EFFECTIVE MEDIATION FOR EMPLOYMENT CASES

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INTRODUCTION

Journal articles,[1] law review articles,[2] and court decisions[3] dwell on the question of whether mandatory employment arbitration clauses are enforceable. This discussion is important, but to some extent it misses the point. Of all the alternative dispute resolution ("ADR") forms, arbitration is most like the courtroom and has the human and transactional costs that are perceived as the negative aspects of litigation.[4] Some cases either require publicity or are necessary for the development of employment law. In fact, the privatization of justice has been criticized as diverting public issues into private settings.[5] Nevertheless, preventive law must both facilitate the development of in-house conflict management systems that allow either arbitration or a trial and facilitate the use of dispute resolution as early, and as close to the source of conflict, as possible.[6] The development of such programs can create opportunities for both empowerment and recognition.[7] Further, such programs reduce the costs associated both with litigation and with arbitration. In-house dispute-resolution systems and litigated case-mediation systems both provide parties with an opportunity for creative control of the employment dispute.[8]

At present, mediation is the favored form of ADR for employment discrimination disputes.[9] Mediation offers advantages that are important to the participants: a safer atmosphere; greater confidentiality; enhanced privacy; decreased

emotional trauma; reduced transactional costs; greater flexibility in the time, scope and procedural format; increased creativity in the remedies; increased opportunities for empowerment and recognition; and increased focus on interests rather than legal positions.[10] Given the favored status and advantages of employment mediation, this article guides attorneys through the mediation process in employment cases.

PRELIMINARY CONSIDERATIONS

The Nature of Employment Cases

Employment cases involve not only workplace disputes but also the very personal core issues of validation and self-esteem.[11] Being gainfully employed is more than a means of earning a living "it is dignity!"[12] Hence, the employee who has suffered from discrimination, harassment or retaliation might feel angry, betrayed, hurt and devalued.[13] With the exception of bullies described in cases like *Oncale*,[14] few respondents desire the label of harasser. While the wrongly accused might feel stigmatized, angry and humiliated, the justly accused might feel betrayed and fearful of losing either their job or reputation. Large multinational corporations such as Coca Cola, Texaco, and Mitsubishi dislike both tarnished reputations and the costs involved in defending and in paying claims of systemic workplace discrimination or harassment. Whether involving either a corporate or an individual respondent, or a group or an individual complainant, the issues of employment cases are intense. Careers on both the respondent and the complainant sides of the employment dispute might be at

risk, and those involved can expect to be examined under a microscope. This is particularly true for the complainant. Although “people who live in glass houses should not throw stones,” this adage has never stopped defense counsel from its voyage of discovery and attempted conquest. An individual with a self identity strongly linked to the workplace is especially vulnerable both to the overwhelming impact of rejection and the often sudden loss of long-term workplace relationships. In many of these cases, the psychological dynamics of depression and related issues may be at work. Attorneys, adjusters, corporate decision-makers, alleged perpetrators, and alleged victims must be sensitive to these volatile emotional issues as they arise before and during mediation.

The Mediator

Experienced advocates educate the neutral mediator on the latest employment cases and supply the mediator with the motions and briefs in support of, or in opposition to, motions for summary judgment and class actions. Then, the advocates submit thoughtful, persuasive, and confidential settlement statements to the mediator.

Mediators must be perceptive and must understand the unique business issues and the complex psychodynamics involved in handling these employment cases. In addition, mediators must understand workplace reality by posing such questions as “What really happens in the workplace?”; “Is there a conspiracy of

silence?"; "Is there a conspiracy of silence?"; "Are the work evaluations realistic?"; "What power imbalances are at work here?"

