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MEDIATION ADVOCACY:

AN EMPLOYEES' ATTORNEY'S PERSPECTIVE

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NEGOTIATIONS AND ADR IN EMPLOYMENT DISPUTES*

The opportunities are legion for problems and disputes to arise out of the employment relationship – during and after the period of employment, and involving non-legal as well as legal issues. Counsel for employees should, of course, be familiar with the legal issues that may arise and with the traditional legal procedures for addressing such legal issues. But familiarity with such legal matters is not enough. Counsel for employees should also be familiar with tactics, strategies, and methods for solving legal and non-legal problems and resolving disputes that do not necessarily depend on the assertion of legal rights and that do not necessarily employ formal legal procedures. This paper addresses negotiation approaches and dispute resolution procedures that are well-suited for dealing with the problems and disputes often encountered by employees and their counsel.

A. ALTERNATIVE DISPUTE RESOLUTION: AN OVERVIEW

1. Primary Problem Solving.

Generally, employees and their counsel should seriously consider using so-called alternative dispute resolution (ADR) mechanisms. Broadly speaking, ADR encompasses a wide spectrum of ways to try to resolve disputes other than through judicial proceedings. ADR might be more accurately described as primary problem solving or dispute resolution, inasmuch as it should be considered before litigation, not merely as an alternative to litigation.

2. The Litigation Alternative.

The vast majority of employment-related disputes do not need or warrant litigation, which is simply too expensive, slow, inefficient, and inflexible for many such disputes. Nonetheless, litigation is a necessary alternative (perhaps, a "last resort") when other mechanisms to avoid or resolve a dispute have failed. The availability of litigation, of course, is sometimes essential to spur parties to engage seriously in ADR procedures.

3. An Escalation Approach.

A gradual escalation-of-confrontation approach can be especially useful in employment disputes. The employee's attorney should begin to try to resolve a problem through the approach that is least confrontational but that has a reasonable prospect of success (e.g., direct negotiations between parties). If that does not work, then progress as and when needed to more confrontational or adversarial approaches (e.g., internal corporate procedures, then external or formal mediation, then non-binding arbitration).

* This paper is derived from Chapter 16, "Representing the Executive," by Wayne N. Outten, in Executive Compensation (BNA 2002).

4. Internal Dispute Resolution Procedures.

Over the past twenty years, more and more companies have instituted internal dispute resolution procedures. Unless the employee perceives that the company's procedures are unfair or futile or that use of the process would be prejudicial, the employee should seriously consider using such procedures. They may work; and even if they don't, the employee probably will learn in the process about the strengths and weaknesses of each party's positions.

5. External ADR.

Once an employee decides to take a dispute "outside" the company, various alternatives are available. The employee and the employer may agree to employ mediation with a paid private mediator and/or to submit the dispute to arbitration. In employment discrimination cases, of course, the employee can go to the EEOC or to a state or local human rights agency. Such agencies are using ADR techniques, especially mediation, more and more to try to reduce their backlog of charges.

6. Mediation.

Mediation is an increasingly popular ADR procedure for employment disputes. Instead of direct negotiations between the parties or their attorneys, mediation involves negotiation facilitated by a neutral third party. The key benefit of mediation is that it is voluntary and non-binding. The parties can design the process to suit the dispute, can choose the mediator, and can retain control over whether and how to settle. Done right, mediation can resolve disputes relatively quickly and amicably that could not be settled through direct negotiations.

7. Arbitration.

Arbitration raises considerations that are altogether different from those arising from mediation. Arbitration is an adversarial proceeding in which a neutral third party, selected by parties, decides the dispute, instead of a judge. Binding arbitration entails surrendering the authority to resolve the dispute to the third-party neutral.

8. Hybrids.

Characteristic of the flexibility of ADR programs, various "hybrids" of mediation and arbitration have been tried with some success.

B. AN ESCALATION APPROACH

The best strategy for employees and their counsel to use in many employment disputes is a gradual escalation approach. This approach is especially well suited for

disputes involving current employees. In that context, the employee and the employer have an existing relationship that may be maintained and even enhanced if handled properly or that may be harmed or even ruined if handled improperly.

Under an escalation approach, an employee initially tries to solve problems and resolve disputes without undue confrontation with management. Rather than threatening to file charges or start a lawsuit, the employee should first try to engage in a constructive dialogue with appropriate company representatives to identify the problem and try to resolve it.

If the employee has counsel, the counsel often will stay in the background and the employee will not even mention the counsel. This can facilitate direct discussions between the employee and the company's representatives. Once counsel appears on the scene, the dynamics change. Often, the company's counsel then appears on the scene and the discussion escalates to a level that is less conducive to an amicable resolution.

