The Employment Law Counselor Episode 24

PLUS Staff: [00:00:00] Welcome to this PLUS Podcast, *The Employment Law Counselor*. Before we get started, we'd like to remind everyone that the information and opinions expressed by our speakers today are their own and do not necessarily represent the views of their employers or of PLUS. The contents of these materials may not be relied upon as legal advice.

Victoria Fuller: Hi, everyone. Welcome to *The Employment Law Counselor* podcast. I'm your host, Victoria Fuller. As always, I'm joined by my co-host, Laura Corvo.

Hey, Laura. What's going on?

Laura Corvo: Hi, Vicky. I'm doing great. I am really, really excited for today's topic and also for the two amazing guests we have joining us today

Victoria Fuller: I am too.

So, you and I have been talking about this topic for a while now. I'm really glad that we finally got there. We're focusing today's episode on a form of dispute resolution that tends to be pretty highly successful in the employment space, and that's mediation.

Laura Corvo: Yeah. That's right, [00:01:00] Vicky. A lot of us as employment defense lawyers like to brag when we prevail at trial or win a motion, but oftentimes one of the biggest wins we can deliver to our clients is successfully mediating a case and resolving a case through mediation.

Victoria Fuller: Completely agree. And Laura, to help us shed some light on what mediation is, how it can be effective, and some of the ins and outs of conducting a successful mediation, we have two pretty fantastic guests joining us today. They both come with pretty amazing qualifications, different perspectives. [They are] both very experienced in mediation space.

First, please help us welcome retired Judge Tom Rueter, who is now a mediator, arbitrator, and court-appointed neutral through JAMS.

Laura Corvo: That's right. Judge Rueter served for 26 years as a US magistrate judge in the Eastern District of Pennsylvania, including nine years as chief magistrate.

Before becoming a judge, Judge Rueter also served as an assistant US [00:02:00] attorney, and we are very proud to say that Judge Rueter launched his legal career as an associate with White and Williams, in our Philadelphia office.

Welcome, Judge Rueter.

Hon. Thomas Rueter (Ret.): Thanks, Laura. Thanks, Vicky. Glad to be here.

Victoria Fuller: We're glad to have you.

And if you could also help us welcome our other guest, April Quire. April is a senior claims examiner for executive assurance claims with Arch Insurance. April has just about two decades of experience in the insurance industry in both leadership and individual contributor roles. She has extensive experience in E&O, D&O, and specializes in employment claims.

Welcome, April.

April Quire: Thank you, Vicky. I'm excited to be here. One of my favorite topics is mediation and negotiation.

Victoria Fuller: Well, you're in good company there.

Laura Corvo: April and Judge Rueter, we're just really happy to bring our listeners the perspectives that each of you share.

As Vicky said, Judge Rueter, you're a seasoned mediator [and] an arbitrator. You've also served as a judge and a litigator. April, [00:03:00] you are a seasoned claims rep. You've seen countless employment claims and mediated countless employment claims.

Let's kind of get things started and share your perspectives with our audience. Judge Rueter, I'd like to start with you. Can you explain to our listeners the difference between mediation and arbitration? People often confuse them, but they're actually two different animals, and can you just walk our listeners through what they are and what the difference is?

Hon. Thomas Rueter (Ret.): Sure. Arbitration is a result of a contract between the parties where both parties agree to resolve their disputes outside of court, but before an arbitrator mutually picked by the parties.

The unique thing about an arbitration versus mediation, which I'll speak about in a minute, is that an arbitration is binding. [It is] binding in the sense that the parties have submitted the issue for decision before the arbitrator. The arbitrator's decision is final, and the grounds for appeal of an arbitrator's decision are very limited under the Federal Arbitration Act. You have to show fraud or corruption [00:04:00] or impartiality. It's very, very difficult to appeal an arbitration decision. It's really-- The appeal has to be based on procedural fairness as opposed to the substance of the dispute.

In contrast, mediation, again, it's not premised or driven by a contract between the parties. It's a voluntary agreement between the two parties to submit their issue to a mediator to help them resolve the matter on a completely voluntary basis. The mediator doesn't decide any issues. The mediator acts as a facilitator, someone who helps the parties reach a resolution on their own. It's not binding, it's completely voluntary. At the end of the mediation, if the parties do not agree to an outcome, they go on their way and continue litigating the case, unlike an arbitration where there is some finality because the arbitrator makes the decision.

Victoria Fuller: What I think is interesting there, Judge Ruder, as you said, mediation is voluntary. Both [00:05:00] parties have to agree to go. You're not stuck with it. You have to agree at the end on a resolution, both parties.

And yet, even though it's a voluntary system, it is wildly successful when it comes to employment claims. I'd like to hear from both of you, maybe let's start with April, why do you think that is? What is it about employment claims that makes it so susceptible to resolution at mediation?

April Quire: Sure. One thing I just wanted to note before answering that, while I am an employee of Arch Insurance, I am here speaking in a personal capacity today and not on behalf of Arch Insurance. Any statements that I make are general industry observations and are not being made on behalf of the company or any of its affiliates or subsidiaries.

With that said, I'll get to answering the question. I think a mediation, it's an opportunity for the parties to come together. It's an opportunity for the plaintiff to have a chance [00:06:00] to feel heard. There's often a lot of emotion involved in an employment claim. It gives the plaintiff a forum where they can

feel like their concerns are being heard, and then it gives us an opportunity to see if there's common ground and if there's a number that makes sense for everybody to be able to walk away and put the matter behind them.

Victoria Fuller: And Judge Ruder, from your perspective as the mediator, why do you think employment claims resolve so frequently at mediation?

Hon. Thomas Rueter (Ret.): I think for many reasons, [as] April just outlined, it's an opportunity for both sides to present their perspective on what happened to the mediator. A good mediator is a good listener, giving them an opportunity to tell both versions of what happened.

But I also think that [in] many employment cases, the actual value of the cases, or in other words, the loss that the employee has suffered from the loss of a job, sometimes is outweighed by the cost of [00:07:00] litigation. The cost of litigating these matters is, is very, very expensive. It involves depositions of many employees or supervisors. Sometimes having it resolved on a less expensive venue, such as mediation, makes sense for both sides before both sides spend a lot of money.