The mediator must work hard, probe, and serve as the "reality check." Therefore, an effective employment mediator has a good sense for people, a good intuition, and an insight into workplace power imbalances. Also, the mediator must be empathetic, flexible and creative. Thus, both storytelling and the ability to use humor build the rapport, and the trust required for successful employment mediation.[15]

Mediators bring different approaches to employment mediation. Some might utilize "therapeutic mediation,"[16] where the mediator both considers and incorporates the emotional dimensions of the dispute.[17] "Therapeutic mediation" might have greater utilization with in-house programs or pre-litigation mediation than during traditional mediation. Another approach gaining popularity primarily with in-house employment dispute resolution programs is "transformative mediation" as promoted by R. Baruch Bush and Joseph Folger.[18] Bush and Folger suggest that disputes are opportunities for growth and "transformation." The "transformation" occurs, in part, through "empowerment" of strengthening a participant's capacity to analyze conflict situations.[19] Moreover, "transformation" occurs because of the "recognition" that takes place with the enhanced capacity to see and to consider the perspective of others.[20] Other mediators use an "interest-based," or "problem-solving," approach. In such an approach, the

mediator helps the parties both to identify and focus on individual needs and interests, and to search for mutually satisfactory agreements.[21]

Still other mediators use “distributive,” or “zero-sum” negotiation, which relies upon rights-based analysis.[22] In such negotiations an advocate typically seeks to maximize the financial advantage for the client.[23] With the emergence of employment-practices liability insurance, adjusters increasingly attend the mediation of litigated cases. Involvement of a participant whose interest is primarily financial changes the interpersonal dynamics of employment mediation and makes “distributive negotiation more likely.[24]

In sum, the participants’ choice of a mediator and their mutual design of the mediation process can be critical to the success of the mediation.[25] A good employment mediator must have the capacity to be empathetic, build rapport, establish trust, be a reality check and recognize the dynamics of power differentials. An employment mediator must be capable of combining aspects of different mediation approaches and must know when to utilize a particular approach.

TIMING

The timing of employment mediation is a critical element to success. Litigated employment cases should be mediated neither too early nor too late. While each party needs sufficient information to make an informed decision, each party must

be aware that too much discovery “bloodshed” may cause positions to become frozen and settlement opportunities to be lost. Each party needs enough information to adequately appreciate individual risks and to fully evaluate its case. To appreciate risks and evaluate a case might require an internal investigation, which follows the issuance of the right-to-sue letter, the deposition of the complainant and the defendant, and neutral fact finding. Considering the attorney’s fee, too much discovery might make settlement prohibitive. Similarly, where the case has gained a lot of pre-trial publicity, the chances for pre-trial resolution might be lost, as the defendant has incurred the intangible cost of adverse publicity.

STRATEGIES FOR MORE EFFECTIVE MEDIATION

Design

A step often overlooked in employment mediation is the customization of the mediation design. All too frequently, advocates and mediators fall into the rut of “cookie cutter” – one size fits all – mediation. Thus, the mediator must be creative and articulate in determining with the parties the mediation design most likely to produce a satisfactory result. Factors to be kept in mind when designing an employment mediation are (a) the nature of the accusations; (b) the personalities of the accuser(s), the accused and the institutional decision makers; (c) the conflict resolution styles of the participants; (d) the workplace dynamics; and (e) the public interest issues. Design options include among others: a pre-mediation conference between counsel and the mediator; pre-mediation

caucuses; staggered starts; co-mediation, a pre-mediation discovery plan; and an agreement as to mediation attendees. The advocates and the mediator might discuss expectations for the mediation: "Are the participants anticipating a distributive negotiation, and interest-based or problem-solving mediation process, or are they looking for transformative opportunities?"; "Do the participants want the mediator to be evaluative or facilitative, or in some hybrid mix preferred?" Frequently, a mix of mediation styles and techniques is required for effective mediation.

Most mediators recommend that the parties go outside the typical mediation box and work with the mediator in advance of the mediation. Too often advocates and mediators bring a rights-based analysis to the mediation and forget to adequately consider the emotional and environmental issues. A pressure-free, pre-mediation caucus using active listening helps both the mediator and the participants to develop insight, understanding, rapport, trust and respect before mediation. Thus, the pre-mediation caucus assists in enabling closure at the mediation. When going outside the mediation box, parties should consider the number of both plaintiffs and defendants and the nature of the accusations to determine whether a diverse co-mediation team would be more effective.

Addressing the Elephant inside the Tent

A mentioned above, employment mediation deals with various emotional issues. Therefore, any rights-based analysis that neglects to address the importance of

the underlying issues and interests is often doomed to fail. Although participants in employment mediation are not expected to be psychotherapists, the participants must be empathetically cognizant of the potential effect on the mediation of the important psychological issues that might arise. If emotional or psychological factors interfere with the mediation, referral to or consultation with a therapist might be appropriate.