Using this approach, the employee and the employer might resolve the dispute without undue harm to the relationship. If it works, that is good for everyone. If it does not work, the employee can always escalate. For example, the employee might next assert that the employer's conduct is not only unfair but also is illegal and that the employee is considering asserting a legal claim. This step obviously might aggravate the employment relationship, particularly between the employee and any persons charged with illegal conduct; and it risks retaliation. On the other hand, this step might be necessary to get the employer's attention, to convey the seriousness of the employee's position, to call attention to the employer's risks, or to provide legal protection against retaliation.

At this stage, the employee is more likely to reveal the existence of counsel. Even then, however, the employee may be better off trying to keep counsel in the background. This will allow the affected parties to try to resolve the dispute without greater harm to the relationship than may arise if counsel for the parties get involved directly. Of course, in such situations, it is likely that counsel will be in the background on both sides, but the opportunity for direct dealing between the parties may lessen the tensions. On the other hand, in some situations, counsel can bring objectivity and perspective to both sides and thereby facilitate dispute resolution.

The employee's counsel should carefully consider the best tactics applicable to the situation. The relative roles of the employee and the counsel during the early stages should be based on a careful assessment of various factors, including the ability and willingness of the employee to handle the discussions without counsel present and the approach that is most likely to be effective.

It warrants repeating, however, that if a less confrontational step is tried and fails, the employee can then escalate to a more confrontational approach. It is difficult, however, to go in the other direction – to de-escalate from a confrontational approach to a less confrontational approach. Thus, it generally makes sense to begin at the lowest level

of confrontation that has a realistic chance of success, unless the possible cost in time or energy outweighs the possible benefit or unless a statute of limitations is a concern.

C. INTERNAL DISPUTE RESOLUTION PROCEDURES

Many companies have instituted internal dispute resolution procedures. These may range from informal policies, such as an open door policy, to formal final and binding arbitration. In between, the dispute resolution procedures might include an ombudsperson, peer review, early neutral evaluation, mediation, and other measures to identify and solve problems.

Companies that set up such procedures generally find that they serve two separate though compatible objectives: First, from a human resources perspective, they help build morale, avoid friction, reduce turnover, and promote productivity. Second, from a legal and financial perspective, they tend to reduce the costs and risks of adversarial proceedings. As discussed below, they may provide appropriate opportunities to resolve disputes from the perspective of employees, too.

Company procedures typically include mediation using external mediators. The sponsoring company usually pays all or most of the cost of the mediation. Some companies provide an allowance, say \$2500, for the employee to retain counsel for the mediation.

Many company procedures have arbitration as the last stage of the process. Some companies attempt to impose mandatory pre-dispute binding arbitration on their employees as a condition of initial or continued employment; employees' counsel oppose such requirements for various reasons, including the fact that the "agreement" to arbitrate is seldom truly knowing and voluntary. Many companies, perhaps recognizing the legal, policy, and personnel problems with these mandatory arbitration requirements, offer arbitration that is voluntary at that point, that is not binding on any of the parties, or that is binding only on the employer (allowing the employee to retain rights to litigate). In any event, under appropriate circumstances, arbitration might be appropriate for an employee's claim, given that arbitration is usually faster and less expensive than litigation. This is especially true for non-discrimination claims, such as those involving compensation or contract disputes.

Whatever the merits of arbitration for employment disputes generally, it is especially well suited for disputes with current employees, especially if the alternative is litigation. Arbitration is used routinely for disputes that arise under collective bargaining agreements and has proved quite successful in that context. Of course, the non-union context raises quite different issues, as the courts have generally recognized. Nonetheless, for current employees, the opportunity for a relatively quick and inexpensive resolution of a dispute has obvious advantages, including enabling the parties to get the dispute resolved and move on with the employment relationship.

Employee's counsel should seriously consider using a company's internal dispute resolution procedures. Of course, the employee and the employee's counsel should be appropriately skeptical about the process. It may be procedurally or substantively unfair. It might be used to cover up problems or to build the company's defense. Or it might lead to reprisals against the employee. Thus, counsel and the employee should try to ascertain the credibility and fairness of the company's process. Counsel should ask the employee what the experience of other employees has been with the process; the employee might ask other employees what they know from personal experience or have heard about the process.

