Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

January 2020 www.nassaubar.org Vol. 69, No. 5

Labor & Employment Law/Immigration Law

The Use of Mediation in Employment Matters

Recent years have brought greater use of Alternative Dispute Resolution as a mechanism for resolving disputes and moving matters in litigation forward, but while we call mediation and arbitration "alternative" dispute resolution, as alternatives to litigation, they really are nothing new at all. In fact, the use of ADR goes back roughly 4,000 years.[1]

As we enter a new age in New York's courts, with a mandate to implement Presumptive Mediation, it is useful to examine how mediation can be an effective tool in a variety of matters. With this article, we will examine the use of mediation in addressing employment cases.

A Brief Overview of the Mediation Process

It may be helpful to share a brief overview of the mediation process, both for those who have been through mediation and those for whom mediation is new. While different mediators approach the process in different ways, there are certain general expectations as you approach mediation.

There also are different styles for mediation. The mediation training undertaken most recently at the NCBA, in cooperation with the NYSBA, focused on facilitative mediation, the "original" style of mediation. The concept of facilitative mediation is for the mediator to facilitate discussion between the parties, identifying not just their positions but, more importantly, their underlying interests. Thus the mediator guides the parties to solutions that can reach a lasting solution to the matters that brought them to mediation.

Other types of mediation include evaluative mediation, transformative mediation, collaborative mediation, and combined processes such as "med-arb" (a combination of mediation and arbitration). Also, facilitative mediators may occasionally mix in some evaluative elements when they see the opportunity to guide the parties with knowledge they bring to the table. This most often will happen confidentially, in caucus, so the playing field of joint sessions remains level. This evaluative component may be part of the "reality testing" done as part of the process. This is distinct from a fully evaluative process, where the mediator is expected to bring prior legal (sometimes judicial) experience to bear, directly testing and challenging the parties' positions. This fully evaluative process may be seen as more akin to judicial settlement conferences.

Let's review the steps of a typical facilitative mediation process:

- Pre-mediation call, during which each party discusses with the mediator expectations and process
- Counsel submit mediation statements to the mediator so he/she is familiarized with the key elements of the case, including key agreed facts, facts in dispute, legal issues, counsel's overall evaluation of the case, and potential range/proposals for settlement
- At the first mediation session:
  - Introductory remarks by the mediator
  - Opening statements of each party, with a no-interruption rule
  - At this point, the parties may continue to discuss pluses and minuses of their cases—as well as potential paths to move forward—with the mediator, continuing to facilitate the discussion throughout
  - Depending upon the mediator's sense of the parties' positions, the mediator may ask to caucus with each party separately to probe for opportunities and examine the parties underlying interests (n.b., depending upon the mediator's approach and judgment of the most effective approach for the case at hand, the mediator may choose to caucus from the start, intermittently, or not at all)
- Mediator identification of common threads and opportunities for finding common ground
- Generating options
- Reaching agreement

This simplified overview may vary, and whether it reaches a complete settlement, settles only some issues, or fails to make any progress at all, a mediation can take hours or days, stretching over weeks or months, depending upon the complexity of the issues and the commitment of the parties to exploring opportunities for making progress.

The Emotional Component

Whenever parties attempt to resolve difficult employee-relations issues, emotions can run high on all sides. The employee/plaintiff feels they have given their best effort and are the subject of mistreatment by heartless bosses. Management, on the other hand, are fed up with an unappreciative employee who is, in their view, nothing but trouble and now has insulted them by claiming the entire situation amounts to persecution.

This is not unusual, even outside of employment matters. Even cases driven by seemingly black-and-white issues, such as a breach of contract, have an emotional component that can, at first, seem surprisingly intense. In a joint session during a mediation, the parties will discuss the alleged breach of a contract where a million dollars of damages is claimed. Who performed under the contract or did not? What were the obligations? It all seems straightforward enough, even if the parties disagree on factual issues. Then they move into caucus, and what seemed black-and-white suddenly gains the color of human emotion. "We did business for 17 years, and then he does this and goes to my competitor? How could he do this to me?" Not so black-and-white after all. While this is a common enough occurrence, it's almost a certainty in employment matters.

Jess A. Bunshaft

It is the nature of employment matters that they can be particularly loaded with emotion and underlying issues. These must be addressed if the parties are to find their way to a resolution of the case with which they can live. Long before most employment litigation reaches even the beginnings of a legal process, the eventual plaintiff has been processing emotions driven by the feeling that they have been victimized. They have spent months or years living with feelings of anger, sadness, abandonment, betrayal and a host of other emotions that have built up inside them. In order to successfully bring a matter fraught with so much emotion to a conclusion, those emotions best be addressed.

