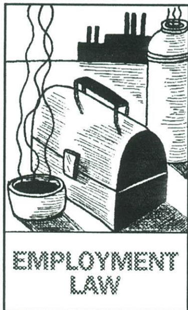
Litigators Who Take Advantage of the Mediation Process Help Their Clients

By Lynne S. Bassis

Have you or your family ever added on to your home? If so, then you know that add-ons, if done well, improve the experience of living. If done poorly, they detract from the experience of home life.

Every employment litigator now knows that our civil justice system has a permanent add-on — it's called mediation. Does this add-on contribute to or detract from the litigation process? Different litigators make different assessments.

So how is a litigator to handle what may be viewed as an undesirable add-on? The employment mediator's answer is simple: *use* the mediator and *use* the mediation process.



■ Illustration 1. An employee of Hispanic descent works for a manufacturing company. She is a valued 12-year employee with no performance issues. The company experiences a reduction in work force and terminates the employee. The employee files a charge of national-origin discrimination with the Department of Fair Employment and Housing.

Should the company's attorney agree to mediate? Different attorneys will have different answers to this question. Litigator A says, "Sure — what's there to lose?" Litigator B, an equally competent litigator, states, "My client didn't do anything wrong. What's there to mediate?" Why would two accomplished litigators take opposite positions?

Litigator A's response is a true statement if the attorney's goal is to reduce the time that the company needs to spend on legal matters, thus allowing the president to return to running a company and the human-resources director to resume the handling of personnel issues.

Mediation also makes sense if Litigator A's skill set includes "persuasive conversational competence." This is the ability to step out of the direct or cross-examination mode of speech and phraseology and step into a simple conversational mode to speak to someone who holds a different point of view.

The practice of persuasive conversational competence includes the ability to be nonconfrontational while politely and persuasively asserting a point of view different from that of another attorney.

Litigator B's response is a true statement if the goal is to demonstrate that no discrimination has occurred and if Litigator B possesses proficient courtroom advocacy skills. Litigator B, while excelling in closing argument, may be less comfortable with the more intimate discourse of mediation.

The sequence of events leading up to the mediation add-on was predictable. Something negative happened in the workplace. The employee felt wronged. The employee is a member of a protected class, and the alleged offender is not. The employee perceives a nexus between the two. An administrative charge ensued, with the lawsuit in tow.

Litigator A sees an opportunity to use the mediation to thwart a lawsuit. Litigator A understands that most lay people do not understand the laws of discrimination, that lay people may not know what constitutes discrimination and that in today's diverse workplace, where different cultures abound, disputes will arise.

To craft a solution during the mediation, Litigator A and the human-resources director collaborate. Drawing upon the director's information arsenal, they offer valuable assistance to the employee. The cost to the employer is nominal, results in significant savings of time and money because of the diverted lawsuit and offers invaluable assistance to the former employee, now unemployed worker.

For example, how about preparation of a distinctive letter reflecting the contributions of the employee and stating that dismissal was not due to performance problems but due to a reduction in force? What if the letter identifies specific machinery operated or types of tasks performed where the employee showed aptitude, intelligence and creativity?

Other options include job coaching or assistance in conducting an Internet job search and continuing medical benefits for a brief time to offset expenses.

Farfetched? Not to Litigator A, who sees this as a reasonable resolution.

■ Illustration 2. A female construction worker alleges sexual harassment by her co-workers and sex discrimination in the company's failure to promote her. She quits the job and begins to thrive in a new career. Still disillusioned about her prior work experience and unable to obtain information about what happened, she files a charge with an administrative agency, obtains a right-to-sue letter and files a lawsuit. Her counsel believes that she has a viable case.

What should counsel for the company do? Both Litigator A and Litigator B conduct a thorough investigation. Both conclude that while some less-than-kindly expressions about the woman's anatomy were made, and maybe some unwanted touching occurred, the case does not rise to the level of a hostile work environment or discernable sex discrimination.

Litigator A comes to the mediation ready to converse about the case because of the results of the investigation. Litigator B balks at the mediator's attempt to converse about the case because of the results of the investigation. This is the same case, but the two hypothetical attorneys use mediation differently.

Litigator A welcomes the opportunity to have his or her preliminary case assessment either confirmed or undermined — better earlier than later and better in a confidential mediation. Litigator A, viewing the mediation as another step in the maturation of the lawsuit, uses persuasive conversational competence to ask probing questions of the employee and counsel. The plaintiff's contrary views are seen as checks and balances on Litigator A's own case assessment.

Litigator B echoes the client's insistence that all cases should be litigated, even if an alternative approach makes economic or business sense. Litigator B is resistant to the mediator's attempt to evaluate the investigation results, lest it weaken the conviction that no wrongdoing has occurred. Litigator B is not interested in any information that will not lead to admissible evidence.

Only a fraction of the civil cases filed in California ever go to verdict. Therefore, the measuring instrument of the case most likely will be the plaintiff and counsel, not a judge or jury. By failing to acknowledge this, Litigator B has missed an opportunity to demonstrate persuasive conversational competence which, in all but a minute number of cases, the litigator eventually will be called upon to use in settlement negotiations.

A final coup de grâs occurs. Litigator B makes an offer of settlement: "Would you like to return to work?" The plaintiff

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