joan Morrow. Joan is a former litigation attorney turned professional mediator, now with over 1,500 mediations and over 20 years in that role. She is based in Virginia, mediates in person in the Mid-Atlantic states, and mediates nationally via video conferencing. She has considerable experience in mediating higher ed and school cases. Joan, thank you for joining us today.

JOAN: It's again my pleasure, Kimberly, to have the chance to talk with you and to your listeners about the mediation alternative to litigation.

KIMBERLY: Thank you, Joan, for the guidance that you provided regarding getting to the table in Part 1 of this two-part mediation podcast series. I urge our listeners to listen to that podcast as well as our **mediation basics** podcast on our risk management website, **EduRiskSolutions**.

Now, after listening to the first podcast, we know that work to prepare for the mediation has been done, and the parties who should be present at the table are there. What should the parties expect to happen on the day of mediation, Joan?

JOAN: As we discussed in the first podcast, if the lawyers have done their job, they will have already provided their clients with a good preview of the process. There are, however, always some surprises at mediation, not always pleasant ones. So, lawyers must tell their clients three things before the mediation. One, whether there will be joint sessions and, if so, for what purpose. Two, whether the presentation by the lawyer or the client will be expected. And three, who will attend from the other side. Each lawyer should discuss all these matters with the mediator beforehand.

KIMBERLY: Why are these things so important?

JOAN: The reason is that if any of these items comes as an unpleasant surprise to the client, there is a very real risk that mediation won't proceed at all, or that the client will be unhappy with their lawyer, the mediator, and the process before it's even started.

KIMBERLY: What else do you think should be previewed?

JOAN: Clients should definitely be told to expect a slow-moving process, and this shouldn't be viewed as a failing. In fact, mediation works because it allows people time to talk about their feelings, to get past negative emotions, to begin to see the case more objectively, and to give up their expectations regarding how much they are going to get or how little they are going to pay. Patience is the name of the game because to rush or pressure the parties through any of these steps will incite resistance and make saying "no" seem better than getting to yes.

KIMBERLY: Thank you, Joan. Now let's talk about joint sessions. We've seen from our experience here at UE that the usefulness of joint sessions seems to elicit varied opinions from attorneys. Some attorneys believe that holding joint sessions where the parties come together before going into separate caucuses provides an opportunity for plaintiffs, particularly those alleging emotional distress, to be heard, which helps move them toward resolution. However, and many of the claims we mediated, counsel agree early on that having a joint session would be counterproductive to resolving a claim. Based on your many years of experience, what do you think?

JOAN: There is indeed a debate among lawyers and mediators regarding joint sessions, with strong proponents in all camps. These being never, always, or sometimes. Since the mediation should be shaped to fit the dispute, the best approach may be to begin with a few questions about the particular dispute to be mediated. First, would a joint session be beneficial or rewarding for the people attending the mediation? Second, would it advance the goal of settlement or any other desired outcome, such as rehabilitating a damaged relationship, providing an apology, or sharing information? And third, if the answer to either of these questions is yes, then how should the joint session be structured to attain that goal and to avoid negative fallout?

Now speaking for the many lawyers and mediators who disfavor joint sessions, I would say that many have arrived at that opinion through bad experiences, namely work counsel or parties engaged in hostile, provocative, or overly adversarial behaviors that made people very angry and quickly found it the death knell to any chance of settlement.

KIMBERLY: That's very interesting. Can you spot these cases in advance?

JOAN: I believe the answer is frequently yes. They can include cases where the relationship between the parties and/or lawyers is so acrimonious, the civil communication is not only unlikely, but the mere sight of the other party would raise the temperature level. Then there are cases where one party for whatever reason will feel intimidated or disadvantaged in the presence of the other party. An example would be putting a plaintiff in the same room with the alleged sexual assailant. Or, as often happens, cases where at least one party simply does not want a joint session. Since what happens at mediation is a matter of party consent, counsel should never let a joint session be dictated by the mediator.

I will confess that the majority of the cases I mediate do not involve joint sessions. When I ask counsel before mediation whether they want to have an initial joint meeting, the answer is generally no. And even at mediation, when I suggest that the parties may want to shake hands at the outset or at the conclusion of a mediation that resolves, the answer is often still no.