After such an evaluation, counsel and the employee must decide whether and how to use the company's process. Generally, unless it is clear that the process is tainted, is a waste of time, or may lead to repercussions, the employee who is still working for the company should use the process. It may lead to a favorable resolution without further expense, delay, or confrontation. Even if it does not lead to a favorable resolution, the employee may learn a good deal during the process about the strengths and weaknesses of both parties' positions. Even in defeat, the employee might be satisfied that the process was fair and that the company was right, or that further pursuit of the dispute is otherwise not warranted.

D. MEDIATION OF EMPLOYMENT DISPUTES

1. What Disputes to Mediate.

An attorney representing employees -- or employers -- should consciously consider mediation in virtually every significant employment dispute that cannot be resolved through direct negotiations.

Familiar surveys have shown consistently that a very high percentage of civil lawsuits settle before judgment, typically more than 90%. And countless disputes settle before they ever mature into lawsuits. Therefore, it is highly likely that any particular dispute will settle at some point; the question usually is, when? Mediation presents the opportunity to ascertain whether such disputes can be settled earlier in the process than may otherwise be the case.

The success rate for mediation depends on numerous variables, such as the ability and techniques of the mediator and the manner in which the mediation was initiated. Empirical evidence suggests that the success rate is much higher when the parties initiate and pay for the mediation, as compared to when the parties are pressured into forum-annexed mediation by a judge or someone else. Reports indicate that court-annexed and agency-annexed mediation programs have success rates in the 50%-60% range, whereas private mediations succeed 80%-90% of the time. (For these purposes, "success" is defined as a settlement satisfactory to the parties.) Sometimes, even when a mediation session fails to result in a settlement at that time, the session may lay the groundwork for a subsequent settlement.

The benefits of mediation include the following:

1. Mediation avoids the expense and delay of litigation.
2. Mediation engages the parties in creative problem solving.
3. Mediation may lead the parties to adopt solutions that a judge could not or would not direct.
4. Mediation helps maintain or repair relationships between the parties.
5. Mediation provides the parties a “day in court” and an opportunity to vent.
6. Mediation allows the parties to learn from their mistakes and take corrective measures (e.g., employers learning of poor management practices or errant managers).
7. Mediation keeps the dispute and its resolution confidential.
8. Mediation avoids public disclosure of private or sensitive matters.

Many employment disputes, including discrimination claims, lend themselves to mediation. The following types of situations are especially well suited for mediation:

1. Where the employee still works for the employer: the parties may be able to maintain or re-establish a good working relationship, which is obviously hard to do when the parties are engaged in adversarial litigation.
2. When private or sensitive matters are involved, such as sexual harassment claims: the parties, especially the employer and the alleged harasser, often prefer to discuss and resolve such matters in the confidential context of a mediation, without the embarrassment or discomfort of public proceedings.
3. When “reasonable accommodations” are sought under the Americans with Disabilities Act: the employee and employer, who are most familiar with the employee’s condition and abilities and with the functions and nature of the job, can try constructively to find effective ways for the employee to do the essential functions of the job.

Whatever the nature of the dispute, the parties and their attorneys must have a good faith interest in trying to resolve the dispute on reasonable terms. If either party lacks such good faith going into the mediation, the chances of a resolution are small, though not zero.

Some attorneys are reluctant to suggest mediation because they fear that doing so will suggest weakness. This is an overblown concern. Most experienced litigators recognize that a very high percentage of cases settle and that litigation is a costly and risky process for all parties. Accordingly, an employee’s attorney should not be afraid to open the door to settlement discussions, including possible mediation.

Mediation does have some drawbacks. When it does not succeed, the parties may have incurred some expense and delay in the process, though these are generally relatively minor in the context of a litigated dispute. Moreover, when a party (or party’s attorney) does not engage in mediation for the right reasons (i.e., with the good faith intention to try to reach a fair and reasonable resolution), then the other party may feel – with some justification – used and abused, especially if it appears that the other party was

engaging in mediation for devious reasons (e.g., to stall proceedings or to get some “free discovery”). Fortunately, such conduct is uncommon, especially as attorneys and their clients learn the advantages of giving mediation a good faith try.

For both employees’ and employers’ attorneys, a common problem is convincing the other side to try mediation. This is especially problematic when the opposing attorney is unfamiliar with the process or is suspicious of the motives of the person suggesting it. A good way to address the former problem is to refer the opposing attorney to other attorneys on the same side of the aisle who have experience with the process; almost invariably, this works to convince the attorney that mediation is an effective device for employment disputes. The latter problem requires convincing the other attorney that you are proceeding in good faith and that you have no interest in wasting your (or your client’s) time and money on a pointless exercise. In any event, most attorneys, once they understand the process, realize that they have little to lose by trying it.

