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Message From the Chair

By Patti Perez

CREATIVE CONFLICT RESOLUTION— A WIN-WIN

For a long time now, we've heard about alternative dispute resolution within various areas of legal practice. Growing weary of resolving all disputes through our inherently confrontational adversarial system of litigation, parties have looked for ways to make things less adversarial and not coincidentally, less expensive. This is certainly true in the context of employment law . . . an area that involves so many layers of human emotion, interaction, and dynamics.

Though this type of conflict resolution (arbitration and mediation) is still popular and a wonderful alternative to going to trial, lately I've seen more and more parties (both plaintiffs and defendants) interested in resolving issues before the conflict gets to the point of a formal legal claim. I have been conducting workplace investigations since I began practicing law, though these were not common back then, and have also investigated internal claims as a human resources professional. In the past 8 ½ years, however, during the time I have specialized in work as a neutral, I have seen a tremendous increase in this area of practice. Yes, in part because there is greater awareness of a company's obligation to investigate and resolve employee claims. But I maintain that companies also hire my firm to perform this work because it's the right thing to do—because they want to know up front and early on whether there are issues they need to look into, and they want to do so regardless whether the behavior is unlawful.

In fact, this area of practice has grown so much during this time, that my good friend and colleague Amy Oppenheimer, who has also been performing investigations and other pre-litigation neutral work for many years, decided to form an organization for workplace investigators throughout the state. As an aside, if you perform investigations, this is a group you should join. The California Association of Workplace Investigators, or CAOWI, provides a wonderful resource for those who want to network with other workplace investigators, and learn about best practices and tips on fact-gathering and analysis. If you're interested in joining, log on to www.caowi.org, or get in touch with

Amy, who is also a member of our Section's Executive Committee.

Back on the topic of creative conflict resolution, I find it fascinating and encouraging that employers are interested in making sure that they address problems early in order to "nip them in the bud." By doing so, they not only avoid litigation but, more importantly, they make employees feel as though their concerns have been heard and addressed, and also help their businesses run more smoothly and productively. After all, employees who feel they are treated fairly and appropriately are productive employees who make a company profitable . . . everybody wins in this scenario!

In addition to workplace investigations, I have also seen an increase in the use of pre-litigation workplace mediation to resolve workplace conflict. In some cases this involves lawyers, and is essentially a mediation session where parties discuss, with a facilitator and the assistance of counsel, ways in which conflict can be resolved to avoid litigation. More commonly (at least in my practice), this type of workplace mediation usually involves employee concerns where there is no threat of litigation. Instead, it is a session aimed at providing managers and employees (or often co-workers, with no management involved in the conflict) creative and practical ways to work together professionally and respectfully. As my good friend, former Federal Magistrate and mediator-extraordinaire Leo Papas puts it, traditional mediation in the context of employment law is like divorce counseling, while pre-litigation mediation is like marriage counseling, since the ideal goal is keeping the parties "together."

At the root of these and other forms of creative problem-solving in the employment law realm lies the issue of fairness. Though the intellectual challenge was certainly an attraction, I must admit that I chose employment law as my specialty because it allowed me to satisfy my fascination with human behavior. In exploring that fascination, I began digging deeper into areas of organizational psychology and became particularly interested in the study of organizational justice (also called organizational fairness). Okay, so most of you are not quite the nerd I am and don't go off

and do organizational psychology research, but the common-sense conclusions from this body of research are not only intriguing, they can help all of us in our practice. Think about it—whether you are representing a plaintiff, a manager, or a company, a large part of your evaluation of the case will hinge on whether a judge or jury will believe that what you are asking for is fair.

Organizational justice looks at the *perception* of fairness at work, and how that perception influences employees' decisions. Most of the body of research focuses on human resources matters, asking questions about employees' behaviors based on their perceptions of whether they have been treated fairly at work (e.g., are employees more likely to quit, steal, be less productive, etc.). Some of the research, however, focuses on whether an employee is more likely to bring a claim against her employer if she feels unfairly treated. Need I say what the research indicates? The discipline is divided into three subsets: distributive justice (are rewards and punishments distributed fairly?); procedural justice (are there procedures in place for making decisions . . . and, if so, are those procedures followed consistently?); and interactional justice (does management treat employees in a respectful and professional way?). Although judges and juries ultimately apply the law when making decisions, these concepts become important, since we see over and over again that decision-makers (and jurors in particular) want to do what is "fair" and "right."

Even if you're not interested in doing more research on this topic, I invite you to come explore these areas of alternative and creative dispute resolution. In addition to our traditional presentations, which focus on litigation (please check our website regularly and watch for emails announcing many of those throughout the year), I am also pleased to say that the Section will present seminars on conducting investigations (organized by Amy Oppenheimer, presented in Los Angeles on June 1, 2010, with a second presentation, sponsored by CAOWI and the San Francisco Bar Association on June 3), and on creative problem resolution in October, in San Francisco and San Diego. I hope to see you there. ☺