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By United Educators

Mediation Insights From a Professional Mediator: Part 1

Podcast Transcript

Prevention and Protection

a United Educators Risk Management Podcast

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Guests:

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

KIMBERLY: Hello, Heather.

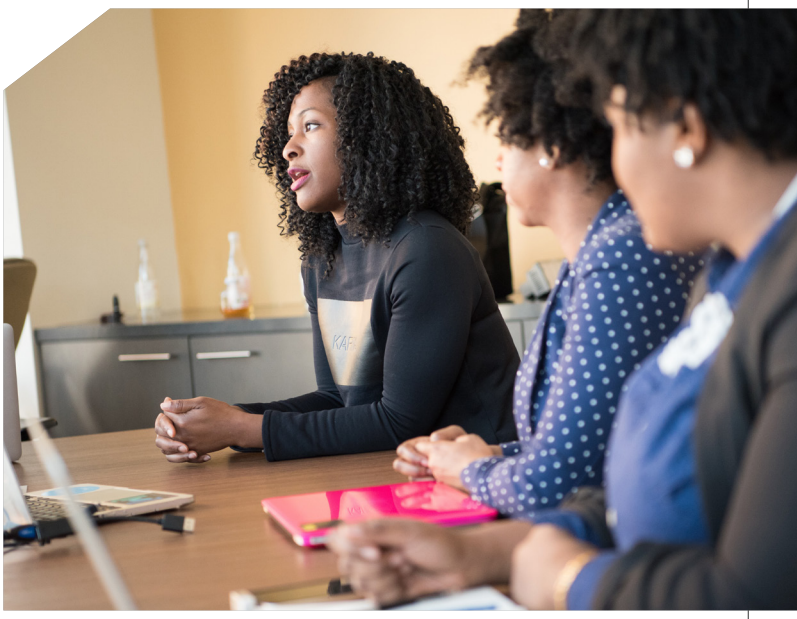
HEATHER: Joining us today is Joan Morrow. Joan is a former litigation attorney turned professional mediator, now with over 1,500 mediations and over 20 years in that role. She is based in Virginia, mediates in person in the Mid-Atlantic states, and mediates nationally via video conferencing. She has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

JOAN: My pleasure, Heather. I really enjoy the opportunity to talk to you and your members about how mediation can be used to deal with actual or threatened claims.

HEATHER: Joan has agreed to join us for two podcasts to talk in depth about mediation from a mediator's perspective. In this initial podcast, we'll be talking about the usefulness of mediation, how to decide if mediation is right for your case, and then how to properly prepare to attend mediation. In our second podcast, Joan will discuss joint sessions and the use of settlement range brackets in difficult mediations. I also want to remind our listeners that UE has already produced a podcast on **mediation basics** that can be found on our website, **EduRiskSolutions**, along with other podcasts relevant to risk management.

Joan, a number of UE claims often move toward settlement. One way to facilitate a settlement is through mediation. Sometimes schools we work with are unfamiliar with the process and are leery about committing to it. First, how do we decide whether mediation will be useful or even necessary to resolve a case or a dispute?

JOAN: Each case is different. But there are certain kinds of cases that really cry out for mediation involvement. For example, disputes where one or both sides are so emotional that they can't consider the issues objectively. The cases I primarily mediate, namely, discrimination, retaliation, civil rights, sexual harassment, and assault, all fall in this category as do tenure denials or revocations or Title IX matters.



Another example would be litigated cases where the lawyers have such a toxic relationship that direct negotiations would be doomed to fail. And then there are cases that are factually or legally complicated or where resolution will involve not only dollars but lots of nonmonetary terms.

These can be class collective actions, claims impacting university or departmental policies, or multiplaintiff or multiparty disputes. Another area where mediation can be very helpful is where there are mixed feelings within the school about whether to settle or not, let alone on what basis. In these cases, a mediation process can be crafted to help arrive to consensus for the outcome—what I call getting institutional buy-in. This list could go on, but the last example that comes to mind are cases where notice of the claim is given. The parties want to try early settlement but neither side has enough information to evaluate the claim or the damages. In these cases, a mediator can either help negotiate a voluntary exchange of information or help the parties craft a multistep process that makes it possible to get the case ready to be mediated.