KIMBERLY: Taking all this into account, is holding a joint session good or bad? And what about the importance of the parties being heard as part of the process?

JOAN: Allowing parties to be heard is terribly important to them and to mediation success. But it's important to ask a question, namely, just how well will the party be heard in a given joint session? At some joint sessions, a plaintiff's heartfelt, even tearful, account will be received by a defense group that sits with arms crossed, faces red, offering no reaction to what's being said either signal lack of sympathy or a directive from their lawyer to say nothing. When that happens, plaintiffs are likely to feel more upset after the session than they did before it. So, instead of that disaster, a patient listener, also known as the mediator, who meets privately with each side, may be the better candidate to listen to parties vent to express sympathy and understanding about what happened without validating the legitimacy of the legal claim or defense. The bottom line on joint sessions is that the process should be shaped by the parties, the lawyers, and the mediator based on the needs of the dispute and the goal to be accomplished.

KIMBERLY: What you've outlined makes sense as reasons to not have joint sessions, but what are the situations where you found joint sessions to be appropriate? Perhaps more importantly, what have those sessions accomplished?

JOAN: Joint sessions can be very meaningful and enormously helpful in reaching settlements and the degree of emotional closure. I'll give you several examples. First, on a small scale where emotions are not running high, a short session for handshakes, introductions, and expression of hope for a resolution can set a tone of civility, mutual respect, and optimism. That is a really good way to start the process.

Second, people who attend mediation also want an opportunity to meet opposing counsel, to get a brief look at the plaintiff, or to size up the key defense witness. This is especially important for claims professional, for key defense decision-makers who have had no connection with the dispute or any acquaintance with the plaintiff. What's helpful is that these previously uninvolved decision makers can be presented as part of the solution rather than the source of the problem.

A third example is joint sessions where parties can civilly share information, answer questions, and provide explanations. Those can be very productive, can build rapport and trust. Fourth, joint sessions can also be used to solve problems. For example, sometimes the resolution will involve navigating government regulations, tax laws, institutional policies, or some other obstacles to settlement. In those cases, counsel meeting together without clients, and with or without the mediator to discuss possible solutions, can be very helpful. And when the lawyers have a good relationship and trust each other, their candid conversations can slice through hours of mediated negotiation.

Last, but definitely not least, joint sessions can provide a setting for a sincere apology or a statement of regret to a plaintiff who wishes to hear that statement directly from the defendant. I mentioned the wish for a direct apology since I've worked with many plaintiffs who prefer to hear me read a written apology from the defendant and they have to be in their presence. When it comes to apologies, I have to add that there is no underestimating the powerful emotional impact a genuine apology can have on all mediation attendees. An apology is not a substitute for compensation, but it almost always reduces resistance to settlement and makes it much more likely.

KIMBERLY: The information you've shared has been very helpful. Do you have any other thoughts on joint sessions?

JOAN: I do. My remarks regarding joint sessions pertain to the vast majority of employment cases where the plaintiff's only remaining relationship with the defendant is litigation. Where an employment or academic relationship will continue after settlement, a process also needs to be structured. One will likely need to include some joint meetings to rehab that damaged relationship.

KIMBERLY: That's a good point, Joan. And I think you've made excellent points about joint sessions in general, but I think it's time for us to move on. The mediator has, let's say, spent a significant amount of time with each side, helping them to better understand the facts and the legal position of the other side. Now, let's talk numbers. Mediators usually start with an opening demand from the plaintiffs and then go back and forth with offers from there. However, in many of the mediations I've participated in, at some point, one party or even sometimes the mediator will propose a bracket which then brings the mediation to a halt because it's a concept that is particularly confusing to many mediation participants. Could you please explain what a bracket is and when setting a bracket in a mediation might be helpful?