Theme

Each side of an employment litigation must assess its case and develop a theme that reflects its view of the facts and the law. Themes organize a case and are persuasive. Parties should utilize themes in mediation just as they would at trial. An added advantage of utilizing a theme at mediation is that participants often get a pre-trial reality check in determining if the theme has resonance with the mediator. As the participants try the theme out on the mediator, they must consider how the theme “resonates” with the other side and how sincere it sounds to the opponent. If an advocate does not have a theme to advance at the mediation, that generally means the advocate has not effectively prepared the case. Failed preparation undermines the advocate’s credibility and the persuasiveness of the presentation, thereby making closure at mediation more difficult.

Preparation of the Advocate

No self-respecting advocate would go to trial without meeting with witnesses and reviewing their prospective testimony. Similarly, no rational advocate would go to trial without exhibits. Under the modern state and federal rules of civil procedure, an advocate must give the opponent full notice of experts, lay witnesses, economic loss projection, and exhibits. Never-the-less, participants in mediation often miss the opportunity to make a good first impression for fear of giving away too much information. Plaintiff's advocates should show the opponent why the opponent should give the plaintiff money or a workplace accommodation. The pre-mediation preparation and the mediation conduct of plaintiff's counsel should reflect insight, determination, competence, and readiness to go to trial. Plaintiff's counsel might consider: (1) giving the opponent a version of the plaintiff's "confidential settlement statement"; (2) bringing a key lay witness to the mediation; (3) making an expert available by phone; and/or (4) using vivid statistical visuals. On the other hand, if defense counsel wants the plaintiff to settle early, to dismiss the case, or to settle modestly, the defense counsel should take key depositions, provide supportive statistical data, and file a motion to dismiss before the mediation. Defense counsel should convince plaintiff's counsel, and the plaintiff, that the defense is ready for trial and that the trial will not be a "walk in the park." On the other hand, defense counsel should propose creative settlement options available during a mediation that might not be available at trial.

Preparation of the Client

Advocates must prepare their clients for mediation. Just as an attorney would prepare a client for trial, an attorney should use pre-trial rituals like “role-playing” and “wood shedding” before a mediation. In addition, an attorney should conduct risk-benefit analysis and consider weaknesses and strengths before mediation. Both counsel and client should consider the client’s interests and how to address those interests in mediation. Counsel and client must at least tentatively, establish a realistic monetary and non-monetary settlement target. This is often a difficult task for advocates. Although advocates are often hired to be “gladiators,” clients must understand the need for a “gladiator/dove” at the mediation, if the participants expect to accomplish conflict closure. In other words, advocates at employment mediation need to be empathetically assertive.[26] Advocates must avoid the trap of seeking client approval.[27] Advocates need to seek out the client’s covert as well as overt interests. Then, after thorough preparation of the client, the attorney will more confidently “counsel” the client toward a satisfying closure of the case.

Preparation of the Other Side

If the objective of a particular mediation is to come to closure, the advocate must prepare the other side for resolution. First, this requires sufficient discovery (formal and/or informal) to allow the opponent to see its weaknesses. Depositions can both provide necessary information and impress the opponent of the advocate’s skill while highlighting weaknesses in the opponent’s case. Disclosure of reports from credible and respected experts assists with balanced

case evaluations. Both sides should avoid the temptation of playing “let’s hide the ball.” If both parties play “let’s hide the ball,” then each party will evaluate different cases. When parties evaluate different cases, common sense says that dispute resolution will be more difficult, that the opportunity for transformative mediation will be lost, and that interest-based (problem-solving) mediation will be frustrated.

Venting

It is often essential that counsel allow the participants to have a day in court. Many feel that this means allowing the parties to express their views of the facts and to give direct or indirect expressions of their feelings. However, counsel often becomes emotionally invested in the case and must give expression to their advocacy before closure. The astute advocate allows venting to occur but not to polarize.[28] Thus, the astute advocate uses venting both to reach out to the other side and to create an opportunity for reciprocal listening. In this way, the advocate creates the opportunity for empowerment and reciprocal recognition of perspective. Reciprocal listening skills provide the opportunity to address the underlying interests of both parties and to discover any transformative opportunities. Purposeful venting can create increased opportunity for conflict resolution. Along with venting, advocates should consider the appropriateness and the value of either acknowledgment or apology. An acknowledgment is often appropriate and helpful when the parties contest liability but accept some level of

harm. An apology may be necessary when a party concedes liability but disputes the level of harm.