KIMBERLY: Joan, when a case is ready to mediate, what is the usual mediation process?

JOAN: In general, cases are ready to proceed promptly to mediation when three conditions have been met. First, each side has enough information to evaluate liability and damages. Most importantly, each side has identified at least some of their own case problems. Second, the plaintiff has made a demand long enough before mediation to give the defense and/or the insurer time to assess the risk and get settlement authority. Third, a date is set when all the necessary people for a successful negotiation are available to attend the mediation, ideally in person, or if need be by phone or video conferencing.

KIMBERLY: When those conditions are met, what do you or other mediators do before mediation?

JOAN: Simply stated, without getting into too much detail, we set up a schedule for counsel to submit confidential briefs and documents to the mediator. I then schedule separate pre-mediation phone calls with each side's counsel. After that, everybody meets at mediation in joint session, separate sessions, or a combination of the two to negotiate and see if the matter can be resolved.

HEATHER: Before we go on, I just want to remind our listeners that Joan will discuss joint sessions in depth in our second podcast with her that will be available on EduRiskSolutions. Joan, you mentioned that sometimes people want to mediate cases that aren't ready to be mediated. Then, what's the process to get them ready?

JOAN: Sometimes, all that's needed is for the lawyers to agree on an exchange of information relating to liability and damages, so each side can evaluate the claim. But many lawyers are often reluctant to voluntarily provide information even when it's to their client's benefit to do so. The mediator may need to make a few phone calls to negotiate an exchange. But sometimes, the road to mediation is a little more complicated. This can happen when the plaintiff [inaudible] contact with the school is the very first notice that there is a claim, which is often the case with sexual harassment or assault, discrimination, or retaliation claims. Sometimes, these previously undisclosed claims involve high-level administrators or

senior faculty. Especially in these instances, schools will want to learn more about the case and have a chance to resolve it before it's filed in court. But getting that information isn't always easy.

HEATHER: Why do you think it's not easy? And what can be done to make the exchange of information happen?

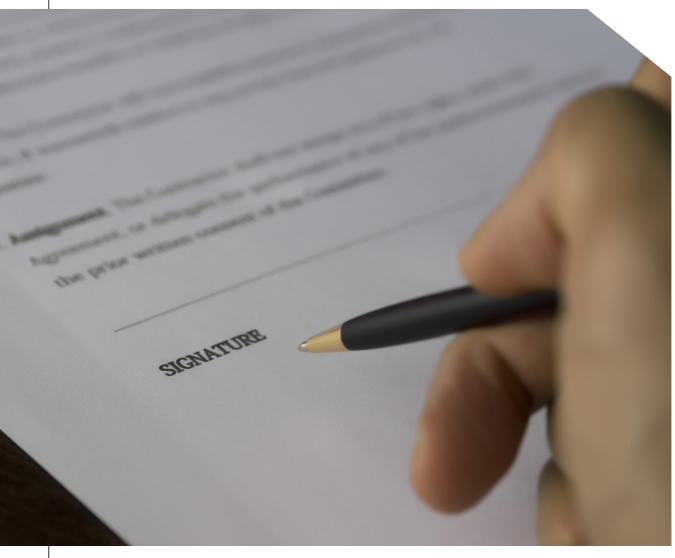
JOAN: The reason is that plaintiff's lawyers will agree that the defense needs information. But since they don't know all the facts, either they don't want to provide information in a form that can be used against their client later if the case doesn't settle. So, they often refuse to allow their client to be interviewed, let alone deposed by defense counsel, and they are often reluctant to provide a too-detailed written statement of the facts, which the defense can use to more successfully defend the claim. This is where an experienced mediator can take advantage of the confidentiality and flexibility of the mediation process and can help shape a multistep process that gets the case ready to be mediated.

