BEST PRACTICE TIP:
Mediating the Employment Case In State Court

By George Fitzsimmons

As a result of the case of State ex rel. Diehl v. O'Malley, 95 S.W.3d 82 (Mo. banc 2003), and several well publicized jury awards, employees are now filing more lawsuits in state court alleging discrimination under the Missouri Human Rights Act. Attorneys for the employee believe that state court juries will be more favorable to their case than federal juries and the verdicts will be more generous since there are no caps under the MHRA. Although there is no mandatory mediation requirement in state court, attorneys for the employer and employee should seriously consider mediating their case under the appropriate circumstances. In my experience mediating employment discrimination claims, more than two thirds of these cases settle at mediation. Clients are frequently more satisfied with a settlement obtained at mediation because they have participated in the settlement process. A mediated settlement reduces litigation costs and avoids the uncertainty of the jury verdict to both sides in the lawsuit.

In preparing for a mediation, the attorneys should consider the following:

1. **SELECTION OF THE MEDIATOR.** The attorney should choose a mediator carefully by considering the mediator's employment litigation background, credibility with all parties involved, experience and ability to settle cases.

2. **ATTENDANCE AT MEDIATION.** The attorney should be absolutely certain that those with decision-making authority attend the mediation. It is not effective for the decision maker to be "available by telephone." At the same the individual(s) against whom the complaint has been made should be kept at a distance from the plaintiff. At a minimum, counsel should discuss this issue with the mediator.

3. **PREPARATION OF THE PARTIES.** The attorney should fully inform his client of the format of the mediation and discuss the client's role in the mediation and the strategy to be followed. In this way, the client will become part of the mediation process and not merely a spectator. A client who is able to explain his position and the reasons therefore can be very effective in the negotiation process.

4. **PREPARATION OF THE ATTORNEY.** Preparing for mediation is much different than preparing for trial. The attorney should be prepared not only to discuss the facts of the case and the applicable employment discrimination law, but also to approach the negotiation creatively. The creative approach should consider the needs of both sides at the mediation if there is to be a settlement. Minimally, issues to consider in advance should include past and future wage loss, benefits, mitigation, retraining, additional education, rehire opportunities, reference letters and apology where appropriate.

5. PREPARATION OF THE MEDIATION STATEMENT. The attorney should thoroughly present the case and the law in the mediation statement. Frequently, the attorney chooses to provide the statement only to the mediator. The attorney should consider whether it would be better to also supply a copy of the mediation statement to the opposing side to help convince the opponent of the merits of the client's position. The attorney should refrain from personal attacks on the opponent during the opening statement as this will harden negotiating positions.

6. NEGOTIATION STRATEGY. The plaintiff's attorney should consider an opening settlement demand that is in the "fair range" of settlement discussion. Excessive opening demands place a chilling effect on negotiations and may push the defense away from the mediation process. The settlement demand should be accompanied by reasons and analysis to support its validity. By the same token, the defense should consider an opening offer that responds to this reasonable settlement demand and provide an analysis of the basis of the offer.

7. BE FLEXIBLE. The attorney should condition his client to remain open-minded as new information is frequently disclosed during the course of the mediation. If either side has a "drop-dead" figure in mind before negotiation begins, it is often difficult to persuade the client of the reasonableness of a settlement offer based on newly disclosed information.

8. MEDIATION PSYCHOLOGY. The attorney should prepare the client for the emotional and psychological aspects of the mediation. The attorney should realize that emotional issues such as loss of employment, damaged reputation, and similar issues frequently need to be vented before serious settlement discussions can occur.

9. PREPARATION FOR THE CAUCUS. The attorney should prepare himself and the client for private sessions with the mediator. The attorney should be prepared to strategize with the mediator to satisfy client's financial and other needs.

10. CLOSING THE DEAL. The attorney should discuss additional needs beyond money with the mediator before the settlement is concluded. The defense attorney should prepare a settlement agreement before the mediation so that all important details are covered. These would include issues such as confidentiality of the settlement, scope of release, non-disparagement, tax issues, structured payments, resignation vs. termination, payment of court and mediation costs and other matters. The attorney should insist that all aspects of the settlement be finalized in writing at the conclusion of the mediation.

The attorney should realize that the mediation process is not about "winning" but a process of working with the experienced mediator to reach a settlement that results in satisfied clients whose needs have been met through the mediation process.

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