A lot of employment disputes, especially if they involve a matter such as like sexual harassment, are matters that both sides have an interest in keeping confidential or keeping it out of the public eye. Many times, the employer's justification for terminating an employee's employment is because of performance issues. And as the case gets litigated, an employee's history of performance, or lack thereof, becomes a matter of public record. It's in the interest of the employee many times to keep those matters confidential because even if they prevail after a trial, still a lot of the negative [00:08:00] aspects of their employment history, as well as employment performance, becomes a matter of public record which may detrimentally affect their prospects for future employment.

I remember a case that I had where, this was after a trial, the employee lost the trial, and a lot of negative things came out about what the employee did while they were working for the employer. About a year later, the employee showed up at my chambers and knocked on the door and wanted to talk to me.I had written an opinion, post-verdict, post-trial, about what happened at the trial because I had to. The matter was on appeal. The employee said he was having problems finding a new job because of what was in my opinion. It wasn't me making any opinion or me commenting on the case. It was just reciting the factual record of the trial record. And I told him there was nothing I could do as

far as unpublishing the decision or striking it from Westlaw or from any of the [00:09:00] public forum.

And so that just emphasizes what I just said. Sometimes it's in an employee's interest not to have these things in the public forum.

Laura Corvo: Judge Rueter and April, I think what you both said is just really interesting. A as you said, confidentiality is an attraction for many, both employees and employers. There's emotions involved. As you said, Judge, good mediators are good listeners and a lot of times the litigants need to get their story out.

So, knowing that, and knowing that these mediations can be successful in employment claims, Judge, can you just kind of walk us through what happens at a standard mediation so that they can get that story out? How does it work?

Hon. Thomas Rueter (Ret.): In most mediations, both lawyers for either party will submit a confidential or exchange mediation statement, which will set forth their positions and tell the story of what happened from their perspective.

Many mediators will have what we call a general session where we'll have all the [00:10:00] parties in a room and have each side, in front of the other opposing party, give their version of what happened. Then there's an opportunity for the other side to respond. I generally don't follow that practice unless it's requested by both parties.

My typical practice is I will first start with the plaintiff first. Even if the plaintiff made a demand and the defendant hasn't responded and it's the defendant's, quote-unquote, "turn" to respond to the demand, I feel like I want to start with the plaintiff first, find out, give them an opportunity to tell the story to me.

I will lead up the discussion with the plaintiff. I may start in the beginning and ask them what they're doing now, what their present occupation is, whether they have a new job. Then just tell them to tell me their story of what happened, and then I may interject and ask some further questions.

And then I try to find out what is the basis for the demand, the demand for settlement. I try to find out what is their economic loss. What is their back [00:11:00] pay? What is their prospects for future employment? [Is] their future employment and their salary at parity or is it below what they were making before in their previous employment.

And after all that process is finished, I'll then go in and speak to the defendant. I will convey to the defendant many of the things the plaintiff told me [and] my impression of the plaintiff, what I think about the plaintiff.

Sometimes many of the people in the other room have never met the plaintiff, especially an insurance adjuster who is really an objective third party to the mediation. I mean objective in the sense that that adjuster wasn't involved in the employment decision to terminate the employee. But I will sometimes bring the employee in with the adjuster and with the defense counsel if the defense counsel hasn't met that person. With the consent of both parties, I may bring them in and have them meet each other, and may even have some discussion a little bit with the plaintiff [00:12:00] so the insurance adjuster and the defense attorney can evaluate, for however brief that session is, and eye up the plaintiff and get a sense of what the plaintiff is all about.

But after that, what I'll do is I'll just go back and forth and exchange offers and adjusted demands in response to that offer. We'll do that for a while. Most of my mediations really don't get down to serious business till the afternoon, unfortunately. But in the afternoon, if the parties are too far apart, I may suggest bracketing.

I can explain what that is. Typically what it will be is I'll ask the plaintiff would he or she reduce their demand to a certain number, provided I can get the defense to increase their offer to a certain point. I may do that, and ultimately at the end of the day, if it doesn't look like the parties can reach an agreement, I may make a mediator's proposal. We'll talk about that later.

That's typically how I conduct my mediations.

Victoria Fuller: But Judge, you said most mediations don't get serious till the afternoon. [00:13:00] I like to joke about the 3:00 rule. It's like everybody realizes at 3:00, "Oh my goodness, we're running out of time. We've got to get ready. We've got to actually get serious about this."

Hon. Thomas Rueter (Ret): Right

Victoria Fuller: I think there's a legitimate adjustment period in the morning where everyone kind of has to get comfortable with the idea that they're not staying on their position that they had when they walked in the door.

So, for me, I tend to gravitate towards the full-day mediations because I think, psychologically, everybody needs that morning time to get their head right.

Getting your head right is not a one and done. I think that's a big part of why mediation is so successful. [It] is because everybody has to get comfortable over the course of the day.

Something else, you talked about this confidentiality. With employment cases, everybody comes in with something they really don't want on a public docket. There are so many business reasons why they might try to resolve something at mediation, but the wonderful thing about that process is [00:14:00] you can get all your cards out and it's confidential. So, it's not on a public docket. It's not in front of the news media or whoever happens to be looking at the docket that day.

I think there's another component to the confidentiality that we should talk about, which is the mediator. Judge, mediators cannot be compelled to testify about the things that they hear in mediation. Is that right?

Hon. Thomas Rueter (Ret.): That's right. Under Pennsylvania, the state where I practice, they have a very strong statute, which is Pennsylvania mediators privilege. [It] says that any communications either to the mediator or from the mediator to a litigant are confidential and can't be used in any way.

I've been subpoenaed or attempted to be subpoenaed a couple times as result of settlements I was involved in that fell apart later for one reason or another. And I've taken a position at JAMS, who I work for, has taken a position that I cannot testify. And most of the courts do not compel-- I [00:15:00] never got an order compelling me to testify about something that was said in a mediation. There's exceptions to that. There's sometimes enforcement, but mediators really don't testify at all, no.

