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Why Does Mediation Work?

The data confirm what many labor and employment practitioners have come to know through day-to-day experience: mediation is a highly effective method of resolving employment litigation short of trial. Experienced employment mediators typically achieve settlements in at least three out of four cases. The process also results in quicker, less expensive, and in many cases more satisfying resolutions than the traditional litigation process. Why?

As a full-time neutral in labor and employment matters, I often ask myself that question. The mediation literature is full of theoretical conjectures, of course, but these are often of more interest to the ADR practitioner than to those who deal with these disputes on a daily basis as advocates and/or human resources or labor relations professionals. What follows are some of my random thoughts on the largely practical, rather than strictly theoretical, reasons that mediation is so effective.

Mediation "changes the shape" of the dispute

Unmediated negotiations in employment disputes tend to focus on conflicting "positions" derived from the parties' perceptions of the relative strengths (and weaknesses) of their factual and legal cases. While such negotiations are not necessarily destined to fail, they face the uphill struggle of a "zero sum" game in which the achievement of one party's objectives necessarily comes at the expense of the other party. The outcome depends nearly exclusively on effective use of "power" or "perceived power." Mediated negotiations, on the other hand, can be—and often are—quite different. A "parable" may help to explain how.

An overworked parent arrives home from a particularly hard day at work to find her (his) two adolescent offspring bickering loudly in the kitchen. "Give me back my orange," Susie cries. "I don't see your name on it anywhere," Jimmy retorts. "Mom! (or Dad!)," Susie says (appealing to adult authority), "I put the orange aside before I went to soccer practice. I put it right there on the second shelf in the fridge!" "So?" Jimmy sneers. "When I got home from school, I found the orange. Possession is nine-tenths of the law! The orange is mine." Jimmy turns slightly and hides the orange behind his back in one hand while holding Susie off with the other as she tries to snatch back the orange.

The parent, after quickly figuring out that there is only one orange in the house, comes up with what seems to be an eminently fair solution. She (he) opens a drawer and retrieves a large butcher knife. Complying reluctantly with a stern parental request, Jimmy turns over the orange. The parent whacks the fruit in two with the knife and hands each child a half, smugly self-satisfied with her (his) Solomon-like wisdom. Unfortunately, the siblings now jointly turn their anger toward the parent, rather than each other. Why?

When I use this "parable" with audiences, the parents in the group answer "Because each child wanted a whole orange." This response reflects not only a deep understanding of child psychology, but also the pervasiveness of the "positional bargaining" paradigm in our society.

In the situation presented in this "parable," a parent with facilitative mediation skills (and the patience to use them with his or her children) would ask questions to determine the interests of each child. It might turn out, for example, that Susie wants the orange to provide a refreshing and nutritious post-soccer replenishment of bodily fluids. Her interest lies in the pulp and the juice. Jimmy, on the other hand, may only need (and want) the zest of the orange for a homework assignment in home arts class (say, baking an orange cake). Thus, it might be possible to satisfy fully the interests of both children with just a single orange.

Most parents will readily recognize that life is rarely so simple, but the "parable" demonstrates an important practical point about mediation: successful resolution of employment disputes usually depends upon finding the underlying interests of the parties. Some of those interests may be independent, i.e. it may be possible to satisfy both parties even though their positions seem in conflict. In a fortuitous case (from the mediator's perspective), some of those underlying interests may even be shared, i.e. interests the parties have in common. For example, avoiding the trauma and expense of continuing litigation (if possible) is a shared interest in nearly every employment mediation I conduct.

Needless to say, discovering and building upon these shared and independent interests is the stock in trade of a skilled mediator. There is no particular reason, of course, that the parties themselves could not discover and build upon these underlying common and independent interests in unassisted negotiations, but the nature of litigation advocacy does not necessarily encourage it. Too often, litigation is war, and a wise person once noted "In a war, it's a good idea not to come in second." When preparing for trial, the litigator's mentality naturally minimizes both the other side's strengths and the weaker points of one's own case. To do otherwise would be to risk coming in second because the trier of fact might perceive that the advocate does not truly believe in the merits of his or her position. Thus, the litigator's mentality tends to reinforce the natural tendency in our society to engage in "positional" rather than "interest-based" bargaining.

Mediation (with a skilled mediator) can change the shape of the conflict and assist the parties in moving beyond conflicting positions in which the only hope of progress is for one or both parties to relinquish proposals each believes are based squarely on right, truth, and justice.

Mediation takes the pressure off the parties and their counsel

In many of the cases I am asked to mediate, the parties and their attorneys have never discussed settlement possibilities prior to

the initial mediation session. When I ask why, counsel usually tell me that they are confident of the strength of their position and do not want to "encourage" the other side to think that the case can be resolved on terms the opponent may perceive as "favorable." As the process progresses, sometimes that explanation seems to be true, and sometimes it becomes clear that one or both parties recognize that they have a case that needs to be settled, but they are trying very hard not to let the other side know that they know!

