Mediating The Employment Relationship Dispute

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One of the fundamental axioms of conflict resolution is the concept that the stronger the past, present or future relationship of the disputants, the more susceptible the dispute is to successful resolution via the mediation process. In a society with a strong work ethic, what we do to earn a living is often at the center of our self-identity and value-system. The employment relationship is often the center of our daily life because an individual usually spends more time at work than any other single activity. Our self-esteem and dignity are by-products of our occupation. Each of us has a significant mental investment in our employment relationship. Every employee of a multi-national company stakes some ownership claim over their specific function from the maintenance crew to the Chief Executive Officer. An individual's occupation is a very personal thing with its own aura of pride, expectations and sense of equities.

The workplace has undergone significant changes as the employment at-will doctrine began to grow from its embryonic rule: simple on its face but governed by exception in actual practice. At the same time, the traditional expectation of mutual lifetime loyalty between employee and employer has dissipated. Employees could expect to spend long years of service with one company until retirement provided that they were honest and performed their job duties. There use to be a stigma attached to being terminated from employment. Now downsizing has made everyone expendable in both the private and public sectors at all position levels and it is against this backdrop that the surge of statutory employment claims has become a significant focus for employers, administrative agencies and the courts. With the high stakes that accompany litigation emotionally and economically, mediation has become the appropriate vehicle for the resolution of workplace conflict. Mediation provides an outlet for emotional venting and a forum for hearing legal and other "soft" issues that would not be admissible in court. I often remind counsel and the parties that while the law is relevant, it is not necessarily the integral reason or the underlying grounds driving the dispute. Employees and managers both can get a "day in court" without the formality and long delays of litigation or hearings. Since there are many non-economic issues in an employment dispute, mediation provides the best opportunity to generate creative options to meet the interests of the parties. An interest-based principled outcome is not only possible, but likely. This is especially true in the class of disputes involving challenges by current employees against employer practices. Mediation is a vehicle that promotes protection of the future relationship of the parties and their individual interests by intertwining the sensitive confidential concerns into the mediation process.

The reality is that neither the employer nor the average employee is eager for a courtroom brawl exposing their "dirty laundry" or prior conduct. It is stressful for the non-combatants, such as co-workers, to testify about events that happened in the workplace years ago. It is a breeding-ground for divided loyalties, pitting employee against manager and former colleagues against each other. The transactional costs and the toll on morale can be devastating to the mission of the organization. Verdicts for either side have a two edged consequence; the losing lawyers quoted in the newspaper that they are confident they will win on appeal while the "winner" bemoans the high transactional costs.

Promoting Early Mediation

Most employers have a grievance or complaint procedure which results in an attempt to facilitate resolution internally. Mediation is a common step prior to voluntary or mandatory arbitration. The convergence of operational philosophy and presumption in favor of dispute resolution by the legislatures and the courts is making mediation commonplace as a prerequisite to avoiding trial..

Alternative Dispute Resolution is specifically authorized and encouraged by many of the employment statutes such as the Civil Rights Act of 1991 and the Americans with Disabilities Act. Mediation is favored by the Equal Employment Opportunity Commission (EEOC), Department of Labor (DOL) and other agencies charged with administering employment statutes. Many of these agencies have established their own mediation programs, usually involving referrals to outside mediators. Furthermore, there is no doubt in my own mind that employees will have to "exhaust administrative remedies" such as mediation prior to seeking

redress in court. As mediation becomes institutionalized in the workplace, the mediator will increasingly be drawn into the fray at an early stage in the conflict.

Many cases already in litigation are being referred to mediation by the disputants themselves or the courts. The manner in which pending employment litigation cases end-up in mediation is not strikingly different than how tort and other commercial disputes are processed to mediation.

Pre-litigation is a cost effective emotionally saving opportunity to achieve goals for either preserving the employment relationship or terminating it with less disruption. It is an educational vehicle for enlightening each side as to their respective positions. Rojas v. Superior Court (2002) 102 Cal.App. 4th 1062, is the proverbial security blanket eliminating the concern of revealing confidential or crucial information at early stages of a dispute. Once litigation is commenced, insurance and coverage issues may be the risk factors motivating parties into mediation. And there is the threatened summary judgment motion believed to be the employer's grand slam, risky but futile. Changed circumstances, newly acquired discovery and smoking guns are noticeable consequences that have counsel leap to the negotiation table.