Victoria Fuller: I think that really aids the process in letting parties have a safe space to be open with each other as they're trying to reach resolution.

Hon. Thomas Rueter (Ret.): Right. One thing I just want to mention too [is] sometimes, maybe April can attest to this, sometimes we may not have a general session in a mediation, but we might have what I call a meet and greet where everybody gets together.

And I know a lot of times the insurance adjusters do a great job with bringing the plaintiffs in with their lawyer. We say, “Hello.” And a lot of times the adjuster will thank the plaintiff and the lawyer for being there. Likewise, the plaintiff's lawyer will thank the adjuster for being there.

I know the impact of that on the client is very important, [when] they know you're there in good faith and you're trying to resolve it. I [00:16:00] think that really is a good start to a mediation. You're not really adversaries. You're kind of partners, at least for the day, in trying to get it resolved. I think there's a lot of respect when they know that, for example, April, who may be from a different state or is a very busy person, came in for the day, either virtually or in person, to try to address the employee's concern and try to resolve it.

I see that impact a lot. I think it's a good thing, and I really encourage people. I always say, "We're going to say hello to one another. We're not going to talk about the case." And a lot of times I think the professionals always are very good at say, "Thank you for being here. I really appreciate you being here. I hope we can get this resolved." And that means a lot.

Laura Corvo: It's funny how the human connection that you experience at mediation often helps to resolve a case. It's not just pleadings and motion practice and things on a piece of paper. Like you said, sometimes you're bringing the parties face to face and forcing them to realize that actually people are going out of their way to help resolve this case.

April, [00:17:00] switching gears a little bit, Judge Rueter just talked about the process that happens on the mediation day. Really, preparation for mediation begins for a long time before that. Can you tell our listeners what has to happen from the insurer's perspective before we get to the mediation day, and what defense counsel and the insured should do prior to mediation to really set themselves up for success?

April Quire: Sure, yeah. I think it's a great question. From my perspective, it's always good to be having these conversations with the client early in advance to make sure that they are on board with the strategy, that mediation is something that they are amenable to.

And then it's very key to have a strong assessment from defense counsel that discusses liability and damages because we never want any surprises at mediation. We really want to understand what kind of exposure we're looking at, how strong is our case, what are our weaknesses, and, really [00:18:00] recommended settlement value is something that's very helpful to have in advance of mediation so that we can all make sure that we are agreeable.

Laura Corvo: Right, and I think it's like you said, you don't want surprises at mediation. Even though mediation sometimes occurs early on, you really do need to do your homework before you get there, right?

Let me ask you about some of the obstacles that sometimes prevent parties from getting to mediation. I know in my own experience that a lot of times when I recommend to a client that they pursue mediation and that they attempt to resolve the case, especially early on. A lot of times I get pushback. I'm sure both of you have had this experience where the employer will say, "One of our concerns," which is very legitimate, "is that if I settle, if I write a check to an employee, I'm going to open up the floodgates and everyone else is going to come sue me. Now I'm in this position where suddenly every employee thinks I'm an easy target and will bring a bunch of cases against me."

Judge Ruueter, I'm interested in what you [00:19:00] tell defendants when they express that concern. April, what [do] you tell your insureds to get them to agree to come to that bargaining table? Judge, why don't we start with you?

Hon. Thomas Rueter (Ret.): Well, the first thing is, it is confidential, so that if the employer decides to settle and pay money to an employee--- I've never seen an employment settlement agreement that didn't have a confidentiality provision in it. I guess there could be an exception with sexual harassment; I guess under some of the new laws that have been passed. But it is confidential, so the employee is required not to disclose the settlement amount that he or she received.

To that extent, if the employer is concerned about other employees being incentivized to try to bring cases against them, hopefully the confidentiality provision will prevent that. And also, there's ways of making the confidentiality provision have teeth in it. You can have a liquidated damage provision. In [the] event the employee does disclose it, he or she has to pay a certain amount of money.

There's [00:20:00] other reasons why an employer should settle, even though [settling] may outweigh the risk of incentivizing other employees to bring suits. [Another reason] is not only the cost of litigation, but it's [also] going to cost the employer to get from today to the end of trial, and also wind up potentially paying for the plaintiff's attorney's fees if they lose.

But it's just tying up employees and having employees from the firm spending a lot of time on the litigation as opposed to making money and working for the employer.

April Quire: And I would just add, from my perspective, something that I am always talking to the insureds about is the fact that litigation is a real drain on their business.

It takes them away from whatever kind of work it is that they're doing. They are going to be caught up in depositions and discovery, By attempting to see if we can settle a matter early, that allows them to get back to their business and do what's important to them.

Laura Corvo: I think that's right, April. I think a lot of times, too, employers don't think about the amount of [00:21:00] effort and the amount of people who will be involved if you litigate the case. The employees are going to know about this case regardless. They're going to know that someone has sued you. You're not hiding it necessarily by not going to mediation or by not trying to resolve it. [You're] maybe expending a ton more money.

What other obstacles, Judge Rueter, do you see in getting a case resolved at mediation other than perhaps the employer's reluctance to settle a case that they may believe that they would be successful with if they went to trial or summary judgment?

Hon. Thomas Rueter (Ret.): I think one of the first problems is not having the right people there. By that I mean, it's on both sides. It could be from the defense side, you don't have the person who has the ultimate authority to settle the case. Many times, we're in a mediation all day. We're going back and forth. We're compromising.

The person who ultimately makes the decision is not there and is not experiencing the pain, the blood, [00:22:00] sweat, and tears of trying to get to a certain resolution. It's very easy for a person, you know, I call them the Wizard of Oz. They're behind a curtain where no one knows who they are, but they just will nix a proposal willy-nilly and quickly, and they're not really appreciating how we got there or how we got to the end of the day. That's a very frustrating thing.

The other thing is bad lawyering. I used to joke around. I knew I was going to have a good day when I was a judge when I opened up the file and I saw who the lawyers were. It really didn't matter what the case was. It was who the lawyers were.