Concerns of the type mentioned above are reduced when mediation is required or “suggested” by a court or agency or by a company’s internal dispute resolution procedure.

2. When to Mediate.

As a general principle, the best time to mediate is “sooner rather than later.” Of course, there are exceptions.

The primary tension here is between cost and information, although other factors can matter, too (e.g., determination of a key legal issue). Given that most cases do settle at some point, money spent on litigating (e.g., attorneys’ fees, deposition costs, and expert fees) can make it harder to settle later rather than sooner. Money spent by the employer on litigating could be used to supplement the settlement “pot.” Money spent by the employee (or employee’s counsel) on litigating can push up the amount needed to settle the case; this is true whether the employee’s attorney is working on an hourly, contingency, or other arrangement. Too often, the primary beneficiaries of litigation are the lawyers, particularly defense attorneys who are paid on an hourly basis.

Some employment attorneys assert that mediation is inappropriate until the eve of trial because the parties won’t be serious about settlement until they are “on the courthouse steps.” Although that is certainly true sometimes, empirical evidence strongly suggests that, at least in employment cases, that view is unfounded. In fact, given some modicum of good faith and reasonableness, the vast majority of employment cases that go to mediation – generally long before trial – do settle.

Some employment attorneys assert that mediation is inappropriate until after substantial discovery has been completed. Plaintiffs’ attorneys say that they need certain information before they can properly evaluate the settlement value of the case. For example, in a discrimination case, the attorney may need comparative information about

other employees. Defense attorneys say that they need to take the plaintiff's deposition before considering mediation; and plaintiffs' attorneys sometimes say they need one or two key depositions first. Generally, though not always, these views are unwarranted. Full-blown discovery is not always needed to evaluate the case. In any event, parties can and do often condition participation in mediation on the other side supplying essential information beforehand. Thus, the employee's attorney might agree to mediate if and only if the employer provides certain information, such as the employee's complete personnel file, designated correspondence or other documents, and files and information about certain other employees. Moreover, during mediation sessions, as the need for certain information becomes evident, the parties can arrange for the information to be supplied; it is not unusual to adjourn a mediation session pending the disclosure of such information.

Another factor favoring early mediation is that, during litigation, parties' positions sometimes harden, particularly if they believe the other side has abused them or the process during the litigation. For example, a plaintiff who has endured a brutal deposition may feel that that the worst is over and that he or she wants to reciprocate by causing pain to the other side. Or an employee of the defendant employer who has been accused of serious discriminatory, harassing, or other heinous behavior may seek vindication. Early mediation can mitigate such developments.

3. The Mediation Forum.

Many courts have court-annexed mediation programs under which litigants can be required to participate by court rules or by order of a judge or magistrate. The Equal Employment Opportunity Commission and many fair employment practice agencies have mediation programs under which the parties might be asked to participate in mediation. These programs have several advantages: they cost the parties nothing (except of course attorneys' fees); they present the occasion for mediation without either party having to ask for it; and the mediators are sometimes knowledgeable about employment law. On the other hand, the caliber of the mediators in such programs varies widely. Most court-annexed programs (and many agency programs) rely on volunteer attorneys to serve as mediators. While such volunteers are generally able and experienced litigators and have had some mediation training, few are expert mediators; as discussed below, the mediator is the key to a successful process.

Many company-established dispute resolution procedures include mediation as an option or as a "mandatory" step in the process. Fortunately, under such programs, the attorneys generally have the opportunity to participate in selecting the mediator and the company pays most or all of the cost. In fact, under some programs, the company provides an allowance of a certain amount that the employee can use for attorneys' fees.

Many mediations are conducted using professional independent mediators. Most areas of the country now have access to such mediators. JAMS has offices in many cities, and most cities have firms and individuals who specialize in mediating employment disputes; the American Arbitration Association and the CPR Institute for

Dispute Resolution also provide mediators. Many professional mediators travel readily to the location of the parties. Generally, professional mediators are the best. But, of course, they are the most expensive mediation providers; in New York City, such mediators typically charge \$200 to \$500 per hour. If the dispute involves substantial claims, such private mediation is generally the best approach.

4. The Mediator.

An effective mediator is essential. Indeed, a good mediator is the single most important factor in successful mediations. Not everyone can be a good mediator; retired judges do not necessarily make good mediators, though some are. The most important characteristics for a mediator are good interpersonal and listening skills, creative problem-solving skills, and credibility with the parties. Substantive knowledge of the law is very helpful, but not as essential.