Advocacy at Mediation

An advocate gains credibility at trial by acknowledging a known weakness and "pulling the punch." The same is true at mediation. Furthermore, treating the other participants with dignity rather than with disdain often helps establish the bridge necessary for resolution. The effective mediation advocate avoids arrogance and unnecessary antagonism. Too often lawyers confuse being an effective advocate with the need to annihilate and demean the opponent. While this acrimonious advocacy might be effective, more often the result is unnecessarily prolonging litigation. Similarly, counsel might feel that the tough-guy annihilator is what the client expects. Counsel must investigate and reconsider these perspective needs before the mediation. Coming on strong might be effective, but empathetic assertiveness is typically more effective. Knowing the case and understanding people can create a momentum that can bring the parties to a positive closure.

When counsel is impatient and rushes to a "take-it-or-leav-it" settlement position, counsel both prevents the other side from getting to a realistic place for closure and misjudges its own endpoint. Patience, listening, reflection, flexibility and informed/velvet-gloved firmness are important advocacy skills in employment mediation.

Tearing Down the Barriers to Dispute Resolution

If the advocate's mediation goal is closure, then the advocate must be aware of, guard against, and tear down the barriers that frustrate dispute resolution. These barriers include: attorney client enmeshment; irrational emotionalism; partisian perception or bias; judgmental over-confidence; reactive devaluation of the opponent's proposals; and the "hired-gun" mindset.[29] Partisan perception is the most insidius of these barriers to dispute resolution. Advocates and clients alike are "disposed to 'perceive' what they expect to and wish to 'see,' as to what it is in their self-interest they want to see.:[30] Unquestionably, effective mediation requires objective analysis, perceptive listening, utilization of people skills, and principled negotiation.

Win-Win

Employment mediation may uncover the opportunity for creative solutions. Options to consider in employment cases might include reasonable accommodation, the reassignment of the defendant, the sanctioning of the defendant, the reassignment of the complainant and the training and retraining of the defendant (and others) within the workplace. Training might involve human diversity and multi-cultural awareness issues. Counseling of the accused or the accuser in anger management, conflict resolution and communication skills might be appropriate. Out-placement services, severance packages, and letters of reference are examples of options that might be necessary in the employment

case. Finally, the accused must acknowledge the complainant. The goal is to look for underlying interests and to consider the possibilities for personal and workplace transformation.

Key Settlement Clauses

When the parties are a hair's breadth from closure, the settlement should not break down on confidentiality clauses, tax treatment issues, etc. Mediators should deal with such issues during the course of mediation.. Counsel should bring key settlement clauses to the mediation and discuss the clauses. The parties can then incorporate the clauses into the Memorandum of Understanding prepared when the mediation concludes.

The Close

There are deal lmakers and there are deal breakers. What conflict-resolution style (accommodative, avoidant, cooperative, competitive and collaborative) does the advocate and the client bring to the mediation? What style will work best to bring the mediation to a successful closure? Do the participants need to step outside themselves and their conflict handling modes in order to close the case? The sophisticated advocate will be in touch with both personal feelings and with client interests and will adopt the style and strategy necessary to "close the deal."

Conclusion

More than two thousand, five hundred years ago, Sun Tzu, a Chinese philosopher and warlord, wrote a book entitled *The Art of War*.[31] Sun Tzu made some observations that thoughtful advocates in employment mediation should carefully consider: "Ponder and deliberate before you make a move,"[32] and remember that "the true objective of war is peace."[33]

Mediation can empower the parties and create the potential for a transformative experience, giving the parties an opportunity for self and mutual recognition, and acknowledgment. Underlying interests as well as overt interests must be recognized and creatively addressed. In employment mediation, counsel must prepare to cooperate and to contest at the same time.[34] In order to be properly postured to both effectively contest and to effectively cooperate during mediation, the astute employment advocate must have given the opponent a reason to cooperate before the mediation. Preparation beforehand combined with patience and thoughtfulness during the mediation are important ingredients in successful mediation advocacy. In employment cases, consideration of the emotional content is particularly important both to give your opponent "face" and to remember that your goa is to make "peace."

