By Louise Phipps Senft

The negotiating table

Turning problems into opportunities

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MEDIATION IN DISCRIMINATION CASES

Mediation should be tried in every case where the parties cannot themselves resolve a serious conflict. Perhaps nowhere is this a truer statement than in cases where sexual, racial, age, disability or other discrimination is alleged.

There are many reasons why going to court or other adversarial processes in these kinds of cases should be the last resort. In court, you may have a winner, or a partial winner, but you will surely also have a loser, and the consequences of losing in these cases are lasting and significant. For example, an employee or other person who brings a discrimination case to court who is unable to prove his or her case often remains in the workplace or other situation where discrimination was believed to exist. A hostile relationship in the work place continues, perhaps worse than before. Not a good end result. And potentially a disastrous end result affecting many people. And if an employee does prevail in court, it is worse for the supervisor than just a person losing a law suit. Hard feelings will continue with the supervisor who may then feel disfavored or discredited with upper management, adding to the stressful situation. Again, not a good end result. You just can't get two winners in these kinds of lawsuits, and even the one winner still often suffers.

Discrimination cases are based at least in part on perceptions made by the complaining party. These may actually be inaccurate but if accepted by a jury can result in a judgment that is ill received by the defendant. By the same token, a person complained against may exaggerate any faults or shortcomings of the complainant in court in an effort to defend against the claim. For example, a supervisor may seek to explain away seemingly disparate treatment of an employee by unfairly painting the employee as an uncooperative and unproductive member of the work force. This can result in a judgment for the employer that is ill received by the employee. In both cases, the matter has been "settled" but hardly "resolved". And in both instances, various versions of the truth become even more distorted fueled by the adversarial ethic that litigation often promotes or engenders.

By comparison, people are less forced to array forces against each other in mediation. This is especially true in the transformative model of mediation where the parties are not only *not* required to prove their case against each other, but are invited to have a conversation about any matters important and relevant to them. While parties may

still want and choose to have their situation heard in all its entirety, in the more inviting setting of the mediation, perceptions can be discussed and misconceptions can be addressed and perhaps cleared up. And differences, real differences, can actually be sharpened and understood much more clearly. And if the parties can come to the point where they work together to improve or change a situation and remove the realities and/or the perceptions of discriminatory conduct, they can come out of the mediation not only with a resolution, if that is what they choose, but a resolution on more genuine terms that often includes an improved relationship. Compare that with the aftermath of an adversarial hearing. In fact, some matters can be clarified and improved in mediation even if the parties don't come to a case-ending agreement.

A ruling in court or elsewhere that a person did discriminate, or that a person was not discriminated against, is a hard one. It is a hard one to make and a hard one for one of the parties to accept. My partner Frank Pugh and I and other members of the Baltimore Mediation Center have done a great number of discrimination mediations, most of which reached a welcomed and satisfactory resolution. And this is so even though in most cases that we recalled there was not a stated agreement as to whether or not discrimination had in fact happened. In those cases, without having to make this "hard" decision, parties agreed on a future free from discrimination, and with very specific terms. It is kind of a no-fault process. Without this "hard" decision there are not the "hard" feelings as an aftermath. We even had one case where the complaining party refused to even mention any specific act of discrimination for fear of retaliation by his supervisor but the parties were still able to agree on an improved landscape, acceptable to both, that addressed all the concerns that were never articulated!

In other discriminatory mediations, although less common, there has been an admission of discriminatory practice and the conversation then turned to how to remedy and repair the harm. Mediation was the perfect forum for such delicate and serious discussions.

The United States Postal Service and the Maryland Human relations Commission are two agencies successfully implementing mediation (transformative model) in discrimination cases. Part of the reason for their success is the fact that mediation is offered and explained to the parties promptly after a complaint is lodged. This is key. Amicable resolution of a discrimination complaint becomes more difficult if time is allowed to pass where the matter festers and hardens and positions become fixed. Where this is proactively avoided, parties can more easily work things out to their mutual satisfaction. Face saving becomes much less a factor. Real conversation becomes more the norm. Most people want to resolve their conflicts swiftly and meaningfully. Few people want to wait months and years to sit in a court room and battle over an unsettling dispute such as a discrimination complaint.

Discrimination cases are also unique in that, in litigation, a discrimination complaint tends to get converted into a demand for money. But this may not be what the plaintiff most desires or needs compared to feeling that they are finally getting respect and fair treatment and having an irritating (or worse) situation cleared up. From a defendant's side, agreeing to measures that will assure respect and fair treatment is often far easier than paying a sum of money which can be akin to a finding of fault, and thus is

resisted. Furthermore, it may be that the defendant is equally desirous of being treated with respect and not taken advantage of. Dialoguing through these issues with the assistance of a neutral facilitator, the mediator, is often far more meaningful for both and all participants. For instance, a supervisor can agree to work place changes yet may have no authority to pay any sum of money. Furthermore, paying a sum of money can send an undesired signal about the workplace to the home office. On the other hand, a situation may call for both the changes that a supervisor could implement as well as the payment of a sum of money authorized by an administrator or counsel also in attendance.

To be sure there can be a draw back to a non-monetary settlement. For an attorney handling a case on a contingency basis, collecting as a fee one third of an apology doesn't go far in paying law firm bills. But in mediation, a non-monetary resolution of a claim can also include payment of counsel fees in addition to other provisions even where an agency involved cannot itself enforce this portion of the agreement. Payment of an attorney's fee can be explained by a supervisor to the home office as something necessary to resolve the matter, far easier than outright payment of a money claim to the complainant. In the process, the parties can get what most meets their needs and counsel can get the deserved fee, which counsel needs.

Counsel has the duty to discuss the possibility of mediation with a client complaining about discrimination or with a client against whom a mediation complaint has been filed. It may be the best advice either client receives.