Mediators' styles vary. The most common approaches are typically referred to as "facilitative" and "evaluative." Under the facilitative approach, the mediator serves as a facilitator for the exchange of views and positions between the parties. This may include, for example, encouraging parties to "vent" their feelings and express their needs and wants. It may also include helping each side understand better the points of views of the other side and helping the parties find mutually beneficial solutions. Under the evaluative approach, the mediator analyzes the parties' legal, evidentiary, and factual positions and explains to the parties and their attorneys the strengths and weaknesses of each party's case. While some mediators tend to use more of one approach than the other, most successful mediators use some of both. Typically, such a mediator will spend considerable time at the beginning of the mediation on the facilitative approach and then gradually become more evaluative as the mediation unfolds, with some movement back-and-forth between approaches.

In selecting a mediator, ask the prospective mediator about his or her experience with cases of the type involved, and ask for references. A good source of information is other employment attorneys. For employees' attorneys, calls to colleagues in the National Employment Lawyers Association can be especially helpful.

5. Pre-Mediation Discussions and Preparation.

When the mediation is not pursuant to a court or agency program, the attorneys for the parties will need to discuss and agree on who to use as the mediator, where the mediation will take place, who will attend the mediation from each side, and who will pay for the mediator.

Assuring that the right people attend from each side can be essential to the success of the process. Obviously, the employee must attend. The employee's attorney may also recommend that the client bring his or her spouse or "significant other." Not only can that person provide valuable support at the mediation, but he or she can be involved in the decision-making process. This reduces the risk that, after an agreement is reached

during the mediation, the spouse or significant other will disagree with the outcome and either pressure the employee to change his or her position or criticize the employee for the outcome. In the alternative, a member of the employee's family or a close friend may be helpful to the employee during the process. Who should attend for the employer is discussed below.

Generally, the starting point for discussion on who pays for the mediator is an equal sharing. The employee's attorney often can and should try to get the employer to pay more than half of the cost, up to 75% to 90%. This is often possible, especially when the employee cannot afford the cost and the employer is genuinely interested in trying to settle the case. The employee's attorney usually does not try to get the employer to pay 100 percent of the cost, on the theory that it is appropriate and desirable for the employee to invest financially in the process. In any event, whatever the cost-sharing arrangements are at the outset, the employee's attorney often can succeed, if the case settles during mediation, in shifting all of the cost to the employer as part of the settlement.

Attorneys should prepare themselves and their clients thoroughly for mediation. While the commitment of time and energy need not approach that of preparing for trial, neither should the parties "wing it." The better prepared you are, the more likely that you will have a satisfactory outcome.

Preparation includes educating the client about the process - explaining how mediation works, what the mediator's role is, how the process will unfold, how the attorneys will conduct themselves, how the parties are likely to conduct themselves, how long the process might take and so forth.

The attorney and client should also discuss in detail the potential remedies achievable through litigation and through negotiation. With the client's assistance, the attorney should prepare a "damages chart" addressing each element or recoverable damages. In appropriate situations, an actuary or economist may be retained to prepare a comprehensive report on damages. Such a damages chart or report will help the attorney and client understand and evaluate their negotiating position. Moreover, it can be shared with the mediator and with the other side before or during the mediation, serving as a checklist for discussion purposes.

The attorney and client should discuss their goals for mediation, including the client's wants, needs, and interests. They should talk openly and about what the client hopes to achieve through negotiation. They should also discuss the alternatives to a negotiated resolution, including the costs, time, and risks involved in litigation. Although the attorney and client should discuss general ranges of financial recovery, they should not fix on any "bottom line" positions or predetermined lines of approach. Flexibility is important. Parties must be free to respond to information, positions, and arguments that arise during the mediation.

The employee's attorney should seriously consider having the employee personally make a substantive opening statement. This is the client's opportunity to tell

his or her “story” directly to the other side. Having the client make this opening statement gets the client actively involved in the process, both before and during the mediation session. In addition, often, a sincere, credible and strong opening statement can have a substantial impact on the other side’s view of the employee, the employee’s case, and/or the appropriateness of remedial measures. Thus, well before the mediation, the employee’s attorney should discuss with the employee the outlines of what he or she might say, and ask the employee to prepare a proposed statement (whether in outline form or in text). Then, shortly before the mediation, the attorney and the employee should review what the employee is planning to say.

Generally, the statement should include, from the client’s perspective, what happened, the effect of the events on the client (and maybe the client’s family), and why the client deserves remedial action. The statement should not directly address legal issues and generally should not include specific demands or terms. The length of the statement depends on the circumstances, but 15 to 20 minutes is usually appropriate. Although the statement should be in the client’s own words, the attorney, after reviewing the statement, should suggest additions, deletions, and changes to make the statement more effective.