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[1] *See, e.g.*, William C. Heekin, *More Individual Employment Disputes Can and Should be Arbitrated*, JOURNAL OF ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT 31 (Fall 1999); Nancy Welsh, *Arbitration and Beyond: Avoiding Pitfalls in Drafting Dispute Resolution Clauses in Employment Contracts,* JOURNAL OF ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT 35 (Fall 1999).

[2] *See, e.g.*, *Carrie A. Bond, Note.* Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace, 65 FORDHAM LAW REVIEW 2489, 2507 (May 1997).

[3] *See, e.g.*, *Gilmor V. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991); *Armendariz V. Foundation Health Psycbcare Services, Inc.,* 24 Cal 4th 83, 99 Cal. RPTR. 2D 745, 6 P3D 669 (2000); *Craig V. Brown and Root, Inc.,* 84 Cal. APP4th 416, 100 Cal.RPTR2D 818 (2000).

[4] *Compare* Karl A. Slaikeu & Ralph H. Hasson, CONTROLLING THE COST OF CONFLICT: HOW TO DESIGN A SYSTEM FOR YOUR ORGANIZATION 53-104 (Jossey-Bass 1998) with CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS 43-48 (Jossey-Bass 1995).

[5] Sara K. Trenary, *Race Rethinking Neutrality and ADR,* JOURNAL OF ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT 40-48 (Fall 1999).

[6] Stephen K. Huber, *Transformative Mediation in the Workplace,* JOURNAL OF ALTERNATIVE DISPUTE IN EMPLOYMENT 37-42 (Winter 1999).

[7] *Id*.

[8] Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes* 34 WAKE FOREST LAW REVIEW 135, 164 (Spring 1999) (hereinafter "Harkavy").

[9] *Id.* at 136.

[10] Kenneth A. Sprang, *Therapeutic Justice Not in the Workplace: The Use of Imago Rational Therapy in Employment Disputes*, JOURNAL OF ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT 53, 54 (Fall 1999) (hereinafter "Sprang" Xciting Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act,* 43 AMERICAN UNIVERSITY LAW REVIEW 849, 852 (1994).

[11] Sprang, supra note 10 at 54.

[12] *Id.*

[13] *Id.*

[14] *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75 (1998).

[15] ROBERT A. BARUCH BUSH & JOSEPH FOLGER, THE PROMISE OF MEDIATION (Jossey-Bass 1994).

[16] Sprang, *supra* note at 55.

[17] *Id.*

[18] Kenneth Fox, *Exploring the Convergence of Organizational and Conflict Theory: Can Mediation Support Organizational Learning,* JOURNAL OF ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT 30, 33 (Winter 1999) (hereinafter "Fox").

[19] *Id.*

[20] *Id.*
[21] Fox, *supra* note 18, at 32.
[22] John Conbere, *Designing Conflict Management Systems to Resolve Workplace Conflicts,* JOURNAL OF ALTERNATIVE DISPUTE RESOLUTIONS IN EMPLOYMENT 33 – 34 (Fall 2000).
[23] *Id.*
[24] Harkavy, *supra* note 8, at 164.
[25] Conbere, *supra* note 22 at 36.
[26] *See generally,* ROBERT H. MNOOKIN ET AL, BEYOND WINNING 9-10 (Belknap Press 2000) (hereinafter "MNOOKIN").
[27] *Id.* at 199.
[28] *See generally,* Stefan M. Mason, *Mediating Litigated Employment Cases,* JOURNAL OF ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT, 60 (Fall 2000).
[29] MNOOKIN, *supra* note 26, at 156 – 72.
[30] MNOOKIN, *supra* note 26 at 157.
[31] SUN TZU, THE ART OF WAR (James Clavell e.d., Bantam Doubleday Dell Publishing Group 183).
[32] *Id* at 32.
[33] *Id* at 7.
[34] *See generally*, BERNARD S. MAYER, THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER'S GUIDE 61 (Jossey-Bass 2000).