

Matters of Principle Require Measured Approach

By Nancy Maisano

Mediation offers an opportunity to resolve litigation in a process that allows a full discussion of the legal and factual issues of the case, an analysis of the costs and risks of continuing in the adversarial process and, at times, a discovery of the emotional drivers of the litigation.

Some mediations, such as those in family law, sexual abuse, catastrophic injury and certain kinds of employment cases, tend to be more emotion-focused than others. During the nine years I've worked as a full-time employment and labor mediator, I've observed that within this category of emotional mediations, there is a subcategory of employment mediations involving parties who are highly emotionally charged or motivated by core principles.

These parties require a tailored approach that sufficiently recognizes and validates the underlying emotional issues driving the case, and therefore produces a more complete resolution. If emotional needs are left unaddressed, a party may experience a feeling of unfairness or defeat even when the mediation results in a negotiated resolution.

When parties are deeply, emotionally invested in a dispute, employment litigation can be difficult to resolve. Whether it is a former employee who feels his identity was irreparably damaged by his termination or a business owner who sees an employment discrimination claim as an attack against her personally, emotions typically run high in employment litigation. In certain cases where the parties are driven by principle, rather than practical realities, emotions run even higher, making the mediation of such disputes more complicated, nuanced and often volatile.

When parties in litigation are driven by principle or a self-defined core value, they may view the realities of litigation and other practical considerations as insignificant or may even disregard them completely. In the minds of such parties, the risks, costs and delays of the litigation process each represent a small price to pay to protect what are characterized as more important foundational values.

In this mindset, compromise for the sake of settlement is akin to rejecting one's own fundamental values. To reach resolution, it is necessary for attorneys and mediators to identify and carefully address the client's underlying principle or value driving the litigation. Ideally, adequate preparation for these potentially volatile mediations requires pre-mediation communication with the mediator to identify these issues early to allow for the development of an effective approach to the dispute.

Taking principled stances can influence all kinds of litigated disputes. In my practice, they surface most often in religious, pregnancy and national-origin discrimination cases. In these cases, plaintiffs litigate not only to seek damages they believe are a result of discrimination, but also to protect their cultural identity, to assert the legitimacy of their religion or to vindicate the rights of their children.

Where parties battle on behalf of an entire country or culture, on behalf of another entity or person, or on behalf of a set of religious beliefs and values, it is with great

struggle that they adjust their perspective, which is a necessary step toward resolution. Without a full exploration of their underlying emotions and convictions, parties often feel defeated or may equate compromise with betrayal of the person or entity they are fighting to protect.

In two recent pregnancy discrimination cases, the plaintiffs viewed the alleged discrimination as direct acts not only against themselves, but against their newborn children for whom they had to fight and seek vindication. In one case, the plaintiff, a new mother of a healthy 13-month-old son, compared herself to “an angry mother bear protecting her cub.” She refused to make another move during negotiations because further compromise meant abandoning her son whom she felt needed her for protection and vindication. Regardless of the legitimacy of her claim, she needed a full exploration, and ultimately validation, of the principle fueling her lawsuit in order to continue negotiating toward settlement.

This discussion gave her the opportunity to fully explain her right to become pregnant and continue working, her frustration and shame surrounding the workplace tension during her pregnancy, and her deep conviction that she must remedy the damage she felt was done to her son. The discussion required her attorney and me as mediator to understand and authentically validate her conviction and the emotional investment in the lawsuit.

Only after this full discussion and the related emotions were identified and expressed could she even begin to listen to the practical concerns and the realities of litigation. Most importantly, she was finally able to understand and accept that a financial settlement and an end to the litigation would best enable her to care for, bond with and continue to protect her son.

In several mediations involving religious-accommodation and national-origin discrimination claims brought by Muslim employees, I have observed a similar, deep emotional investment in the litigation based upon religious and cultural values. The principle of protecting one’s religion, culture or national identity can serve as a formidable barrier to resolution unless the underlying conviction is fully and carefully explored before and during mediation.

In one case involving more than 30 newly immigrated Somali Muslims, who claimed their employer failed to provide prayer breaks and tolerated a hostile work environment, the plaintiffs again equated compromise in negotiation offers with compromising their religious beliefs. It was essential to resolution for the employees to communicate fully to the mediator (and in a few cases directly to the employer representative) about the connection between their pursuit of the litigation and their need to protect and preserve their religious and cultural identity. Only after this opportunity to be heard and understood were the plaintiffs able to understand the broader goals of compromise to a negotiated settlement.

What helps even further to break down the barrier to settlement where plaintiffs are driven by intense investment in principle or conviction is to have the employer directly recognize the importance of the underlying principle during the course of the mediation. This can occur either through direct communication with the former employees/plaintiffs or through carefully tailored settlement proposals.

In one religious-accommodation case, the employer agreed as part of the resolution to create a separate designated prayer room for its Muslim employees at its workplace. In another case, the managers, who were profoundly ill informed about the religious practices of adherents to the Muslim faith, made several offensive statements and bad decisions regarding the Muslim employees, leading to potentially disastrous litigation. In that case, the employer agreed to add to its employment policies a specific religious-accommodation request process and to train its managers on their responsibilities under religious discrimination and accommodation laws, with a specific emphasis on the Muslim religion and cultural sensitivity.

Principled approaches to litigation on the defendant's side are challenging in different ways. Not infrequently, the powerful emotions and convictions of defendants in employment litigation create a barrier to resolution.

I've observed this most often where the employer is a smaller, family-run business in which the business culture intentionally treats all employees as part of a close-knit family. Although in one sense it is a noble aim for an employer to treat employees as family members, this workplace culture typically comes at the expense of formal employment policies and procedures, documented performance reviews and discipline, and strict adherence to employment laws.

When faced with discrimination or wage-and-hour claims made by former employees of such businesses, the owners often react with a strong sense of betrayal and anger. The driving emotional force in defending the litigation may be to preserve the family name or business reputation, or to protect the remaining "family" of workers from what is portrayed as exploitation or to exact revenge.

These convictions fueling litigation often run deeper than the legal or financial concerns that typically guide employers through litigation. Unless these convictions are fully addressed, a settlement, even if obtained in mediation, may not come with a true sense of resolution or peace for the business owner.

To reach settlement in these cases, it is essential first to identify the principle driving the battle and to allow the party to fully express and explain the motivation. To achieve this, the mediator or attorney must engage in empathetic listening with the goal of fully understanding the party's perspective.

The party must feel validated and affirmed in the desire to vindicate the harm done to the separate entity (i.e., religion or cultural identity, or business) or person. This requires careful, active listening with reframing and summarizing to create a rapport and sense of trust and empathy with the party.

Only then can the attorney and mediator address the weaknesses of the case and the realities of litigation or explain that litigation — even if wildly successful — may not fulfill the party's underlying emotional need as effectively as a negotiated settlement. The party's expression of emotions and the understanding and respect of the listeners (typically the mediator and the party's attorney) are the key to unraveling the knot of emotions that may impede a full and rational case assessment necessary to a satisfying mediated settlement.

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