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COMMON MEDIATION MISTAKES AND HOW TO AVOID THEM WORKSHOP

ANTICIPATING AND ADDRESSING THE PROBLEM OF THE POWER DYNAMIC IN MEDIATION

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How many plaintiffs' employment lawyers have had the experience of attending a mediation for which we thought we and our clients were well prepared, only to be surprised by clients who undercut their own interests by refusing to settle on reasonable terms, by insisting on ending mediation prematurely, by declining to work actively and cooperatively with their lawyer on strategy as the mediation progresses, or by insisting that a bad deal offered early be accepted? Certainly many of us have been there. This article argues that a likely source for these difficulties is the power dynamic peculiar to employment case mediations, and that ignoring this power dynamic can be a serious and costly mistake for a plaintiffs' lawyer. The article then suggests some strategies to avoid this mistake and deal productively with power dynamic issues.

I. THE POWER IMBALANCE IN MEDIATION

Certainly plaintiffs' lawyers are accustomed to acknowledging some of the more open and obvious types of power imbalance that form the context for the mediation. It is, for example, a truism that the typical organizational defendant in an employment case has far more resources than the typical plaintiff. But the plaintiff-defendant power imbalance also plays out in other, less obvious ways. Some of those ways have been in place since long before the mediation. Indeed, some have been in place since even before the lawsuit was filed, including the following:

A. PRE-EXISTING PATTERN OF DEFERENCE

The plaintiff is the former or current employee of the defendant. Thus, unlike, for example, most tort plaintiffs, the employment plaintiff has a history with the defendant during which an ingrained pattern of interaction with defendant's higher-ups has developed. That pattern usually involves treating those higher-ups with great deference. Since the employer's representatives at the mediation are ordinarily people above - sometimes well above - plaintiff in the corporate hierarchy, the plaintiff will be necessarily, and sometimes dramatically, influenced by her likely history of deference to them as authorities, a posture those company representatives will naturally seek to perpetuate at the mediation.

B. PRE-EXISTING FEAR

The plaintiff is not only at a disadvantage in dealing with the defendant employer as a result of his position in the hierarchy, but is also likely to be disadvantaged psychologically. Virtually by definition, a plaintiff suing his employer or ex-employer is, or was in his most recent dealings with the employer, in a highly stressful employment situation with increasingly hostile supervisors. Typically that leads to his approaching most encounters with company superiors, even outside the context of litigation events such as mediation, in a state of considerable fear and trepidation. In contrast, defendant's representatives do not bring a posture or history of fear to dealings with the plaintiff.

C. PRE-EXISTING PERFORMANCE ANXIETY

As an employee, plaintiff is/was accustomed to having to prove to her superiors on a daily basis that she is skilled, competent, trustworthy, smart, etc. This pre-existing mind set predisposes the employee to believe she must "perform well," "not look dumb", etc., in encounters with company officials - a state of distracting and unproductive anxiety that the employer's representatives do not bring to the mediation.

D. PRE-EXISTING LOYALTY

Although this is sometimes not immediately apparent to management or its attorneys, most employees and former employees maintain a high degree of loyalty to their employers. Most employees are reluctant to criticize bosses, company management, or co-workers, or to look like they are undercutting their employer's corporate mission, objectives, or profits. Often they feel some guilt for initiating a suit. Typically the best (i.e., most likable) plaintiffs are particularly likely to have this characteristic! This often misguided loyalty makes it extremely difficult for an employment case plaintiff - in sharp contrast, to, for example, an automobile' accident victim, a consumer, a real estate mortgagor, or a business competitor - to look the defendant's representatives in the eye and state, in essence, "you did wrong." Of course, defense representatives are troubled by no such scruples.

Thus, long before the mediation is even scheduled, most employment plaintiffs are already burdened with some combination of fear, willingness to acquiesce to corporate authority, and performance anxiety. These problems can be magnified by some of the ways in which the power imbalance plays out at the mediation itself, including:

E. DISRESPECT BY THE EMPLOYER AND ITS LAWYERS

There are an innumerable variety of ways, limited only by the range of human imagination and its capacity for cruelty, in which management and their counsel manifest disrespect for our clients at mediation sessions. Many of them are not done deliberately, but rather reflect deeply internalized social attitudes. A few of the most typical are:

- Referring to the plaintiff by her first name while supervisors are called by their last name

- Patronizing remarks addressed directly to our clients in joint session (e.g., "I'm sure you don't realize it, but your case alleges _____")

- Open insults addressed to our clients in joint session (e.g., "I'm sure you think you can just file a suit and make a lot of money . . .")

- Interrupting our clients when they are speaking (but not interrupting anyone else) to "correct errors", or to debate issues

Some mediators tolerate, or do not recognize, the impropriety of such tactics. All this adds enormously to a plaintiff's anxiety, fear, and subservient posture.