For example, in a number of cases I've mediated, the mediation process begins with a meeting where I interview the plaintiff with his or her counsel to obtain detailed information about the allegations and damages. I then meet separately with the defense to orally provide that information, which puts school counsel and the school in a position to investigate and evaluate the claim in the next week or so. After that, defense counsel provides plaintiff's lawyer with their facts supporting the defense and their view of the claim. After that exchange, both sides proceed to mediation to attempt to negotiate a settlement.

KIMBERLY: Well then, in addition to pre-mediation exchanges of information, can parties obtain additional information at mediation or be given an opportunity to meet a party to assess credibility and presentation demeanor, especially where video depositions have not been taken?

JOAN: That's a great question for a number of reasons, one of which is to emphasize that what happens at mediation generally requires mutual consent. It never hurts to ask for information. But unlike formal discovery, a party at mediation has no obligation to provide it. It's fine to want a joint session, but it won't happen unless both sides agree to it. That's where the mediator comes in—to encourage a party to provide information or some contact if it's going to be helpful to both of them and to the other side. As for assessing party demeanor, there are those cases where none of the defense decisionmakers attending the mediation has ever met the plaintiff, and where credibility is a very big issue as in sexual harassment or assault cases.

Additionally, even if the school representatives are well-acquainted with the plaintiffs, the claims professional will very often want an opportunity to assess what kind of witness the plaintiff will be when he seldom sees the plaintiff's attorney willing to let the defense to question the client. However, with some encouragement from the mediator, counsel may be willing to pose some questions to their client in a low key joint session with some of the defense representatives present. And, of course, there are cases where the plaintiffs will be prepared to, and even want to, present a more detailed account of what happened and its impact.



HEATHER: Joan, you previously mentioned using mediation to create institutional buy-in. Could you give me an example of how that has happened in some school cases that you've mediated?

JOAN: Sure. In many instances, there are people who have had significant involvement in the situation being mediated, who have a significant interest on what the settlement looks like. Many of these people are not decisionmakers, and so won't be at the mediation. Yet, in extraordinary cases, particularly ones that have a high profile, both defense counsel and school leadership will want to find a way to bring these people into the process, so they'll be more receptive to the negotiated outcome. An example that comes to mind is a case that

involved a much-publicized multiplaintiff Title IX sexual assault case that involved the typical allegations of mishandling and cover-up by the school. The case had produced institutional disruption for months and lots of board involvement.

Because the only school reps who would attend the mediation would be the board chair, the president, and the claims professional, the defense lawyer decided to schedule a pre-mediation session with me and the full board so that they were in the loop about what would happen at mediation, about what outcomes were being considered, and so they could be up to speed if their opinions had to be sought during the mediation.

In another case, a pre-mediation meeting with interested parties was used very effectively in a case that arose when an independent school refused to readmit a student because of a mother's constant, intrusive, and abusive behavior toward a lower school administrator and a teacher. The parents' response was to sue the school for defamation. When the case went to mediation, the headmaster signaled his support for the abused employees by including them in a meeting the day before the mediation where all of us who would be at mediation could understand what they had experienced.

KIMBERLY: These examples involved getting institutional buy-in from important people who aren't going to be at the mediation. But what are the situations where buy-in can only be secured by attending?

JOAN: Achieving the secondary goal of buy-in is one of the great benefits of mediation. A lawsuit often produces very mixed feelings within the defendant institution about settling the claim at all or on the terms to be negotiated. When key players divide themselves into doves, favoring settlements, and hawks, favoring the fight but where the case is nonetheless proceeding to mediation, defense counsel sometimes think it's better to just bring the doves. The problem with this is that even if the negotiated settlement is an excellent one, the doves will be made to feel like failures when the hawks are at liberty to criticize them. The remedy is to bring the hawks with the doves to the mediation, let them express their views, let them participate in the discussion of case downsides. If the case doesn't settle and ends badly, the hawks will have to share responsibility for the adverse results. If there is a settlement, they share ownership. They are implicated in the decisions, and effectively silenced his critics.

KIMBERLY: Can you give me an example of this?

