



DIVERSITY ISSUES IN MEDIATION

By Jonathan D. Andrews

Thank you to SDCBA President Melissa Johnson for graciously allowing Mr. Andrews the use of this space to address this important issue.

Employment mediations frequently involve sensitive issues, including equal opportunity, inclusivity, and fairness within the workplace. Whether a party has been the victim of alleged unfair employment practices or has been accused of engaging in such practices, these can be delicate issues that are challenging for all parties in the session. Mediators, fearful of negatively impacting settlement negotiations, may find themselves loath to address them. But a willingness to discuss difficult issues can often be the difference between successful and unsuccessful mediations.

One of the challenges when discussing diversity matters in employment mediations is having a clear understanding of key issues. Terms like microaggressions and neurodiversity can be abstract for some parties. A deeper dive into the specific actions or behaviors that led to the conflict might help these parties gain a better understanding of how they implicate discrimination or bias and allow them to recognize their potential impact on other parties.

In all mediations — but particularly employment mediations — the process itself must be inclusive and respectful of all parties' perspectives. Mediators should create a space where participants can freely express their feelings and concerns without fear of recrimination. Given that employment litigation often stems from the actual or perceived breakdown in the employment process, creating a transparent, fair mediation process is a critical factor in successfully resolving the matter.

To that end, reinforcing confidentiality throughout the mediation process is also essential for building trust and allowing participants to feel more comfortable sharing their experiences and concerns without fear that those discussions may be used against them in the future.

In order to best facilitate this process, a mediator's cultural competence is a key component in his or her ability to understand the nuances of diversity-related conflicts. Different cultures have unique communication styles, norms, and values, and these can impact their perception of workplace behaviors. Choosing a mediator who has a necessary level of cultural competency is critical.

Cultural competency is not simply a reflection of skin color, gender, religion, or any other protected characteristic. It does not require a PhD in ethnic studies. Rather, cultural competency reflects a mediator's overall experience and emotional intelligence. It is a reflection of a mediator's openness to exploring and considering different viewpoints. It requires both self-awareness and a willingness on the mediator's part to challenge his or her own subjective biases.

Because employment mediations often involve a breakdown in a relationship between the parties, employment mediations can lend themselves to creative resolutions. While monetary considerations necessarily predominate, other resolution options — such as sensitivity training, policy changes, improved communication, or even rehire/relocate — can lead to positive outcomes.

An added benefit of discussing diversity-related issues at mediation is that the parties may not fully understand the implications of their actions or the broader impact of diversity-related conflicts. Mediators can play a role in facilitating discussions about relevant laws and guidelines, as well as the importance of creating an inclusive work environment. Such education can help parties view diversity-related mediations as an opportunity for growth and improvement. Toward this end, regularly assessing workplace practices, policies, and culture can help prevent similar conflicts in the future.

But saying you are open to discussing diversity related issues and discussing these issues are two different matters altogether. To further facilitate constructive dialog, joint sessions in employment mediations are a potential tool that can foster communication and build trust.

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These sessions can provide several benefits. They can, for example, potentially allow all parties to express their perspectives, feelings, and concerns directly to each other. This can lead to better understanding and empathy, as individuals can hear each other's viewpoints in a controlled environment. Face-to-face interactions can foster dialogue and humanize the parties involved. They can help break down barriers, reduce misunderstandings, and encourage more productive conversations.

Joint sessions can also create a sense of accountability, as parties are held responsible for their words and actions in front of others. This can encourage more genuine discussions and a commitment to finding solutions.

Building trust in these mediations is paramount. Joint sessions can contribute to building trust among the parties because when individuals perceive that others are willing to engage in open dialogue, they may become more willing to share their thoughts and experiences.

A joint session can also counteract any potential misunderstandings. Miscommunication and misinterpretation can occur when messages are relayed through intermediaries. In a joint session, parties have the chance to clarify their statements and correct misunderstandings on the spot.

Finally, joint sessions provide an opportunity for collaborative problem-solving. Parties can brainstorm solutions, explore compromises, and work together to find mutually acceptable resolutions. These sessions can provide the vehicle for agreements to be reached, particularly when affirmative relief is on the table. Parties can negotiate and develop solutions that consider their respective interests, concerns, and needs. Parties who participate in joint sessions demonstrate a commitment to resolving their dispute in a transparent and constructive manner. This can help set a positive tone for the remainder of the mediation.

Despite these benefits, joint sessions might not be appropriate or effective in all cases. In situations where power imbalances are pronounced, interaction is triggering, emotions are high, or there is a history of alleged retaliation, separate caucuses might be more suitable. The mediator's judgment and expertise play a crucial role in determining the best approach for each individual mediation.

Addressing diversity issues in employment mediations requires a thoughtful and comprehensive approach that acknowledges the complexities of the situation while striving for fair and equitable solutions. It is a collaborative effort involving all parties, the mediator, and the organization, and its goal is to achieve a resolution that allows the parties to move forward constructively.



Jonathan D. Andrews is a mediator with Signature Resolution. He has been a proud member of the San Diego County Big Brother/Big Sister program for over 15 years and is a current member of the Big Brothers Big Sisters of San Diego (BBBS) County Board of Directors.