II. HOW THE POWER IMBALANCE MAY AFFECT YOUR CLIENT'S REACTIONS TO MEDIATION

Regardless of any other factors specific to the case, and regardless of other forms of preparation you may have conducted with your client, a client who is not well prepared to handle power dynamic problems is likely to react in one or more of the following ways in the mediation session itself:

- Ineffectual forms of resistance, in a misguided effort to reassert the client's dignity and not feel pushed around - Examples: "I'm walking out of this mediation right now;" "I won't take their lousy [actually, quite reasonable] offer;"

- Capitulating to the "you - are - worthless" theme. Examples: "you [lawyer] decide if we should settle, it doesn't matter, I don't care any more;" "Whatever they offer, let's just accept it and get out of here;"

- Projecting a non-credible image. If your client does not believe in herself, feels intimidated, anxious and inadequate, she will not project as a good witness to the mediator or the opponent;

- Suppressing appropriate emotions (such as tears, hurt) to appear "professional" and in control when being demeaned;

- Misdirecting appropriate emotions (e.g., into angry outbursts).

III. SUCCESSFULLY OVERCOMING THE POWER IMBALANCE DYNAMIC

A. PRE-MEDIATION: COUNSELING YOUR CLIENT

Given the barriers posed by the power dynamic what steps you can take as counsel to minimize them?

The first step is to share your understanding of these issues with your client. In order not to fall into a vulnerable state, your client needs to understand exactly what psychological obstacles he will face to the proper handling of the mediation. Thus, for example, many articles tell you not to make concessions too quickly. Unless the client understands the reasons that he may feel impelled to make concessions too soon, however, such strictures will have little impact. Instead, it should be explained to the client that power dynamics encourage over-concession by plaintiffs, and why. The client should be reminded that his historical pattern of loyalty and deference toward the employer, although a positive character trait that will ultimately serve him well in the suit if it does not settle, may interfere with his approach to his mediation and may seriously harm his case. He should be reminded that in the mediation he and the employer are equals with equal standing as parties to a lawsuit. In that context, the usual explanations and arguments against capitulating too soon will have far greater impact.

As another example, the plaintiff should be warned that her honesty, personality, competence, attitude, work ethic and moral character may all be openly called into question by opposing counsel; that that is likely to be hurtful; that while feeling hurt, she may dissolve into pain, rage, or depression (displaced rage); and that these feelings may interfere with her ability to make good decisions. She should be reminded that opposing counsel's statements are simply tactics and should not be internalized.

Finally, plaintiffs should be told of the importance of their demeanor. The factors outlined above that may undercut an appropriate demeanor should be explained. Often it is helpful to remind the plaintiff explicitly that the demeanor of a good plaintiff is somewhat different from the demeanor of a "good" (i.e., loyal and subservient) employee.

B. PRE-MEDIATION: GIVING YOUR CLIENT CONTROL

We need to be proactive in restoring our clients' dignity and autonomy in the mediation process wherever possible. One of the best ways is to take steps in advance to insure that the client is an active and equal participant with you in the mediation. Treating the client as an equal contributor goes a long distance toward overcoming the second-class citizen status otherwise dictated by the power dynamic. Some steps to make your client an equal participant, and to channel anger and hurt feelings constructively, include:

- Ask the client to work with you on dollars-and-cents settlement analyses and calculations before the mediation;

- Urge your client to bring a family member, witness or friend to the mediation who will give her positive reinforcement and moral support;

- Ask your client if it would be important to exclude any person from the defense side from being physically present at the mediation (e.g., the perpetrator in a sexual harassment case);

- Work with your client on "psyching out" the players on the defense side in advance, especially their frailties and vulnerabilities - This goes a long way to equalizing perceived inequalities;

- Ask your client to help prepare some physical portion of the opening presentation - lost earnings charts, excerpts from performance reviews, etc.

- Figure out ways for your client to be a "live" participant in the mediation. These will vary depending on client personality and articulateness. However, even inarticulate clients can make some contribution if carefully planned. Examples: prepare your client to describe the tasks involved in his job; to explain charts, etc. that he has prepared; to list all the names of the promotional jobs for which he applied; to describe his post-discharge job search; etc. Some of these can be done relatively readily even by terrified, or overwhelmed, clients.

- Prepare your client for interacting with the mediator in joint sessions. For example, rehearse how to respond to typical mediator gambits that might disproportionately influence clients who feel overwhelmed and diminished, such as "wouldn't you really like to get the stress of this case over with?"

C. TACTICS FOR ADDRESSING THE POWER IMBALANCE AT THE MEDIATION

While most of the work necessary to address the mediation power imbalance should be done in advance of the actual mediation, it is also important to generate an atmosphere of equality and respect, and to defend your client's dignity, at the mediation itself. Specific steps to consider include:

- Maintain a "zero-tolerance policy" toward dignitary slights that subject your client to power dynamics problems. For example, do not tolerate it if your client is interrupted, or is called by a first name, while other participants are treated more respectfully.

- Don't accept the tired defense canard that your client's views or reactions stem from "emotion" or some such while those of corporate representatives don't, and resist any such characterization, direct or indirect, by your adversary. Point out that all participants in the case appear to be influenced by strong feelings about the matter, that this is unsurprising, and that your client's position warrants a substantive reaction on its merits.

- Propose breaks at key points in the mediation to allow your client to regain equilibrium: for example, right after the end of the opening session at which your client is likely to feel attacked by the defense.

IV. CONCLUSION

The plaintiff/defendant power imbalance is often the "big pink elephant in the corner," looming over the mediation without being directly acknowledged or confronted. Addressing it successfully can make a big difference to us and our clients in mediation.