JOAN: The bracket is a monetary range that is proposed to identify an area where the parties might be willing to negotiate. Brackets, generally, aren't needed if the exchange of demands and offers are producing good movement in reasonable settlement ranges. However, there are all too many mediations where the parties are very far apart, often because each side starts at an unrealistic position that in no way reflects where either side is actually willing to settle. So, a perceived outrageous demand often insights a perceived insulting offer, which sets the course for an exchange of small, mutually provocative moves, which I call the baby step, dance of death. This unfortunate negotiating ritual breeds anger, and pessimism, and also wastes a huge amount of time. So, one way to get the parties out of this self-inflicted dilemma is through brackets.

KIMBERLY: Could you give us an example of how this bracketing process works?

JOAN: Let's say the plaintiff has demanded $1,100,000. Defendant has opened with an offer of $40,000 on a case which everyone knows, but isn't saying, has a settlement value many hundreds of thousands of dollars away from where both parties are starting. After five more exchanges of demands and offers, meaning 10 moves, the plaintiff has moved to $925,000 and the defense is at $175,000. Both sides know that their current numbers are unrealistic and that they have lots of room to move but they just can't figure out how to do it. Despite, I would add, many helpful recommendations from their mediator.

So, a bracket advances in negotiations by getting both sides to make a bigger move that narrows the gap while giving each side running room. So, in this case, the defendant might say, "I will offer $350,000 now if your next demand is $650,000." And then it will be my turn again. Now many plaintiffs wouldn't agree to that range at this juncture since defense is moving only $175,000 while the plaintiff's move would be $300,000. But the plaintiff might respond by proposing, "If the defense offers $400,000, our next demand will be $700,000." And then it's your turn.

Now, even if the parties ultimately don't accept the brackets—this sometimes happens—each side will have gained some valuable information, not to mention encouragement. Specifically, the slow-moving defendant at $175,000 has now signaled that they are prepared to negotiate in at least to the $400,000 range and maybe more since they proposed putting $300,000 on the table, while the plaintiff would still be at $650,000. Similarly, the plaintiff has signaled the willingness to negotiate in the $600,000 range since they're proposing to move to $700,000 while the defense is still at $400,000, which may cause the defense to hope that there may be a chance to settle somewhere in the high $500,000s, a caveat here.

Agreeing on brackets can often pick up the pace of the negotiations. But sometimes the parties can't agree on the range and then spend too much time exchanging unacceptable bracket proposals. When that happens, the mediator should encourage the parties to get back to an exchange of offers and demands. At this point, those exchanges are likely to be more fruitful, because each side has seen that there's a greater willingness to move than as indicated by the actual number that the party has on the table.

KIMBERLY: Thank you, Joan. We've seen that at mediations there's a considerable amount of time focused on the monetary aspect. But at UE, we've seen the resolutions of many cases come down to interesting and creative nonmonetary considerations. For example, in some of our death claims, we've seen schools designate an area on campus as a memorial,

name scholarships in honor of the deceased student, or adopt policy changes to address the circumstances surrounding the death. In some of our employment claims, involving faculty in particular, we have seen schools honor a plaintiff with emeritus status, grant access to otherwise restricted programs or areas of campus, issue statements regarding a plaintiff's contributions to the campus community, and, in very rare instances, even grant a professor tenure status. In your experience, how have you seen nonmonetary considerations factor into the resolution of claims, and just how important are they?

JOAN: The simple answer is that nonmonetary terms are very important in many employment cases, but even more so in cases involving colleges or independent schools because of the nature of the relationships. The plaintiff, generally, isn't someone who just spends a nine-to-five day in an employment or educational setting. Instead, they're involved in a campus community such that their losses involved not only money or status but also a loss of a way of life that can't be re-created elsewhere. Some examples of this would include denials of tenure of an advanced degree as well as detenuring actions. That being said, focus on what a plaintiff needs, emotionally and practically, and what a defendant can provide to help the plaintiffs move forward is a great way to make settlements much more valuable than win in court where the only results is money.

KIMBERLY: Do you have any good examples you've seen in your mediation practice?

JOAN: If a faculty member will be leaving a school, just how that person leaves can have a big impact on future employability. So, some examples of creative settlement terms can include the school's placing a faculty member on sabbatical or off-campus research status so he or she is off the campus but will still appear on the website as a member of the faculty. The faculty member still has the school email address and can make truthful representations of being associated with the school during a job search. If there's been a significant emotional impact on an employee, that person can be granted medical leave with continued salary and benefits during their recuperation, again, while still appearing on the faculty roster as on leave.