That still holds true today. The mediators talk at JAMS. When I was judge, we talked about the lawyers. When I was a judge, I would be on the elevator and someone would say, "Oh," one judge would say, "What do you have going on today?" I'd say, "Okay. Who are the lawyers?" And then you hear a groan. "Oh my gosh, you got that person as a lawyer."

So, I think bad lawyers [is a factor]. Sometimes lawyers-- I think one of the [00:23:00] topics we're going to talk about today is when you have an employment case with a lawyer that doesn't do employment cases, sometimes you do just have a lawyer that, not necessarily because they're unreasonable, because they just are not good lawyers they don't know the weaknesses of the case. They're just not sophisticated or intelligent enough. I don't mean to say it in a condescending way, but to understand they've got a problem in this particular area of their case [is important]. They're the most difficult people.

The other thing [is] people come in and they just have a certain number in their head, and they'll never deviate from that number through the course of the mediation, even though the definition of a mediation is compromise. You know if we're going to get it resolved, the defendant's going to have to pay more than they want to pay and the plaintiff's going to have to accept less than what they want. That's the only way you're going to get it resolved. But sometimes lawyers have a number and it's set in stone and they won't deviate from that.

Victoria Fuller: Um- And I'm going to riff on that for a [00:24:00] second too. Judge because I've seen this happen where you have that lawyer who maybe doesn't know how to value the case because they're not really employment lawyers. They get this number in their client's head, and their client thinks they're getting this very high number, but it's based off nothing. It's not grounded in the actual damages that are recoverable under the statute or the cause of action that's been pled. And then you'd spend hours upon hours getting that plaintiff to accept that that number was never real in the first place.

I think to your point about bad lawyering, that's a type of bad lawyering that we see over and over again where it is so hard to negotiate with make-believe.

Hon. Thomas Rueter (Ret.): Right. Exactly. That just makes it much more difficult.

The other thing is an excessive settlement demand. Now, listen, we've all been in cases where the demand is real[ly] high. Someone asks for $2 million, and at the end of the day they settle a case for $50,000. I think we all have stories like that.

The problem with an excessive settlement demand [00:25:00] is that the client hears that excessive settlement demand. That just makes it more difficult for the mediator when you're in the middle of the mediation and you're explaining to the plaintiff the difficulties they're going to have with this particular case.

It could be they got a job a week after they were fired and they're making more money than they did before, or they were only at the job for two weeks before they got fired, and a jury's not going to be real sympathetic that they lost this particular job. So the problem is that they've already heard their lawyer put out this $2 million demand, and then the case may be worth $25,000. It makes it very difficult to get the client from way up here to way down here. The expectations were set too high by the lawyer.

Victoria Fuller: And I bet, April, I bet you've seen a few things. From your perspective, what have you seen that ends up complicating your ability or your defense attorney's ability to resolve the case?

April Quire: Yeah. I would agree with the comments that were made about excessive demands and plaintiff's attorneys [00:26:00] who are not evaluating the case properly. That's where, further to the judge's earlier point about getting a breakdown of the demand, that's where I think it can be very helpful to see how they are allocating the damages that are available so that at least you can use that to really educate them on how to get realistic about the damages that they could possibly expect to get from this one.

Another problem that we face sometimes is even defense counsels not properly advising us of liability and damages in a particular case or not conducting a robust enough investigation so that we don't have all of the information going into the mediation. Then we're faced with a situation where we have bad facts presented to us that we didn't know about in advance, which can certainly complicate things in our room.

Hon. Thomas Rueter (Ret.): Yeah. April, that's exactly the point I was going to make, to be fair and balanced. From the defense side, [00:27:00] sometimes I think the insurance companies are given the certain facts from their counsel [about] what happened. Obviously before they get to the mediation, they roundtable it or have a discussion of what they think their authority will be when it comes to mediation.

But a lot of times facts change, especially early on when you don't have a lot of discovery. Sometimes during the mediation, it's like that's the discovery you have because you might get some documents in the mediation that you haven't seen before.

I remember a case I had recently where it was a big company. The client was fired because he wouldn't sign in into security willingly and without a lot of trouble. He would get to the security area, and they would ask him to sign in.

He had difficulty signing his name. He was always mouthing off to the security people, and he got fired. This was no discovery. I think the insurance company justifiably looked at the case and said, "Oh, [00:28:00] this case isn't worth anything. The guy's not signing in [or] doing basic things before he goes into work."

When we got to the mediation, I found out that the plaintiff was severely autistic. He had autism. He just had abnormal reactions and behavior than someone who doesn't have autism. So, what I clearly realized, the reason he wasn't signing his name properly and he was a little bit odd at the time when he would get to security, is because he had autism. I think the security officers just didn't understand him and didn't know that.

One of the things I did was I went in, I brought him in, and I had him talk to the defense and just to get an idea of who he was. In that particular case, the insurance company adjusted. They understood, and we got it resolved.

I think sometimes, and it's not the fault of defense lawyers, they just don't have the facts, complete facts. The carrier will base its evaluation on facts that are incomplete, and as a result of that, it's a bad start to a mediation. That's a long way of saying that, but I thought that was a good example of [00:29:00] that.

Laura Corvo: It sounds like the lawyers play a big role in the success of the mediation. What about the jurisdictions?

I know, April, you handle cases from multiple jurisdictions. Does a mediation process or how mediation is handled, the chances of success at mediation, change depending on the jurisdiction you're in?

April Quire: That's an interesting question because earlier Judge Rueter mentioned having an opening session and how he doesn't like to do them. One big difference I've noticed jurisdictionally is that on the West Coast, you almost never see a joint session. It's just not something that people are even considering.

In the Midwest and the East Coast, I think historically I have seen more joint sessions, although less and less these days. It seems like generally, nationwide, I think they are kind of trending downward. But that is a big difference.

I'd say confidentiality of mediation briefs is also a big difference. I think on the West Coast, there's more of an encouraging of sharing mediation briefs, which I think [00:30:00] is very helpful to have a shared brief with perhaps you

supplement it with a confidential portion for the mediator's eyes only. I think to the extent we can get our facts and story out to the other side really, really helps to achieve settlement.