6. Pre-Mediation Conference.

Typically, the mediator will conduct a pre-mediation telephone conference with the attorneys. In that conference, the mediator will outline the procedure and answer any questions the attorneys may have. An important aspect of this conference, from the perspective of the employee’s attorney especially, is to assure that the employer sends someone to the mediation who has sufficient authority to settle the case. Otherwise, the process can become blocked or stalled if the company representative lacks sufficient authority. It is a poor practice for the representative present to have to call someone who has not been part of the process to explain why the company should pay more money or make some other arrangement.

Also during that conference, the mediator will discuss the parties’ pre-mediation written submissions. The mediator can understand the case better and more quickly when the parties have supplied such submissions. Given that the parties and their attorneys will have ample opportunity during the mediation to make whatever points they want to make to the mediator and to address any issues that arise, the submissions need not be comprehensive; they should be as short and simple as possible. The object is merely to acquaint the mediator with the background of the dispute, the status of any litigation and settlement discussions, key factual issues and relevant documents, and important legal issues. The mediator will ask the attorneys whether they want to share their submissions with the other side. Sometimes, the attorneys will submit some materials that are shared and others that are not.

The conference will also include a discussion of the mediation agreement that the parties and their attorneys will be asked to sign before or at the mediation. This agreement will set forth certain key aspects of the mediation, including the fact that the

parties will keep the contents of the mediation completely confidential; no one can use mediation communications, including factual positions and settlement offers, in any subsequent proceedings.

Finally, in the context of private (e.g., non-court or agency) mediation, the mediator and the parties will discuss the mediator's fees.

7. The Mediation.

For most mediations of employment disputes, the parties and their counsel should plan on a full day for the session. Virtually all such mediations take at least several hours. Indeed, it is advisable not to make any plans for the evening of a mediation, if at all possible, because many do run into the evening hours.

The mediator invariably opens the session with preliminary remarks about the process and invites questions from the participants. The participants are urged to listen carefully and patiently to the other side's statements, with an open mind. And the parties are reminded of the confidentiality of the process. Then, the parties are invited to make opening statements; the employee usually goes first. As discussed earlier, some employee's attorneys have their client make a substantive opening statement. Most defense attorneys prefer to make the statements for their side, rather than having their clients speak. (In fact, many defense attorneys apparently instruct their clients not to speak at all during joint sessions.) After the opening statements, the mediator may ask the parties whether they have any additional comments or have any questions, and the mediator may ask some questions to clarify certain issues.

At that point, the mediator usually begins caucuses with the parties and their counsel in separate rooms, typically beginning with the employee's side. From that point on, most of the rest of the mediation probably will consist of separate caucuses, with the mediator shuttling back-and-forth between the caucus rooms. The mediator may meet separately with just the attorney for one party or the attorneys for all parties. Deciding with whom to meet and in what order is part of the mediator's art. Usually, the separate groups do not get together again until the end of the mediation, perhaps to shake hands over a settlement and to work out the language of a written agreement.

If the parties reach an impasse in negotiations, the mediator may suggest a "mediator's proposal." Essentially, this is a proposal that the mediator makes to the parties on a "take or leave it" basis to try to bridge the gap. The mediator tells each party to say "yes" or "no" to the proposal. If both parties say "yes," there is a settlement. If either party says "no," there is no settlement. Importantly, in that situation, the mediator does not tell either party what the other side answered. That way, if one party said "yes" and the other said "no," the second party would not learn that the first party said "yes" to the proposal.

Sometimes the inability to reach a settlement may occur because of the unavailability of certain relevant information; this might include information on the

treatment or compensation of other employees or information about aspects of the employee's damages (such as proof of other earnings or the employee's medical records). Or the parties may decide that they need a court ruling on some legal issue or that they need to await the outcome of some litigation event, such as a summary judgment motion. Sometimes, a party needs to consult with someone who is unavailable at the time. In such circumstances, the parties may agree to adjourn the mediation to another date, pending the further developments.

If the mediation session adjourns without a settlement, some mediators take the initiative to follow up with the parties later to determine whether further communications might be helpful. With or without such intervention, many cases that do not settle during the mediation session do settle later, at least in part due to the progress made during the mediation.

8. The Settlement Agreement.

When a settlement is reached during mediation, the parties should prepare and sign a binding agreement. Leaving the mediation without a signed (or at least initialed) agreement risks a broken deal; once the parties leave, "buyer's remorse" may set in and the deal could fall apart.