A party afraid of tipping a weak hand to an opponent can agree to mediate without sending any signal about its view of the case. Of course, the fact that a party wants to settle the case usually becomes very clear during the mediation process itself. But the opportunity to engage in mediation without showing initial signs of perceived "weakness" tends to bring parties to the table to explore possibilities of settlement in cases that would otherwise simply proceed through the expensive and time consuming litigation process.

In other words, the existence of the mediation alternative makes it possible to resolve some cases in which discussion of settlement would be postponed indefinitely in unassisted negotiations because one or both parties might be reluctant to advance substantive settlement discussion for fear of showing "weakness." Most of those cases would ultimately settle in any event, of course, but by providing a face-saving way for the parties to engage in meaningful discussions early on, mediation provides a valuable and cost-effective alternative to the litigation war of attrition.

Mediation engages the attention of the participants

Given the expense and time commitment inherent in litigation, it might seem odd that the parties (and sometimes their attorneys) are not constantly focused on the lawsuit or potential lawsuit. Yet the fact of modern business life is that even litigation must compete for the attention of busy participants. Counsel have more than one case to worry about. Executives have businesses to run. They may even have other litigation to occupy their time. Individuals involved in employment litigation still have family obligations, the requirements of a new job (or the ongoing search for a new job), or perhaps health related issues to consider. In other words, as serious and time consuming as litigation is, it simply cannot be the entire focus of the lives of those it touches.

One of the things that makes mediation work is that the process requires the interested parties to set aside time and come together where there is (or at least ought to be) only one item on the agenda: is it possible to find a mutually acceptable resolution to this dispute? That mutual concentration of time, effort, and attention adds immeasurably to the prospects for settlement.

Mediation offers a kind of "day in court"

Many plaintiffs in employment litigation have filed a lawsuit primarily because they feel they've never been "heard." Maybe they want to be "heard" by executives of their employer (something mediation can provide in a carefully controlled setting). Maybe they want to be "heard" by a neutral party who can render some judgment about the validity of their feelings. In litigation, that neutral function is normally served by a judge and/or jury, albeit in a somewhat clumsy procedural fashion. But a skilled mediator can often provide an equivalent "day in court"—"hearing" and empathizing with feelings while helping the individual to put the personal and legal effects of the dispute in a context that lessens the need (and desire) to let the litigation process play out.

Similarly, both sides in employment litigation often need and want a neutral "evaluation" of their case. Again, that evaluation can be provided by the judge or jury in litigation. A good example is the judge's ruling on a motion for summary judgment. In my view, however, an experienced mediator, respected by the parties for substantive as well as procedural expertise, can provide the kind of evaluation parties often want.

There is considerable debate within the mediation community about the extent to which mediators should be "evaluative" as opposed to "facilitative." While I recognize and honor the facilitative role of the mediator, I believe that one of the reasons parties select me is because of my background as a former advocate in labor and employment cases. If I can assist the parties in evaluating their cases by offering observations derived from my more than twenty years of experience in these matters, why should I deprive the parties of those insights (carefully expressed, of course, so as not to impair the ultimate neutrality of the process)? Those observations may be particularly important when the parties' differing evaluations of the case lie at the root of a bargaining impasse. In fact, they may be essential to breaking that impasse.

In sum, mediation offers an opportunity for the parties and their attorneys to hear from a neutral with no stake in the outcome. That opportunity may provide a preferable procedural alternative to the kinds of "neutral evaluation" available through the litigation process, satisfying both logical and psychological needs of the participants.

Mediated outcomes offer greater flexibility

At the outset of every employment mediation, I remind the parties that litigation gives control of their dispute to others—in terms of timing, procedures, and the ultimate outcome. In mediation, on the other hand, the parties control their own destiny. Retaining that control and eliminating the risks of litigation are the driving forces behind most settlements achieved through mediation.

One distinct advantage of mediation is that rules of evidence, materiality, limits on remedies, and all the other constrictions of the legal process take a backseat. The parties are free to fashion, within some legal limits, any resolution that makes sense to them. For example, I've seen age discrimination cases that settled because the former employer agreed to market a product developed by the plaintiff. The litigation process could never produce such a result. I've seen plaintiffs assure their childrens' college educations through annuities purchased on their behalf by defendants. I've seen defendants make charitable contributions in the name of the plaintiff. Again, these are not outcomes that could reasonably be expected to ensue from litigation, yet they met the needs of the parties and resolved cases that might have taken years and hundreds of thousands of dollars to take through the end of litigation–and without necessarily addressing the underlying interests of the participants.

This flexibility in possible outcomes often makes mediation a desirable and effective alternative to the litigation process.

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