If we take a moment to think about it, this should not come as a surprise. It is apparent to any working adult that work is a major component of life. Some of us spend more time with our work colleagues than we do with our families. Today, as work morphs into new forms, some examinations of work-life balance have indicated that work has become even more blended into our *raison d'être.* Now, disrupt that work identity and see what that does to the employee. Their day-to-day life has been upended, and they feel devalued and disrespected. In order to move past that, the matters to be settled will transcend mere economics. They require some measure of healing. That is where mediation can play a role that litigation and the almost-inevitable court-based settlement cannot.

From the litigator's point of view, the power of mediation also brings an opportunity for the successful resolution of a matter at an earlier stage—and with a happier client—than a protracted litigation process. Furthermore, the confidential aspect of mediation, with the parties, counsel, and the mediator(s) themselves forbidden from using anything revealed in mediation in any subsequent legal proceeding, allows for the free flow of thoughts, concerns, and emotions in a way that litigation cannot.

Handling the emotional component of an employment matter is something that mediation is uniquely suited to do. In the initial joint session, the parties may state their positions, the facts as they see them, and the legal strengths of their case. Attorneys skilled at representing clients in mediation may also share concerns or concede legal weaknesses, whether openly in joint session or confidentially in caucus, while explaining why they do not see those as fatal issues. In so doing, they can use mediation to evaluate for themselves the overall posture they should take, as well as telegraphing their readiness to deal with all issues.

This may also be the time to begin addressing the damage done to a client beyond simple dollars and cents, whether that is a plaintiff's pain from feeling disrespect on the job or a defendant's upset over the disruption their workplace suffered, such as the long-term manager who feels wrongly accused.

As we move into caucus, the mediator may then be able to tease out what really drives each side's feelings and positions. What are their real interests that drive them, and may shine a light on the path to common ground?

A Negotiation Tool, and an Instrument of Healing

Before any matter can be brought to a negotiated end, counsel must satisfy his/her clients that the outcome is to their benefit. Whether that benefit involves minimizing risk, increasing return, mitigating uncertainty or simply finding peace of mind, no party will agree to resolve a matter unless they recognize "what's in it for me."

As experienced employment counsel can tell you, whether plaintiff's or defendant's counsel, clients can have unreasonable expectations. From the plaintiff who worked for their employer for two years at minimum wage and expects a ten-million-dollar payday, to the defendant who feels aggrieved by even having to deal with litigation and wants you to see them totally vindicated, the realities of these cases can be a wake-up call for clients, and many simply do not hear what you are telling them.

That is where a skillful mediator can help move things forward. By utilizing a neutral, the tenor of the discussion can be changed. Mike McKenna, an experienced employment litigator and mediator in the Eastern District for over twenty years, as well as multiple other venues, commented for this article that mediation provides a unique opportunity for counsel to manage the expectations of the client.

While the typical facilitative mediator is present to do what the name suggests, facilitating discussions between the parties, there is a point at which he or she, particularly during a caucus, may assist counsel in discussing the risks and opportunities with the parties. Even with the best counsel, clients sometimes do not hear what their attorney is trying to tell them. But with the input of a neutral, there can be an opportunity to break through and make sure they get it. In a wage and hour case, for example, it may be the mediator who can get the defendant to understand their exposure, even after their own attorney has been trying for months to make them understand their exposure because their recordkeeping clearly did not meet legal requirements.

In a discrimination case where the plaintiff has stars in their eyes, counting on a huge windfall, they may finally understand what they can reasonably expect when a respected third party helps talk them through it. While good neutrals stay neutral regarding the overall case and process, we often have an opportunity to engage in "reality testing" that can move things forward when parties had previously been unwilling to budge.

With this better focusing of expectations and an opportunity to vent feelings, progress becomes possible. The opportunity to allow this venting and bring better focus to clients' expectations is one of the great benefits of mediation. While our goal as mediators is to resolve matters, that is not always the outcome. The parties have to be willing to work through interests and issues, finding their way to common ground.

Even where that willingness is lacking, however, many attorneys have found great utility to the mediation process. Even where they walk away without resolving the case, they may resolve individual issues in the case, smoothing the way forward, or they may simply move their clients along in their thinking, so that working with them will be easier and everyone's understanding of the issues at hand is better. While this benefit to mediation applies in many types of cases, where the parties may be so personally bound up in the issues underlying the case, it is especially effective in employment litigation.

Jess Bunshaft is a mediator and arbitrator, and serves as Co-Chair with Hon. Marilyn Genoa of the NCBA Alternative Dispute Resolution Committee. They are partners in Synergist Mediation, an ADR practice providing mediation, arbitration and corporate ombuds services. www.synergistmediation.com.

1. "A History of Alternative Dispute Resolution" Barrett, Jerome T. (Association for Conflict Resolution.)