The types of agreements signed at the end of mediations range along a continuum of formality and finality. On one end is a simple "term sheet" initialed by the parties, subject to further negotiation of some terms and preparation of a formal document. On the other end is a formal, final agreement signed by the parties. In between might be a simple binding agreement, signed by the parties, outlining the terms and types of provisions to be included in a more definitive agreement to be prepared. The further along this continuum that the agreement is, the better.

Sometimes, a formal final agreement is not possible, due to unresolved issues, absence of a prototype agreement as a foundation, absence of the equipment to prepare the draft, or simply lack of time, energy, or will at the end of a tough mediation session. Every effort should be made to prepare the best agreement that the circumstances allow. The more issues and language that remain open, the greater the risk of a significant delay in finishing the deal and the greater the risk of the deal falling apart.

One way to maximize the possibility of a formal final agreement is for counsel to bring a laptop containing a prototype agreement, including typical provisions and optional clauses. An optimistic counsel might even have in the laptop a tailored agreement ready to be modified to reflect the actual deal.

The settlement agreement should include a dispute resolution provision. Typically such a provision will provide that, if a dispute arises, the parties will mediate the dispute with the same mediator and, if such mediation fails, will submit the dispute to arbitration. The arbitration provision should specify the arbitrator or the process for selecting the arbitrator, which may consist of referral to an organization to administer the

process. The arbitration provision should also address such matters as the location and the governing rules for the arbitration.

The employee's attorney should also include a provision that, in arbitration, the arbitrator will have the authority to award attorneys' fees and costs to the prevailing party. Absent such a provision, the employee may have to absorb the attorneys' fees and costs incurred in enforcing the agreement. Note that the suggestion is to give the arbitrator the authority to award fees and costs, not the obligation to do so; if the employee loses the arbitration, the arbitrator probably would not make such an award against the employee unless the employee's position was frivolous or in bad faith.

Whether an oral agreement or a signed "term sheet" is an enforceable agreement depends on the intention of the parties and is governed by general principles of contract law. Importantly, under the Older Workers Benefit Protection Act, an employee's rights under the Age Discrimination in Employment Act cannot be effectively released unless the employee is allowed up to 21 days to consider the release agreement and has had seven days to revoke the release after signing it; the revocation period cannot be waived.

Often, the mediator is available and able to help the parties resolve any issues or disagreements that arise during the drafting of the full agreement. Notably, however, standard mediation agreements provide that the parties will never call the mediator as a witness in any dispute over the settlement or otherwise cause the mediator to disclose any aspect of the mediation process or the settlement.

The agreement signed at the end of the mediation should also be signed by counsel for the parties to show that they represented their clients during the negotiation and drafting of the agreement and that they approve the form of the agreement.

E. ARBITRATION

1. Characteristics of Arbitration.

Arbitration employs a private third-party decision maker to listen to the parties' evidence and arguments and to render a decision. Unlike mediation, which is based on mutual problem-solving and a collaborative approach to the dispute, arbitration is based on the conventional adversarial model of dispute resolution. Typically, the parties agree beforehand that the arbitrator's decision will be final and binding, though the parties could agree that the decision is merely advisory.

As compared to judicial litigation, arbitration is presumably faster and cheaper, though not necessarily as fair and just. One advantage of arbitration is finality – the dispute is over (whether or not the result is right or just), without recourse to review or appeal (except on limited grounds, such as bias or fraud). Other commonly cited "benefits" of arbitration include little or no discovery, relaxed rules of evidence, no juries, no motion practice, short decisions, and (according to some) limited remedies. As

discussed below, these attributes of arbitration raise serious concerns for employees and their attorneys.

2. Comparison of Labor Arbitration with Employment Arbitration.

Traditional labor arbitration is somewhat similar to, but really quite different from, arbitration of individual employment disputes, particularly those involving statutory discrimination claims. Traditional labor arbitrators typically confine themselves to determining the facts and applying them to the language and standards of a collective bargaining agreement. Moreover, the parties to a traditional labor arbitration are an employer and a union, not an individual employee; indeed, individual employees typically lack standing to initiate and control such arbitrations. Such arbitrations arise in the context of the institutional concerns and relations of the employer and the union. Most labor arbitrators have little or no knowledge of or experience with discrimination claims, which involve complicated issues of statutory interpretation, case analysis, and evidentiary judgments.

