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Move mountains in the workplace with mediation

By Jan Frankel Schau

Thirty years ago, when a young female associate asked her law firm to accommodate her by allowing her to work part-time for another few months after her maternity leave ended, there was an easy answer: She needed to look for another job.

For mediators, the idea that meaningful changes to the workplace can be made without a judge or jury may not be unique. Mediation, it turns out, is ideally suited for negotiating many nonmonetary terms in employment cases. In arbitration and trial, neither the arbitrator, the judge, nor the jury has the jurisdiction to compel the employer to change their policies. Nor can a trial court compel a heartfelt apology or complete explanation of conduct.

But last month at a forum on changing the workplace through mediation, what was unique (and inspiring) was watching two women, one an accomplished plaintiffs' attorney and the other a well-respected defense lawyer, come together to discuss the benefits of mediation.

Each attorney said she prefers to ask parties to engage in an early, pre-litigation mediation to attempt settlement before commencing a costly trial. Indeed, as Abraham Lincoln famously said, "Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker the lawyer has a superior opportunity of being a good man [or woman]. There will still be business enough."

Prior to setting this early mediation, both sides conduct some informal investigation. For defense counsel, this meant discussing the decisions that led to the claim with the decision-makers, reviewing personnel policies, and reviewing the personnel file of the individual claimant. For the plaintiffs' attorney, this meant conducting a thorough review of her own client — within and outside the workplace — to assess their veracity and verify their contentions, as well as the strength of the legal theories, damages, and potential defenses. The defense and plaintiffs' counsel also each said she appreciates a pre-mediation call with the mediator.

It is during such calls that mediators can begin to understand the real interests of each side as well as the potential obstacles to settlement. For instance, what is the plaintiff's biggest motivation? Is he particularly emotionally distressed in ways that need to be handled with extra sensitivity? Is the defendant owned and managed locally, or by some larger entity outside of California who makes policies and hiring decisions? Is this the first or the 100th claim against this business?

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These pre-mediation meetings allow the mediator to assess the nonmonetary terms that may be critical to settlement. For example, sometimes the employee is still working and the employer will only pay to settle if the employee agrees to resign.

Other times, the plaintiff truly cares about the treatment of her remaining co-workers, and will not be satisfied unless the employer agrees to voluntarily make some positive changes in the workplace.

Once mediation is set, there is typically a conversation between the defense counsel and her client about who will participate on behalf of the company. She prefers not to have the individual who made the decision to terminate an employee, alleged sexual harasser, or bad actor present.

Rather, she likes to bring the person who has the decision-making authority about settlement. She also prefers to attend mediation with a known monetary demand in advance of the hearing. The plaintiffs' attorney, on the other hand, does not typically articulate a written monetary demand. However, she does lay out her client's actual damages either in the demand letter that she sends to the defense counsel, or in the course of negotiations such as in the mediation brief.

It came as a surprise to me that neither side discusses the likely ultimate values with their clients in advance. Instead, they prefer to test out their various theories of claims and defenses before wedding themselves to even a range of possible settlement values.

To be sure, an early mediation is not without obstacles. Insurance coverage often is still unclear, making certain thresholds of authority impossible to breach. At the same time, the issue of liability is seldom clear or accepted prior to the initial legal pleading stage. There are always multiple moving parts when it comes to damages, and sometimes even when it comes to naming the proper parties, in addition to whether the plaintiff will be able to meet his or her initial threshold of pleadings on each cause of action.

Also, it's important to note that early resolution often is not in the best financial interest of lawyers on either side. For example, under the Fair Employment and Housing Act, a prevailing plaintiff will be entitled to recover attorney fees after trial.

This means cases tend to settle at a lower amount pre-litigation than on the eve of trial. On the defense side, a matter which could ultimately cost $100,000 in fees may settle at a time when the defendants have paid only an initial retainer. (That said, it was gratifying to hear both defense and plaintiff counsel agree that they are most interesting in getting the desired result for their clients.)

At the end of the day, both sides agreed that, even if the early mediation does not settle the claims, they appreciate the opportunity to have that dialogue with their own clients as well as with opposing counsel.

And they appreciate those mediators who continue to press for a resolution — even if it comes months after that early engagement.

And of course, I was that young associate who was asked to find another job some 30 years ago. Today, I am forever grateful to have the chance to be a mediator who can serve lawyers making positive changes in the workplace, case-by-case, so that women and other groups will not be subject to such intolerable conduct.

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