Victoria Fuller: So many times we end up going to mediation while we're still at the agency, whether that's the EEOC or the state agency. At that stage, you're not really in, quote unquote, “litigation.” There hasn't been this discovery: getting that information out in your position statement, getting your exhibits attached so you're educating the plaintiff's attorney and the plaintiff.

As the employer, we tend to have the majority of the information. We will have documents that that employee has never seen before but will be important for them to see for a case to resolve at mediation. Getting all those documents out there and getting your story and your narrative cohesive and presentable for mediation is so important. If you mediate before you have all of that together in a nice [00:31:00] package, I think your chances of resolving are substantially less.

Hon. Thomas Rueter (Ret.): Yeah. I agree with both you, Vicky and April. My preference is to do exactly what April said. Have an exchange memorandum where both sides understand each side's position, and then do a side letter to the mediator if there's some particular facts you want the mediator to know, but you don't want the other side to know.

It's very frustrating as a mediator when you go into one room [and] they say, "I want you to go in that other room and tell them what a weak case they have or what kind of problems they have." And they submitted a confidential mediation statement which I'm not allowed to share with the other side. Then I have to say, "Can I use page five and talk to them about it?"

So I agree one hundred percent. When people ask me my preference, that's what I say.

Victoria Fuller: You mentioned earlier you can sometimes look and see who the attorneys are and that's how you know how your case is going to go. As a mediator, what things do you see that let you know, “Okay, this is likely to resolve, or [00:32:00] this case is not going to resolve?”

Hon. Thomas Rueter (Ret.): Well, the demands. If I have a reasonable demand that has some relationship to the economic numbers where there's relationship to the back pay, there's a relationship to a potential front pay. Again [it also

depends on] who the lawyer is, and if it's a lawyer who I think is reasonable. That gives me hope that I can resolve the case.

Sometimes a trial date. If there's a trial date and it's in two weeks and I have the mediation, that more than anything else helps the case to resolve. A lot of times before summary judgment is really a good time to try to get the case resolved. A lot of lawyers that I know on the plaintiff side, the value of the case goes up pretty significantly after a summary judgment motion is denied.

I think their feeling is they feel that now there's a trial looming for the defendant and that there's a prospect of their plaintiff's attorney's fees being awarded if they prevail. Usually, the demand goes up. So I think, [00:33:00], it's best to do it before a summary judgment.

When I get a case after summary judgment is denied, even though we all know judges deny summary judgments for a lot of reasons-- sometimes for the merits, other times because of the time constraints, or they see a factual dispute effect, issue of fact. A lot of times I think some lawyers get emboldened because the summary judgment motion was denied, but sometimes it doesn't affect much on the merits of the dispute.

I don't know if that answers your question, but I think that's one of my thoughts about it

Victoria Fuller: It does. So, as we were talking about when is a good time to resolve, and I think early resolution should always be at least considered because generally speaking, [it's] your most cost-effective time to get that case off your docket

Hon. Thomas Rueter (Ret.): Just to go back quickly to on jurisdictions.

Some jurisdictions have mandatory mediation. The Western District of Pennsylvania has a program where you have to go to mediation in all cases and they do it right after the Rule 16 or the [00:34:00] pretrial conference, if you're in a state court system.

It's good and bad. It can be bad in that usually one party doesn't want to go to mediation. It may be because they feel they don't have enough information to justify paying money. I found that when parties come and they have to come and they're both not willing, it's not a good start to a mediation.

The same thing with mediation clauses in arbitration agreements. A lot of arbitration agreements require mediation as a prelude to arbitration. A lot of them are doomed to failure because a lot of people just do it to go through the motions. They're not really there to settle it. They just do it to fulfill the requirement.

The same thing of a judge sometimes. A judge will order people at a Rule 16 or a pretrial conference to go to mediation without really checking out whether both sides really thinks it's feasible.

For a lot of people, too, the judge says, "You want to go to mediation?" And they really don't want to go to mediation, but they want to placate the judge. They want to get on the judge's good side, and they go to mediation, and they're not really serious about it.

You've [00:35:00] got to be careful. I think from the non-mediator's perspective, you've got to be careful going into those, making sure both sides really want to do it because private mediations are expensive, and to spend all that money and time [is] not worth it.

Victoria Fuller: April, you've done a ton of mediations, and you have that perspective of the adjuster and being in the room observing mediators. What, in your experience, have you seen that you think makes for an effective mediator?

April Quire: I think a mediator really needs to have credibility with both sides. [They] need to have credibility in both rooms. [They] need to really be willing to dig into the facts and understand the case and the dynamics of what's going on in this particular litigation.

My least favorite thing is when a mediator is just a mere number shuffler. That kind of drives me crazy. I think, what are we paying for here? So really, you know, someone who can dig in, emotionally connect with the parties, and [00:36:00] really have the ability to explain the risks to both sides.

Laura Corvo: Vicki, I like the question you posed to April. I think I want to tweak it a little bit for Judge Rueter as a mediator.

You talked a little bit about some of the mediation techniques that are ineffective for different counsel, but what do you see from litigants or counsel that can backfire at mediation? [What do you see] that can obstruct the success of mediation?

Hon. Thomas Rueter (Ret.): Sometimes counsel, in the presence of their client, can be very strident, very aggressive, and non-conciliatory, and just refuse to concede. There might be some warts or some weaknesses in their case. That's a problem.

[I] sometimes like to talk to the lawyers privately without their clients because I get a different take or response to some of the points I make in private than in front of their clients. They all have an obligation to zealously represent their client, and they never want to let their [00:37:00] clients think that they're not entirely on their side. There comes a point where, and maybe this is done in private as opposed in my presence, the lawyer's got to tell the client that their case is not one hundred percent bulletproof, and there are some issues here that require them to compromise.

When I come into a room and I try to talk to the client and I get resistance and aggressive fighting me, it makes it difficult. There's a way I think a lawyer who's good can kind of resist some of the things I'm saying, but also admit that maybe some points I'm making are correct.

Laura Corvo: How important do you think it is, and I found this in my own experience at mediation, to have the conversation with the lawyer and the mediator.

As a lawyer, sometimes I want to give a heads-up to a mediator about certain things so that they have the full picture. How important do you think the ability to communicate directly is?