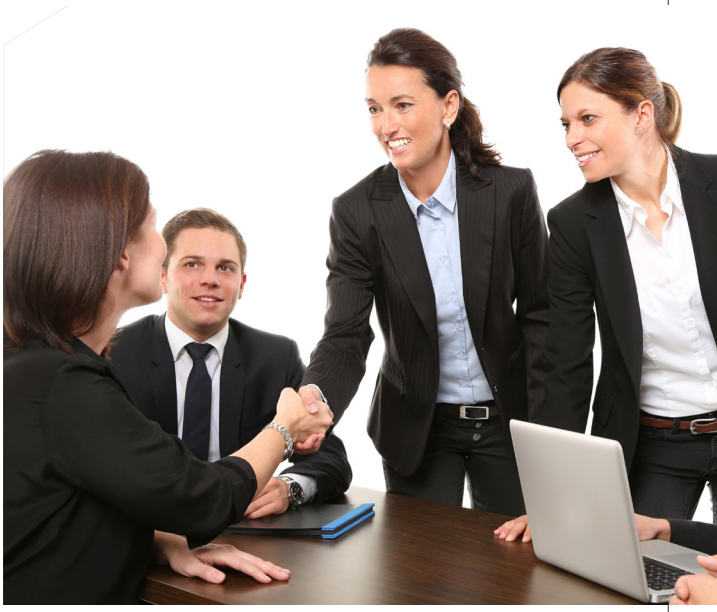
JOAN: In one such case, the school sought input from senior department members who are not decisionmakers, but who would have to continue to interact with the disruptive, difficult tenured faculty member who was settling a claim, but unfortunately, from the standpoint of his colleagues wouldn't be resigning. The workplace for them had become very hostile. They were opposed to settlement, but their opposition to it went away when their input was sought before the mediation on settlement terms that were important to them. Namely, the hiring of the mediator, happily not me, on a short-term basis after settlement to facilitate communication, to establish ground rules for future department interactions and meetings, and to identify an administrator who would be perceived as neutral to field complaints that might arise in the future. The matter was resolved, and this department was able to get back to the business of education.

HEATHER: Joan, in your opinion, who should attend the mediation to increase the likelihood of success?

JOAN: On the plaintiff side, sometimes it's just the plaintiff with counsel. But the question should be asked to plaintiff's counsel whether there is someone like a spouse or a parent who the plaintiff would want to consult before making a decision to settle. If that's the case, that person should be at the mediation so they can hear the reasons for compromise and understand the case weaknesses. On the defense side, the necessary people can include, first, people with substantial knowledge about the facts and who are needed at mediation for information. If these people are not decisionmakers, they're often dismissed when the discussion turns from facts to privileged matters and confidential settlement negotiations.

Second, people who are decisionmakers and have real, and I emphasize, real settlement authority, which means that they have an ability to negotiate and have the power to move past pre-determined or capped amounts of authority. I will tell you, the

chances to settle will be greatly undercut if the plaintiff believes that defense representatives are mere proxies to the real decision-makers who aren't there. And, last but not least, important people who may fall in the naysayer or hawk category we previously discussed. The bottom line is this: The goal should be no more attendees than necessary but having all the right people there.



KIMBERLY: We've evaluated our case and decided that the case should be mediated. What are some best practices for choosing our mediator?

JOAN: A quick answer is, very carefully. For mediation to be successful, it's crucial that both sides have confidence that the mediator is competent, impartial, and trustworthy when it comes to protecting confidential information. For starters, you should seek mediators who have both significant experience, meaning hundreds of mediations and demonstrated skill as a professional mediator. Second, you want your mediator to have significant knowledge and mediation experience in the subject matter areas involved in the claim. For higher ed or school cases, it's important the mediator has significant experience and an understanding of college or independent school governance structures, procedures, constituencies, and sensitivities that are unique to schools in general, and each institution in particular.

And, last, but definitely not least, you need a mediator with the personal traits, skills, and style that will enable that mediator to quickly earn the confidence and trust of the people who will attend the mediation and can also work cooperatively with both counsel. My advice to lawyers is, before retaining a mediator, you should talk to the mediator. Ask about their style and process, assess their personality and your chemistry with them, get references, and then actually talk to the references. The wrong mediator can tank what might have been a successful mediation and make settlement much more difficult to discuss in the future.

