Thoughts on Mediating Employment Cases

Alleged harassment cases are ripe for fast-track approach

By JOSEPH D. GARRISON and JONATHAN E. SILBERT

Employers and employees increasingly are finding mediation to be a civilized, effective way of resolving disputes. As in all mediations, success in employment cases depends on all parties arriving at a shared recognition of the risks—and costs—of litigation. While the parties often cannot fully appreciate the risks until after substantial discovery, prelitigation mediation may also succeed. Indeed, many corporate dispute resolution programs mandate mediation before litigation or arbitration.

As the parties in these cases are normally "under the same roof," they often have access to the same facts and do not need extensive discovery. Discrimination and other statutory claims are particularly appropriate for early mediation, especially when one or more of the following are true: (1) the employee still works for the employer, and a decent working relationship could be maintained or reestablished; (2) private or sensitive matters, such as sexual harassment claims, are involved, (3) an employee seeks "reasonable accommodations" under the Americans With Disabilities Act; (4) executive contract terms or severance benefits are in dispute, and the parties would prefer confidentiality; and (5) litigation would probably exacerbate emotions that are already running high.

The greatest obstacle to success in early mediation is lack of information. The parties need to determine whether the information gained in formal discovery is worth the expense and risk of shifting perceptions as the case proceeds. Moreover, defense costs might better be used to help fund an early settlement.

If discovery largely concerns documents, the parties might agree to provide sufficient document discovery without litigation to permit a reasonable risk analysis without prejudice to either side's position if the case does not settle. If more discovery is necessary, the mediation may be adjourned pending disclosure of needed information.

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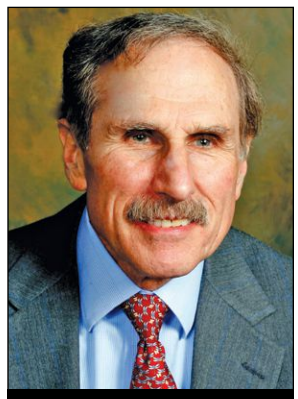

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Alleged harassment cases stand out as excellent candidates for accelerated mediation. The issues and facts are sensitive, and a discovery campaign by the employer, which the employee may perceive as more harassment, could undermine the employee's incentive to settle. If the allegedly harassed employee can fully express his feelings to a neutral who will listen, the parties may avoid the hardening of attitudes that litigation and depositions so often engender.

More frequently, however, parties mediate while adversarial proceedings are already in progress and the risks are better identified. If the plaintiff has defeated summary judgment, for example, the employer may rightly perceive an increased risk. If discovery proves mixed or problematic, and the employee perceives a substantial risk of dismissal, it may be time to consider making concessions.

Credibility Crucial

Who should be the mediator? There is no present empirical evidence that "certified" or "credentialed" mediators are any better than those who are not. Nor is there a uniform definition of what makes a "good" mediator in the employment context. To select the right mediator, one needs to analyze: (1) the nature of the dispute; (2) the objectives of the process; (3) the kind of process that will be most likely to succeed; and (4) the recommendations of one's trusted colleagues.

Clearly, one wants a mediator experienced and knowledgeable in employment cases. Credibility with the parties is crucial, and for that reason many defense attorneys choose members of the plaintiffs' bar as mediators because plaintiffs will have faith in them; for the same reason, plaintiffs' counsel sometimes suggest mediators who have been identified with representing management. Often, both sides will prefer a former judge. No one, however, should select a mediator without having obtained references, and any potential mediator should be able to provide names of attorneys for whom they have done mediations.

Decision-makers with authority to settle—the employee, the employer and, when there is insurance, the adjuster—must participate and, preferably, be physically present. If an adjuster is located hundreds of miles from the mediation site, arrangements should be made to secure the promise of good faith participation and immediate access by phone or Skype. In cases of alleged harassment, however, it is usually better that the alleged harasser, unless a decision-maker and/or prepared to make a personal apology, not attend.

Mediation allows each side to have the functional equivalent of its "day in court," including the chance to speak freely and in confidence to the mediator. The client's sense of being an active participant, and that her views, although perhaps not fully embraced, were at least taken into account, is critical to success. Unrestrained venting, however, while perhaps cathartic, can easily undermine the process. And while attorneys should not script their clients, they should assure that they understand that the purpose of such a "day in court" is to inform, not harangue.

Some mediators prefer a joint opening session where each side stakes out a position. In such circumstances, counsel should consider having their clients make part of the substantive opening statement and should review with care what the client intends to say. Other mediators prefer not to begin with a joint session, concerned that such an event will turn into a confrontation that gets the mediation off on the wrong foot. Attorneys should feel free to express to the mediator in advance their feelings about whether the mediation should begin with a joint session.

Financial Considerations

As part of premediation preparation, parties should consider potential tax consequences, counsel fees and expenses arising both from successful and failed mediations. Other issues to contemplate include (1) negotiating a period of consultancy; (2) reimbursement of medical insurance or COBRA payments; (3) payment over time or purchase of an annuity; (4) agreements to buy back company stock; (5) vesting of stock options or other forms of deferred compensation and altering the date of termination to permit exercise of stock options or receipt of bonuses; and (7) making a charitable contribution or establishing a foundation in the plaintiff's name.

Finally, employment negotiations can include nonmonetary settlement options such as (1) apologies; (2) reference letters; (3) outplacement support; (4) changes in policy; (5) commitments to conduct training; (6) an agreement that the employee will not apply for rehire; (7) an agreement not to defame or disparage the company or the plaintiff; and (8) confidentiality.

Mediators will, during the course of mediation, communicate various ideas to parties and/or counsel, sometimes to obtain a reaction to a proposal the other side has made and sometimes to gauge the response to a proposal the mediator believes the other party might be induced to make, but one should never assume that every suggestion coming from the mediator has been initiated or approved by the opposing party. Counsel should not hesitate to seek a private conference with a mediator to float ideas, enlist the mediator's help in trying to make the client more realistic, help with the delivery of bad news, or complain if counsel thinks the mediator is treating the client too harshly.

Gradual Approach

The participants will need to be patient with the process, which often produces considerable down time as one side or the other works through its misgivings and misunderstandings to try to reach consensus. One must resist the urge to be insulted by an offer or demand and be prepared for a gradual approach. Counsel can significantly assist and even accelerate the process, however, by encouraging clients to put forth opening demands and offers that, while leaving room for good faith negotiation, are still within the bounds of reason. The last thing the mediator wants to hear in the first round of negotiation is, "I'm not going to bid against myself."

Impasse is always a possibility, and some say the mediation hasn't really begun until an impasse is reached. At this point, it may be worth considering a "mediator's proposal," either on the spot, or with a report-back date after having a few days to consider both the proposal and the reasons behind it. If the mediation will be adjourned, counsel should continue to think about why an impasse occurred, and feel free to keep the mediator involved, including by phone or email, if there is any possibility of further dialogue.

An oral agreement to which the mediator is a witness will usually suffice to bind the parties. When there is a lack of trust and/or the details are complicated, however, or when final approval must come from a corporate board, parties should reduce the agreement to writing, including the obligation to use best efforts to obtain final approval, if needed, and have everyone sign. Ideally, it should also provide that the parties understand the document is an unambiguous and enforceable agreement designed to put an end to litigation (See *Audubon Parking Associates Limited Partnership v. Barclay and Stubbs,* 225 Conn. 804 (1993)). In age discrimination cases, a valid release requires the inclusion of a seven-day "cooling off" period for revocation.

In sum, mediation of employment cases has proved to be a most effective tool for resolving this form of dispute. Both management and employees should encourage its continued use and development. ■

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