Hon. Thomas Rueter (Ret.): Oh, it's very important. I would encourage either a pre-mediation call. Just reach out and say, "Can I talk to you?" a couple days [00:38:00] beforehand or at the start of the mediation. The case manager or the people, the receptionist know you want to talk.

One of the more frustrating things with Zoom mediations, I know we'll talk about that, is sometimes the lawyers will have their clients all in a big conference room. I'm on Zoom. I'm talking, and there's no way I can kind of let the client know that I'm kind of separating the lawyer from them, where I can talk to the lawyer. I prefer it when the lawyer has his own or her own virtual room.

What I do when I get in the office, sometimes I'll tell the people, "I'm in this room. I'm right across the hallway from you." So then when the lawyers come to come out, they leave without the client, and they'll say, "Okay, judge, this is

our demand or our offer." And I'll say, "Come on in. Come on, I want to talk to you." Then I'll try to get a little light sense talking to them.

The other thing is, I think there's a need for humor in these mediations a little bit, too. I think sometimes the lawyers can be very serious, and sometimes I think it eases the tension when you have a little bit of humor.

Laura Corvo: Absolutely.

Hon. Thomas Rueter (Ret.): [00:39:00] Sometimes I do that with the client. I might find a personal connection I have with them. They went to the same high school I did or something like that. I'll start talking with them. It gets them a little bit more at ease with things.

I don't know if that answers your question, Laura, but that's a big impediment.

Laura Corvo: It certainly does. And I think, like you said, that ability to communicate with all parties is really what the beauty of mediation is and, you know, to have that connection with each party.

Victoria Fuller: We've talked a lot about different things that can complicate resolution and can hold up a case from getting to yes. Let's talk about some tools to close that gap.

Judge Rueter, you mentioned this earlier, this concept of the mediator's proposal. Can you explain what that is for our listeners and when you bring that out?

Hon. Thomas Rueter (Ret.): After a full day or many hours of mediation, sometimes even earlier if it looks like the parties are just so far apart that they can't get it done by themselves, I'll make what's called a mediator's proposal. Some people call it a recommendation. That is a [00:40:00] number that I believe is a fair resolution. Probably more importantly, it's a number I think both sides would agree to.

I've had a lot of times when I was a judge too, we want you to put a number on the case. Well, I could say to April, let's say she's representing an insurance, say, "Okay, $10, April, is what I recommend." And April thinks I'm the greatest mediator around, you know? But I'm not going to get the case resolved.

Vice versa, I said to the plaintiff, "April, you've got to pay $10 million," and the case is worth fifty. She looks at me, and she'll never use me again as a mediator.

So, a mediator's proposal is a number. There [are] two numbers. There's a number what I think, personally, I would do as a judge in a non-jury trial. What verdict I would give. The other number is the number I think I can get both sides to agree to. That is a combination of where the parties are numerically in their numbers.

Throughout the course of the day, I may even--- I don't call them trial balloons, but I may say something to the [00:41:00] lawyers like, "Maybe I could get the other side to pay this," or, "Maybe I can get the other side to accept this. What do you think?" And I kind of try to see what their reaction is.

Sometimes people say no in many different ways. Someone says, "Nah, I don't think that's going to work." That might work because the way you said no. Or [they may say], "No, Judge, absolutely not. Never going to happen." That's a different kind of no.

Sometimes by talking to people and asking them about different numbers, what they think, sometimes I'll say, "What do you think the plaintiff would accept?" You know their demand is a million dollars, but I say, "What do you think they'll accept?" Sometimes talking to people and getting a little bit of a reaction from them or how they answer me, that may tell me something about where your head is.

I never ask the question like, "Well, what's the most you'll pay," or, "What's the most you'll accept?" I think that's unfair. But I think there's a ways of discussing and getting a sense of what the defendant will pay and what the plaintiff would accept. All that [00:42:00] kind of information, I think at the end of the day, gives me a sense of a proposal I could make which both sides would accept.

The problem is sometimes people want me to make a proposal early on when things are hopeless. That's a little bit dicey because you make a proposal and you think it might work, but you're not quite sure because you don't have enough information. You haven't gone [far] enough in the process.

The other thing I want to mention too, it's so funny in mediations. If you're ten minutes in a mediation and you say to the plaintiff, "Would you accept $100 if we settle the case?" And they'll say, "Absolutely not. No way." But you go in through six hours of mediation and that same $100 is now $100 on the table.

It's different

Victoria Fuller: This is exactly what we were talking about earlier. It's, you have to spend time getting comfortable moving away from your position so that $100 at 9:00 AM [does] not [have] the same impact as $100 at 3:00 PM.

Hon. Thomas Rueter (Ret.): Right. Exactly. After all the effort to get that $100. And that's what I always tell the defendants too. [00:43:00] A lot of people just leave and if you just hang in there, it takes a long time, but sometimes you can get there because just the process changes people's positions.

Victoria Fuller: April, I want to ask you about mediator's proposal because in my experience, claims reps can have very strong opinions about whether they want or do not want mediator's proposal. Do you have thoughts on it? Do you want it? Do you not want it? Does it depend on the circumstances?

April Quire: Yeah, the answer is it absolutely depends.

I think that's where it really becomes important to have a very trusted mediator. If it's a mediator that I know and I trust and we've been through the day and they're recommending a proposal to try to bridge a gap, then that's something that I would absolutely be willing to consider. But it really depends on each situation.

Hon. Thomas Rueter (Ret): That's a good point, April. I usually only give a mediator's proposal if the parties kind of want me to.

I did have a mediation a while back. It was three days of mediation and 150 [00:44:00] lawsuits, and I don't want to tell you the details. It was 150 individual cases of sexual assault against an institution. There were all kinds of insurers. There were towers of insurance. It was one of these cases where the statute of limitations had been extended by the legislature, so we had history of sexual abuse going back years with different claims made policy. There were towers within each year, so there were a lot of voices on the defense side.

After three days, we're going back and forth, we're doing it by each claim, and we were just basically putting a dollar value on the claims. Then you would aggregate. You would just multiply them by the number of suits, and that was the ultimate number.

