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Why Mediation Works

By Ruth D. Raisfeld

Employment lawyers are familiar with the following scenario: *A client comes to you having received a letter from a lawyer representing a former employee. The client reports that the employee was fired for performance-related reasons after several years of employment. The client has a human resources manager, but the supervisor did not document the reasons for the termination. The employee's lawyer wants to discuss the terms of the separation and is suggesting that the employee was fired because she objected to harassment by the supervisor. The client is frustrated, feeling the company did everything possible for this employee who just didn't work out. However, the client has some reservations about the supervisor's own performance and isn't sure whether the supervisor's employment will last. The client asks you to take a look at the file and see if you have any ideas about how to respond to the demand letter.*

One of the options savvy employment lawyers consider offering the client is to submit the dispute to mediation. In mediation, the employer and the former employee can sit down with each other and their lawyers, and with the help of a neutral third party, they can reach a resolution before either side incurs unnecessary legal fees, additional emotional wear-and-tear, and disruption of normal business activities. This article describes the process of mediation and why it works particularly well in employment matters.

What Is Mediation?

In mediation, a trained third-party neutral is selected by the parties (or appointed by a tribunal) to assist the parties in resolving their dispute. Mediators may be members of a panel, are associated with a dispute resolution organization, or have a private mediation practice. Mediators serve pursuant to written mediation agreements that provide for confidentiality of the process, and outline the procedure that will be used in the mediation session.

The hallmark of mediation is that the mediator meets with both sides, in joint and separate caucuses, and guides the parties through exchange of information and exploration of interests and positions in a confidential setting with the goal of enabling the parties to reach agreement themselves. The mediator has no power to render a binding opinion or impose a settlement. Generally, discussions that take place during the mediation are deemed to be confidential in accordance with the parties' mediation agreement or are treated as "settlement discussions" under state and federal evidentiary rules.

Why Mediation Works

Most governmental mediation programs and private mediation providers estimate that approximately 80% of the cases submitted to mediation settle at the mediation session or shortly thereafter. Settlement rates, however, are not the only indicia of the benefits of mediation. In other cases, mediation can open the door to resolving the case down the road but still before trial. In addition, in some cases, while the mediation may not produce an immediate settlement, some aspect of the litigation, such as dropping parties, narrowing discovery issues, or fact stipulations can be worked out. Several unique features of the mediation process contribute to the high probability of the case settling before protracted litigation ensues.

All the Parties and Counsel in a Room At the Same Time

One of the great things about mediation is that if it is properly scheduled, it gets all the parties and their counsel to be in the same place at the same time. Counsel are familiar with the seemingly endless months of phone tag, unanswered e-mails, and argumentative letters between counsel that deter full discussion of settlement proposals until the court schedules a conference or counsel must call an adversary for an extension. Similarly, it is sometimes a challenge even to get a client to focus on a case until a deposition is noticed or some other court appearance is necessary. The scheduling of a mediation at which counsel and decision-makers for the parties must be present provides a unique opportunity for all stake-holders to be focused on the issues and interests that led to the dispute or litigation in the first place. Sometimes, the mere scheduling of a mediation forces counsel and the parties to pick up a file, review the facts, law and outstanding issues, and brainstorm possible ways to resolve the case.

Fresh Perspective on the Facts and Law

Quite often, counsel and the client get so involved in the minutiae of waging a litigation, that they "lose the forest for the trees." Counsel may dread the call from a client wanting an update on the status of a case filed long ago; the client may become dissatisfied with counsel's view of the case, which has migrated from "optimistic" to "doubtful." In such cases, a mediator can provide a "reality check" about the prospects for success at trial that counsel may have difficulty commu-

nicating to the client or that the client is having difficulty hearing. A mediator who is experienced in the relevant substantive law, who has been briefed on the issues at hand, and who has had an opportunity to "size-up" the evidence and witnesses, can help counsel and clients to assess and communicate about the strengths and weaknesses of a case. Similarly, the mediator does not have the same emotional investment in "winning" that the counsel and parties have, and therefore is able to provide a dispassionate viewpoint that can move the parties away from a stalemate.

