IS CULTURAL COMPETENCE NECESSARY OR PREFERRED IN EMPLOYMENT MEDIATIONS?

By Johnathan Andrews, Esq.

As mediations have increasingly become the go-to forum for resolving disputes, employment mediations have become almost exclusively a distributive numbers exchange in which the parties' interests may be rejected, disregarded, or both. Discussions of "interest" generally go no farther than conversations about lunch preferences.

Joint sessions in employment mediations are rare, and displays of emotion are discouraged. Parties interpret terms such as reconciliation, rehabilitation and tangible considerations as signs of weakness, rather than opportunities to resolve disputes creatively. Our current litigation system, unfortunately, fosters this behavior. Sensitive topics are avoided – presumably to avoid "blowing up" the mediation – even though sensitive topics lie at the heart of most employment disputes.

When considering whether to introduce sensitive issues such as race or cultural diversity into this mix, parties predictably choose to keep mediation as emotion-free as possible. The argument I hear from those who advocate this approach is that "we need to diffuse emotion, limit contact, and focus parties on objective, tangible objectives." Mediating under these circumstances may eventually result in a monetary resolution, but it can be perceived as shallow and unsatisfying for both sides.

Intuitively, as advocates and neutrals, we understand that various external factors influence our negotiating styles and overall perspectives. These may include such personal guideposts as our family, faith, community, education and intellect. But they may also touch on an often overlooked factor – one particularly salient when negotiating and evaluating employment disputes: our cultural identity.

And this is the paradox. Employment cases, after all, frequently involve allegations of mistreatment, discrimination and harassment. A significant number of claimants identify themselves as culturally diverse. Given this context, one would assume that the issue of implicit or explicit cultural bias/influence would be at the front of every mediator's mind.

Race and culture are sensitive topics, especially in today's socio-political climate. When raised in the context of mediation, many advocates and neutrals are quick to say they do not "see color;" they do not believe race should play any role in dispute resolution. The sentiment may be well-intended and meant to reflect a lack of bias. It can also be interpreted as a desire to avoid a sensitive, emotional subject or as a tacit admission that the mediator/advocate is not knowledgeable about the cultural issues at play.

In employment mediations – where issues of discrimination and harassment predominate – the overwhelming majority of advocates and neutrals are not culturally diverse. Employment mediations are also one of the few ADR forums where joint caucuses are seldom used, ostensibly because the issues in these cases are so emotionally charged mediators and advocates are afraid they cannot handle them effectively.

The net effect is that employment mediations are set up to avoid dealing with the very issues that created the dispute in the first place. Is it any surprise, then, that employment mediations have such a comparatively low success rate?

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If advocates and neutrals do not see color and do not want to see color, how successful will they be at recognizing or evaluating discrimination claims? How persuasive will a mediator be communicating with an aggrieved party if the basis of the party's claim is built on a premise the mediator consciously or unconsciously does not see?

Process is important. Perception of fairness is important. Even if parties ultimately reach the same outcome, the journey to the outcome is critical. For a party who feels strongly that the mediation process will be better with a mediator whose record demonstrates cultural competency, the issue of culture should be discussed right at the outset.

California law could be interpreted to require that mediators be culturally competent in order to maintain impartiality and identify bias. California court rules require mediators in non-family civil cases to "maintain impartiality toward all participants in the mediation process at all times." Thus, mediators have an affirmative duty to make reasonable efforts to determine if bias exists.

If the mediator is aware of a bias that compromises his or her ability to maintain impartiality, the mediator must decline to serve as the mediator, regardless of the consent of the parties. This duty is a continuing obligation; thus, even if a mediator suddenly realizes during the course of mediation that she is biased, she must disclose her bias to the parties and likely withdraw from the case. The Uniform Mediation Act imposes similar requirements.

Going farther, the ABA Model Standards dedicate an entire standard to the issue of competency. The Standards specifically reference a mediator's skill and training in cultural understanding:

Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.1

When coupled with the California Rules of Court, the Standards underscore the critical role of cultural competence in addressing whether a mediator is qualified to handle any mediation – particularly mediations involving culturally sensitive issues such as discrimination.

It should go without saying that in order to successfully explore parties' interests, a mediator must understand how much his or her cultural intelligence influences and distorts the ability to interpret and use information. The task is difficult, but the California Rules of Court provide guidance:

A mediator has a continuing obligation to assess whether or not his or her level of skill, knowledge, and ability is sufficient to conduct the mediation effectively. A mediator must decline to serve or withdraw from the mediation if the mediator determines that he or she does not have the level of skill, knowledge, or ability necessary to conduct the mediation effectively.2

Cultural competency/intelligence speaks to the level of "skill, knowledge, or ability" of a mediator and can also have a transformative effect in educating an employer on its blind spots and helping it avoid similar situations going forward. It can also provide an employee with greater opportunity to be heard and feel valued, which can put the worker in a better position to resolve the conflict and move forward with his or her life.

Getting to a place of cultural sensitivity is not a mere function of skin color. Rather, it involves a deep dive into cultural biases. The effort may be considerable, but the benefit to the parties and process is undeniable.

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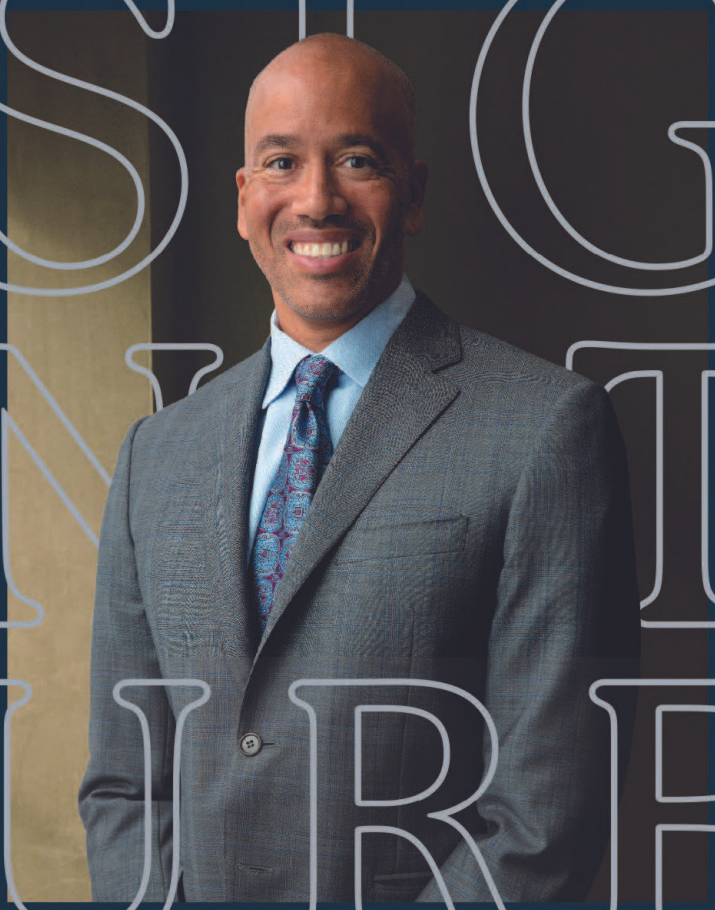

Before joining Signature Resolution, Jonathan D. Andrews was known as one of California's most popular and respected employment attorneys with both the plaintiff and the defense bars. On our neutral team, he uses his 24 years of employment law and wage and hour experience to mediate with an unwavering desire to help parties resolve disputes and acknowledge the humanity of each situation.

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