To make a long story short, the parties, for three days, they just couldn't get there. I said, "I'm making a mediator's proposal." The defense unanimously did not want me to make a mediator's proposal. They were angry at me, and they're

mostly insurers. I always just do what I think is right, but I did make a mediator's proposal. And the case didn't settle that day.

I did it because I [00:45:00] felt like the insurers were arguing among themselves as to contributions and allocations over the different policy periods. I think for them to agree to that, they needed a number to target of what the ultimate number was to settle the case. The case, it did settle. It went to the district judge for a status conference, and they eventually settled. I personally feel it was the right thing to do, but I think I got some people angry at me because I did that.

That was the only time I ever did it, but I just felt after three days it was the right thing to do. Sometimes I just do what I think is right at the time, and I did it. I think it turned out the right way. At least that's what the lawyers told me, anyway, even though the clients didn't like it.

Laura Corvo: I think too, the mediator's proposal from the litigant's perspective, when you're trying to convince your client that it's the right thing to settle, they see the mediator often as the judge or the seasoned attorney who's going to understand this. They've gained some trust. If that mediator's proposal helps defense counsel or plaintiff's counsel move their client [00:46:00] a little bit too, because now you have the neutral who says, "This is really what the value is. This isn't just me, your counsel, telling you you've got a problem here."

It's interesting.

Victoria Fuller: All right, let's turn the conversation to everyone's favorite topic, in-person or Zoom? What do you think? Let's start with you, April. Do you see any significant difference in success rate when mediations are done remotely versus in person?

April Quire: I spend a lot of time paying attention to this topic.

Candidly, when we first started doing Zoom mediations at the start of the pandemic, I didn't think they were going to be as successful. I thought there would be a lot of problems, but I've been really pleasantly surprised. I think my general experience is that mediations over Zoom have been as effective as in-person mediations.

Victoria Fuller: And Judge Rueter, how about you? What do you think?

Hon. Thomas Rueter (Ret.): I kind of agree with April. I think generally speaking, they're just as good as in-person [00:47:00] mediations.

I would say probably the advantages of Zoom mediation is you can get more people involved easily. Remember I was talking earlier about the scenario where the person behind the curtain's making all the decision, and that person's not there. You kind of eliminate that because that person, it's more easy and accessible for that person to be at the mediation, even if they shut off their monitor and are doing work. When we need him or need her, we can get them on there quickly to kind of get them involved in the mediation. That's the advantage.

The disadvantage is if you want the mediator to talk to the client. Sometimes even the plaintiff's lawyers want the mediator there to talk to their client because they may be having difficulty convincing the client that their demands are too high or unreasonable. Sometimes that person-to-person, face-to-face is better than having it on the screen. Even on the [00:48:00] defense side, too, sometimes defense lawyers will, you know, want me to talk to their client and talk to them. Again, I think that face-to-face is a little bit more effective.

The other advantage [of] having it in person is there's more at stake. I mean, people are investing of their time and they flew in or into a different city, or they took the train down to the city. A lot of times there's time constraints. I know a lot of times, you know, I always like it when they say, "I got a six o'clock plane tonight." It really makes it like the pressure's on, and they work harder to get it done quickly. Whereas Zoom, there's less pressure. It's easier to leave and pack up your bags and just say, "I'm not playing ball anymore."

But I think overall, I agree with April. I don't think if you weighed it, the advantages of in-person versus Zoom are not that great, where I wouldn't say the Zoom session's not effective. It is effective.

Victoria Fuller: I agree that it can be very effective. I will never forget, though, during COVID, I had one. The [00:49:00] complainant's attorney had a cat jumping onto the table and then walking across his keyboard. And you're trying to be serious, right? So, I'm trying not to laugh. This tail is wagging like a cat's tail. It was really funny.

Hon. Thomas Rueter (Ret.): Yeah.

Victoria Fuller: But,

Hon. Thomas Rueter (Ret.): The other thing, sometimes in Zoom session, especially when you have the client, there's another voice back there. It might be the spouse or it might be the brother-in-law who's a lawyer or something like that. That's kind of maddening in a way, too. You see it going on, that there's somebody there. You don't have that maybe in person. Although, maybe you do. They're out in the hallway talking to that person.

Did you ever have that, Vicky or Laura? Did you ever see, like, there's somebody behind the screen there kind of pulling the-

Laura Corvo: Yeah, I always ask the mediator to confirm that nobody else is in the room with the with the plaintiff, just because of the confidentiality too. But you can't guarantee it. You don't know if somebody's, you know-

Hon. Thomas Rueter (Ret.): Right ...

Laura Corvo: sitting off camera and listening or-

Hon. Thomas Rueter (Ret.): JAMS makes you sign a confidentiality agreement, everybody that's there. Even on Zoom, they make you sign that, [00:50:00] each participant. But sometimes you're right, Laura, you can't control that. There might be somebody that is in and out of the room and things.

Laura Corvo: At the same time, I think, especially as more and more employers have employees throughout the country, it just practically is so much easier to bring everybody together via Zoom, and the costs certainly are so much less.

Hon. Thomas Rueter(Ret): Well, I'm good with hybrid, too. I'm sure April does a lot of these. In fact, April, it sounds like we did one the other day where you were kind of hybrid. If it's the clients, both on the defense and the plaintiff side, that the mediator needs to have direct contact, you can have them there, but the insurance representative who's very busy and can't travel to mediation every day, have them [join] by video conference, so they're listening and they're meeting the people. That's also just as good, too.

Laura Corvo: What about when you have a litigant, whether be it a pro se litigant or an attorney who is not an employment attorney? How do you educate them, April and Judge, on some of the [00:51:00] different nuances of resolving an employment case?[How do you educate them on]things like apportionments of the settlement for W-2 wages, confidentiality concerns when certain state

laws prevent certain items from being completely confidential or non-disparagement, things like the Older Workers Benefit Protection Act.

As employment lawyers, we know all of those things, right? We've thought about them. We've educated our clients on it, but a lot of times, either a pro se plaintiff or a plaintiff's attorney who is not an employment attorney might not know those things. Does that lack of knowledge serve as an impediment to settlement? April, let me throw that to you.