An Opportunity to Hear the Other Side's Case Without Pleadings, Affidavits or Transcripts

A critical feature of the mediation process is opening statements by counsel and the parties in joint session, followed by separate caucuses. A properly prepared and delivered opening statement in joint session not only helps to brief the mediator regarding the issues in the case, but provides an opportunity for each side to hear directly the nature of the complaint and the likely defenses. The opening statement is often the first time an employee has an opportunity to explain why he or she believes the employer was unfair or acted illegally. From the employee's standpoint, the ability to explain his or her side of the story, and the economic and emotional impact that the challenged employment decision has had on them, is an important catharsis that may enable them to accept the reality of a challenged employment decision and move on with their lives. From the employer's standpoint, the employer may learn something about the employee, the supervisor, and the employer's workplace that they were not aware of previously, or that they knew of but had not completely or properly addressed. Further, both sides can assess the credibility of the parties, other potential witnesses, and their knowledge of the issues. Finally, in separate caucuses, the parties can share with the mediator the existence of documents, e-mails, and other circumstances that may contribute to hastening a settlement. These kinds of disclosures often reveal the strengths and weakness of each side's case and the potential complexity of litigation should the case proceed. However, the work is done in one mediation session, rather than after many months of costly and disruptive discovery.

Results That May Not Be Awarded By a Court or Jury

Mediation is an extremely effective dispute resolution mechanism in employment cases because the parties can fashion remedies that may not be available through litigation. The most common of these remedies are transfers, letters of reference, assistance without-placement, provision of health insurance, or provision of training. Similarly, in disputes over unpaid wages, commissions, or bonuses, mediation provides an opportunity for both sides to "work through the numbers" without spending inordinate time battling over depositions or experts. Further, in covenant-not-to-compete cases and partnership disputes, the parties may use mediation to get a quick picture of competitive issues and come to an agreement on dividing clients, accounts receivable and handling work-in-progress.

'Face-Saving' Cover for Settlement Discussions

Counsel may be reluctant to engage in settlement discussions because they fear being seen as "weak" or uncertain about the strengths of their case. Counsel may also be concerned about appearing zealous and confident in front of their clients. Mediation can facilitate the passing of offers and counteroffers and thereby eliminate or reduce the amount of "ego" that is typically expended in settlement negotiations. While mediations can and do get contentious, an effective mediator can encourage a "let's-just-get-along approach" that adversaries may be unable to accomplish on their own.

Mediation Provides Confidentiality and Avoids Publicity

The privacy afforded by mediation processes is a key factor contributing to the success of mediation in resolving employment disputes. Both employers and employees may wish to avoid the glare of public attention and scrutiny that often accompanies employment litigation. The most recent obvious examples of publicity surrounding employment litigation include the Bill O'Reilly sexual harassment case, the Morgan Stanley sex discrimination case, and the class action against Wal-Mart. Airing employment disputes before a judge or jury may affect personal relationships of the parties involved, the reputation of witnesses, and interfere with the conduct of daily business transactions, even where the parties are confident about their cases. The confidentiality provided in the mediation process encourages candor, problem-solving, and creativity in approaching employment-related disputes while avoiding the destructive impact of negative publicity.

Mediation Is More Predictable Than Litigation

No lawyer can ethically or practically guarantee a client a particular result in court. Litigation is unpredictable: a document can surface that no one remembers; a witness can crumble on the stand; a jury may not appreciate the nuances of an argument. Particularly in employment litigation, memories fail, the emotional significance of an employment decision fades, and the witnesses may have dispersed to other jobs. Mediation can avoid the consequences of submitting a complex matter to a judge or jury that may not have the time or expertise to hear and understand the facts that led to the dispute in the first place. In mediation, without rules of evidence or procedure, the parties can use less structured means to convey the heart of a problem to the mediator and the other side which may facilitate settlement discussions, concluding the matter without suffering through the vagaries of litigation.

CONCLUSION

Mediation is not a panacea for all hotly contested cases; there will be those litigants who won't back down and those cases where a legal decision is necessary. However, mediation can provide efficient and effective dispute resolution long before the parties are on the courthouse steps.

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