Another similar device is an apparent consulting agreement where the faculty member or the administrator can honestly represent a continuing relationship with the school, but where the school has confidentially agreed not to require any services. On a more creative side and depending on the rank of the plaintiffs and their need for recognition, some departures I've negotiated have included very detailed terms relating to the retirement announcement, the budget for retirement party, the number and identity of invitees, and the administrator's continued involvement with certain committees on an honorary basis after the employment is terminated.

It's worth saying that many of these terms have little or no monetary cost to the defense. That can be truly invaluable to a plaintiff desirous of recognition for a long career or needing to salvage a career that has suffered a major speed bump as defendant institution. What's also great to see is that many of these terms, when offered at mediation, often create real optimism in plaintiffs for their future opportunities and make settlement much more likely because none of these terms can be awarded or won in court.

KIMBERLY: Joan, those are all very interesting suggestions for faculty and administrators, and I urge our listeners to take some of them to heart. But what terms have you seen in mediated settlements involving students whether discrimination or Title IX sexual assaults?

JOAN: With students, if the claim involves one of academic performance either impacted through alleged discriminatory or retaliatory treatment, or failure to provide appropriate accommodations, the nonmonetary terms may involve working with faculty to convert transcript entries from fails to incomplete, to soliciting recommendations from faculty to assistant in

transfers, to retroactively granting leave of absence status to eliminate the evidence of poor performance while the plaintiff was involved in conflict with the school. Such settlements often include a designation of who should provide references and what will be said, and an assurance that other faculty contacted for a reference will direct that inquiry elsewhere.

In cases where a sexual assault has occurred and the school is alleged to have mishandled its aftermath, I've seen nonmonetary settlement terms to include opportunities for the claimant or the alleged assailant who has since become a claimant to meet with Title IX compliance staff or faculty leaders who handle hearings to explain how certain steps in the process impacted that student and might be changed. If the student is continuing to be enrolled, a member of the faculty or administration that he or she trusts can serve as a contact person for any issues that arise. The options are as diverse as are a plaintiff's needs. While we're talking about nonmonetary, it shouldn't be forgotten that the school should also identify the non-monetary terms it needs, since it's not all about the plaintiff. Higher ed cases with departing claimants often involve a negotiation of the extent to which the individual can return to campus and in what areas.

Where the campus is one that welcome members of the public to many sporting or cultural events, a "no trespass" order will likely be viewed as punitive unless justified by some really extraordinary circumstances. But there can be case-related restrictions, sometimes for a negotiated period of time. Nondisparagement agreements can also be important to both sides, with a plaintiff agreeing to a broad nondisparagement agreement and the school agreeing that a limited number of its employees who were involved in the claim or its resolution being directed to not disparage the plaintiff.

KIMBERLY: Joan, you've shared a wealth of information with us in this podcast. As we wrap up, if you can leave our listeners with three main takeaways about mediation from this episode, what would they be?

JOAN: First, not just summarily dismiss joint sessions, but to give them serious consideration based on the factors I've discussed to see if your case is one that would actually benefit from a joint session and help make this settlement more likely. Second, to be open to using multiple strategies and negotiating methods, including brackets, to learn how the other side is valuing the case. And third, to commit to listen, learn, and think creatively about how nonmonetary considerations can effectively address emotional and practical issues that money alone can't resolve.

KIMBERLY: Once again, we would like to thank you, Joan, for sharing your experience and mediator's wisdom on this topic.

JOAN: It's truly been my pleasure. I do hope our conversation will be helpful to your members.

KIMBERLY: That is all we have time for in the second of two podcasts on mediation. We at UE hope that you've found this podcast helpful. And we want to remind you to listen to the first podcast we recorded with Joan about preparing for mediation, as well as our other podcasts on **mediation basics** and our podcasts on other topics. Those are available on the UE risk management website, **EduRiskSolutions**. If you have feedback to share or other suggestions for topics we should discuss, please send an email to risk@ue.org. Thanks as always for listening.