April Quire: Yeah, sometimes it definitely can.

From my perspective, I would always defer to defense counsel and the insured in terms of the way any settlement would be allocated. This is an area where we really rely on a strong mediator to educate the plaintiff about these terms and conditions that are standard in the employment space.

So that's where, again, just having that strong [00:52:00] mediator is really key.

Hon. Thomas Rueter (Ret.): Yeah, it's a problem because if the mediator has done his or her job and has resolved the case, it's probably a result of that because the pro se plaintiff trusts the mediator. The mediator has given advice that the pro se plaintiff trusted and relied upon.

When we get to some of these issues, the pro se plaintiff winds up asking you, the mediator, “What do you think I should do here? Should I agree to no rehire provision?” for example. A lot of even lawyers that don't do employment work will say. “A no rehire provision? We-- I'm not agreeing that my client can't work again for this particular employer.” Pro se plaintiffs have the same reaction.

I do advise them what the law is and what maybe its standard terms are in employment action. I'll also try to caution them repeatedly. “Get your own lawyer. Get your own advice. If you [00:53:00] have any questions about the settlement agreement, you don't have to retain a lawyer to represent you throughout the case, but he or she could look at the employment agreement.” After I say that, I'll tell them what I think and what is standard and what's customary

It’s a fine line. You’ve got to be careful, especially as a mediator and as being neutral. You're not the guy's lawyer, and that's what you’ve got to be careful about.

Victoria Fuller: I think one of the biggest issues that I come across with pro se [litigants] or with attorneys who are not employment lawyers is this issue of allocation and not understanding that, for the most part, employment settlements are taxable, and also not understanding that emotional distress damages, for example, have to get reported on 1099. They're trying so hard to push as much as they can into emotional distress. You may not be getting payroll taxes on it, but you're still getting taxed on it.

Hon. Thomas Rueter (Ret.): Yeah.

Victoria Fuller: Or if they're personal injury attorneys, they just, they don't think it needs to be reported at all. I think that could be very difficult, trying to educate them. [It can be difficult] to say like, "No, we have to have a proper allocation. An appropriate amount does have to [00:54:00] be allocated to lost wages, and this is not just like whatever you want it to be. We have to be thoughtful in how we allocate between the different buckets of employment damages."

Hon. Thomas Rueter (Ret.): Yeah. No, you're absolutely right. That always becomes like the issue at the end of the agreement? We always kind of seem [to be] discussing that, you're right, especially lawyers who do primarily personal injury. They think bodily injury is not taxable, but that was all remedied by, I think it was President Clinton when he passed a law way back then and said anything emanating from a labor dispute is taxable.

It's funny because if employees think they're going to avoid the IRS by taking it on a 1099, they don't. In fact, they kind of cheat themselves because the employer doesn't have to pay the taxes, the Social Security taxes, so they lose the employer's contribution, which helps them when they retire.

It's always an issue. I agree with you. And it varies. Some employers just have different policies. Some are [00:55:00] very strict. Some are more loosey-goosey and will go along with it. Sometimes people, the lawyers, will say, "Well, the last case I had with you, did 80/20 on the allocation, and now you only want to do 50/50." It's just employers are more concerned about the IRS than other employers.

I don't know what you think, Vicky and Laura, but that's kind of what I see often.

Victoria Fuller: I tell plaintiff's attorneys all the time, "I'm not setting up my client for tax evasion." So, we will allocate as appropriate.

Sometimes there really aren't any lost wages because the plaintiff got another job right away and they're making more money. They have two weeks of lost wages. Other times, they've been out of work for two years and they're like, "Let's put it all into emotional distress." No, we're not going to do that. I think that can be that tough issue right at the end of the day when everyone's hungry and tired and they just want to go home. Now we've got to talk about taxes which is everyone's least favorite topic when it comes to settlement. [00:56:00]

I think working through that earlier in the process at mediation, setting the table to make sure that the plaintiff and the plaintiff's attorney understands that that's a thing, not at the end where we all agree on a number, and now we've got to talk about allocation.

Laura Corvo: I agree with that. I'd like to raise that, once I know we're kind of at a place where we're probably going to settle, I want to be very explicit about allocation because, like you said, it just oftentimes that end of the night thing that blows up. Clients don't understand it. Everyone's frustrated. They're just like, "Come on, just let us sign this thing and go home." But it is important, and there is tax exposure.

Hon. Thomas Rueter (Ret.): I had a no rehire provision, also one that I've had some difficulty with.

I had a case with a very large corporation that I settled. I mean, we settled the money. It fell apart because of the no rehire because this corporation had so many affiliates and subsidiaries. This person in this particular field really was [00:57:00] concerned about getting a job in that field and being precluded from that space. A lot of times we get around it because we'll do a list of the subsidiaries and the affiliates so that the employee knows what he or she can't do as far as applying. But I've been finding lately it's been a problem.

Victoria Fuller: Just for our listeners who maybe have not heard of a no hire or no rehire provision, it's typical in employment settlement agreements where the employee agrees not to apply for, accept, or go work for the former employer or the alleged employer. That is so the parties can walk away with peace knowing that they're not going to have a future conflict.

As Judge Rueter said, occasionally there are [instances], I think it's pretty rare, but it does happen, where you have small industries [or] small spaces where that no rehire can be problematic. There's usually some kind of workaround with more work on it. You're not going to apply for the main [00:58:00] company, or if you work for this other company that gets acquired, you don't have to quit

your job. It can create problems, but for the most part, [for] most employees it's just a clean walk away. They go off and do something else.

Laura Corvo: So, I can't believe we're already out of time.

This has been a fantastic discussion. I want to thank Judge Rueter and April for joining us today. I think this, again, just has been fantastic.

Victoria Fuller: I agree, Laura. I think this has been a great discussion. We've had so much good commentary on mediation. I hope our listeners have gotten something out of it.

And we just want to, actually, on the note of our listeners, thank everybody for joining us here today on *The Employment Law Counselor* podcast, where we talk about the risks facing employers today and discuss how better mitigation equals less litigation.

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