HEATHER: We've made the decision to mediate, we've carefully chosen our mediator, and we've set a date. How should we prepare for the mediation itself?

JOAN: Again, very thoroughly. People need to remember that a mediated settlement is the equivalent of going to trial, since if it is successful, it will produce the final result. So, how successful the negotiated outcome is for your institution will be dependent on how well the lawyer, the client, and the mediator are prepared. First, the lawyers. They need to be fluent with the facts and the law and to have analyzed the range of case outcomes. They need to understand institutional or emotional factors that play on the decision to settle or not. The lawyers also need to be ready to talk specifically about the client's case strengths and the opposing party's weaknesses with reference to the evidence and the law. With a client preparation, it's very important for lawyers to prepare their clients for the mediation process and for taking an active role in it.

Before the day of the mediation, counsel should meet with the clients to discuss the case, to provide a candid assessment of its strengths and weaknesses, risks, and likelihood of success. I think it's especially important for the lawyers to find out what nonmonetary terms are important to the client. A few examples would be plaintiffs' resignation, or an agreement not to reapply, a nondisparagement agreement, and confidentiality. What will be said to others, including the media, after a resolution? One of the most important things for clients to understand in advance is the role of the mediator, and that he or she will be talking about case downsides and playing devil's advocate. Clients find this part of mediation extremely disquieting. But they need to understand that the mediator will be doing the same thing in the opponent's room. And last, a client should be informed about what will happen. For example, who's going to be there? What's the process? Will there be joint sessions or shuttle diplomacy?

Now, where there's an insurer involved, the claims professional attending the mediation will likely be very familiar with mediation. Many of these professionals are lawyers. They are often former litigators. But in some cases, it may be very beneficial for defense counsel to include the insurance representatives in pre-mediation discussions with the clients. Areas of agreement and varying perspectives can be identified ahead of the negotiation day.

As for mediator preparation, I have the lawyers provide me with materials, key documents, court filings, and a confidential mediation brief to help me become fluent with the facts and issues in the case. After I read all that, I have a separate pre-mediation phone call with each lawyer, sometimes lasting an hour or more to discuss their view of the case, and to alert me to the concerns, wishes, and very importantly, the personalities of the people attending the mediation. These calls are absolutely critical to mediation success since they give me a chance to establish a working relationship with the lawyer, to understand the client's expectations and needs, and to avoid what I call landmines that can create consternation.

KIMBERLY: Joan, you've outlined the many things that could possibly happen at mediation. How do we define success at mediation? Is it only if the parties reach agreement?

JOAN: As is often the case, success is very much in the eye of the beholder. There are some cases where one or both sides coming to mediation really want or really need to settle the case. For these parties, if the mediation doesn't result in settlement it leads to disappointment, often a disaster. However, many parties mediate not because they have decided to settle the case, but because they want to find out whether they can arrive at terms that will make settlement possible. This often happens in class or collective action cases where the high cost of litigating, losing, and paying plaintiff's attorneys fees make it desirable to explore settlements sooner rather than later. This often happens as well in cases not yet filed, but where filing will produce publicity that will make settlement more difficult and less valuable. Many of those cases do get settled. But if they don't, the clients at least know that an early settlement wasn't possible.

Speaking for myself, I view the goal of mediation to be either to settle the case or to guarantee that it can't be settled. Meaning that each side has exhausted its capacity to continue to make movement on money or other important terms. And what I personally see as mediation success is that the case settled and the parties feel good, not only about the choices they made, but also about the mediation process.

HEATHER: Thank you, Joan. You have shared a wealth of really helpful information with our listeners. But that's all we have time for in this first of our two podcasts on mediation. We here at UE, hope that our listeners have found this podcast helpful. And we want to remind them that the second podcast with Joan, as well as podcasts on other topics are available on the UE risk management website, **EduRiskSolutions**. I want to thank Joan. We'll talk to her in our second mediation podcast in a bit, and thanks to everyone for listening.