The Mediator and Your Case are Unique

Every mediator brings their own unique personality and style to the process. Mediation expertise is always the first attribute any advocate should seek in a mediator, with substantive knowledge of the employment laws and practice just as important. This is especially true in cases where the representatives themselves may not be fully versed in the statutory and regulatory scene. Employment Retirement Income Security Act of 1974 (ERISA) issues regarding health and welfare benefits and pensions are often considered along with familiarity with worker's compensation practice and social security law is often critical in resolving certain type cases such as ADA and age claims.

Advocates often attempt to match the mediator with the demographics of the claimant for example, seeking minorities for Title VII cases, females for sexual harassment and older persons for age claims. Mediators of all backgrounds are successfully mediating discrimination cases so I am dubious of this approach. This demographic approach may backfire if the employer believes the mediator is identifying too closely with the claimant, causing a loss of credibility of the mediator by the party who generally has less risk of impasse. The benefit of this perception is that the experienced neutral can ease concerns letting the employer be aware that when the claimant identifies with the mediator, they are listening which ultimately results in resolution.

There is always substantial debate concerning a facilitative versus an evaluative approach to mediation. My opinion is that the parties to employment disputes are generally seeking some reaction or opinion from the neutral. In any mediation process, the parties and the mediator should address these expectations as soon as practical. My style is a combination, often starting with a facilitative methodology and gradually engaging the evaluative technique. Co-mediation models work for employment cases as well.

Some of the attributes common to successful mediators are: acceptance of individual differences, ability to remain objective, patience, personal integrity, creativity and innovativeness, sense of humor, good communication skills, practical, ability to tolerate high levels of conflict, thoughtful under stress, persistence, high self esteem. These qualities inspire confidence.

Having the Parties and their Voices of Reason Present

A claimant's employment relationship dispute is most effectively untangled with their attendance at the mediation. Given the tensions and emotional component often attached to the issue, family members, counselors or friends from whom they are receiving advice will often wish to participate in the mediation process because it is rare that a terminated employee is not relying upon family or friends for financial and emotional support. Participation by third parties can be catalogued in several ways from active participation during negotiation to waiting patiently outside during the facilitation process. Encouraging a claimant to utilize their spouse or parent for support is exercised with caution as settlements have been scuttled by the overprotective spouse or confidant who has unrealistic economic expectations of settlement. As a general rule, once I am convinced that the spouse or parent is the voice of reason I will keep them in the stream of negotiation. Until then, I promote emotional support without active participation. For the employer, it is critical to have representatives of the employer present, especially a human resources representative,

executive officer or company board who has authority to bless a settlement that may include monetary or other terms such as reinstatement of a position or form of apology. In harassment cases, bringing the alleged harasser can be counter-productive for the employer and the claimant, yet there are times when their apology has been the deciding break through for resolution.

Let's Make A Deal: The Settlement Terms Checklist

When discussing settlement terms, open minded negotiations can achieve the goals desired. These include: continued employment or reinstatement, back pay, front pay, wage continuation, compensatory damages, punitive damages, acknowledgments or apologies, posting notices, employment records, prohibitions against re-application for rehire, subsidiaries; successor companies, references, letters, outplacement services, return of documents or other proprietary information protection, non-compete clauses, sensitivity and other training programs for the workplace, tax consequences and indemnifications, confidentiality, mutual non-disparagement provisions and/or no contact with current employees. Also for consideration are attorney fees, liquidated damages and/or remedies for breach of settlement agreement, dispute resolution mechanisms for alleged breach of settlement agreement including naming the mediator handling the case to facilitating any subsequent disputes, probationary periods of employment, employee benefits; health insurance; pensions; stock options; vacation; sick pay, publicity releases, donations to charity; public service. Typical terms include no admission of liability, mutual general releases, and no assignment of claims.

I urge settlement agreements in employment relationship disputes to be prepared and executed at the mediation. The beauty of the a pre-generated settlement agreement on a lap top or delivered via email allows an anticipated agreement to be fine tuned, executed, and achieve psychological closure without the risk of "buyers remorse."