3. Method of Choosing Arbitration.

A threshold issue pertaining to arbitration of employment disputes is the manner in which arbitration was supposedly chosen by the parties. Attorneys for employees have no problem with so-called post-dispute arbitration, i.e., when the parties to a dispute enter into an agreement to submit a pending dispute to final and binding arbitration. In that context, the parties have the obvious incentive and opportunity to negotiate the rules and standards for the arbitration, such as how much discovery will be conducted and what remedies are available. On the other hand, attorneys for employees uniformly object to so-called pre-dispute arbitration, which some employers seek to impose on employees as a condition of initial or continued employment (or as a condition for a raise or promotion). In the view of plaintiffs' employment attorneys, such "cram-down" arbitrations are tantamount to adhesion contracts and are seldom truly knowing and voluntary.

4. Mandatory Pre-dispute Arbitration.

Pre-dispute arbitration provisions have been the subject of much discussion and debate in the employment law community, especially after the Supreme Court's decision in Gilmer v. Interstate/Johnson Lane.¹ Virtually every neutral or objective body that has examined the issue has concluded that such pre-dispute arbitration provisions are inappropriate when imposed as a condition of employment, especially for discrimination claims.² The 1995 Due Process Protocol of the American Bar Association-sponsored Task Force on Alternative Dispute Resolution in Employment Disputes was unable to

¹ 111 S.Ct. 1647 (1991).

² See, e.g., U.S. Secretaries of Labor and Commerce, Commission on the future of Worker-Management Relations 33 (Dec. 1994) (Dunlop Commission Report).

reach consensus on this point.³ The legality, enforceability and appropriateness of such mandatory pre-dispute arbitration is beyond the scope of this chapter.

5. Minimum Due Process Standards.

Whenever any employment dispute is submitted to arbitration, certain minimum standards of due process must be met. These standards are still evolving and have been the subject of such discussion, including the reports of the Commission on the Future of Worker-Management Relations (Dunlop Commission) and the Task Force Protocol.⁴ The Dunlop Commission outlined the following key quality standards for fairness:

1. A neutral evaluator who knows the laws in question and understands the concerns of the parties.
2. A fair method of cost sharing between the employee and the employer to ensure affordable access to the system for all employees.
3. The right to independent representation if the employee wants it.
4. The full range of remedies available through litigation.
5. A written opinion by the arbitrator explaining the rationale for the result.
6. Sufficient judicial review to ensure that the result is consistent with the governing laws.

6. Policy Considerations.

In addition to such issues of voluntariness and due process, cramming employment discrimination claims into compulsory arbitration raises important issues of policy. Anti-discrimination statutes promote paramount social and legal policies against discrimination in employment. Such policies could be thwarted or weakened by pushing discrimination claims out of the courts and into arbitrations. Obviously, discriminatory conduct by employers would be less likely to come to the attention of the public if the claims are determined in private arbitrations. Moreover, given that arbitrators' decisions are not reviewable or appealable (except on very narrow grounds), the enforcement of the anti-discrimination laws could not be monitored or protected; arbitrators could ignore or misapply the dictates of the law without recourse, and the law would not be subject to development and clarification. If arbitration of employment discrimination claims becomes more prevalent, it will be necessary to adopt standards for greater scrutiny of arbitrators' decisions to assure compliance with statutory standards.

7. Self-Regulatory Organizations

Pre-dispute requirements to arbitrate employment claims have been common in the securities industry. Indeed, in the Gilmer case (mentioned above), the plaintiff was required to arbitrate his age discrimination claim through the New York Stock Exchange

³ A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, reprinted in (BNA) Daily Lab. Rep., No. 91, May 11, 1995, pp. E-11 to E-13.

⁴ See also the JAMS/ENDISPUTE Policy on Employment Arbitration: Minimal Standards of Procedural Fairness, and the National Rules for the Resolution of Employment Disputes: Arbitration and Mediation Rules of the American Arbitration Association.

arbitration process based on the arbitration requirement incorporated in the standard SEC registration form (U-4) executed by all registered representatives in the securities industry.

Major changes have occurred in securities industry arbitrations. The National Association of Securities Dealers eliminated the arbitration requirement from the U-4 form with respect to statutory discrimination and harassment claims filed on or after January 1, 1999. Notably, that rule change did not apply to other kinds of employment claims against NASD members (e.g., common law discharge or compensation claims). Moreover, the NASD continues to provide a forum for arbitration of all claims, including statutory discrimination claims, pursuant to (a) a post-dispute agreement to arbitrate or (b) a “pre-dispute” agreement between an employee and a member employer, even when the pre-dispute agreement was “mandatory.”

In granting its approval of the rule change, the SEC stated that, “[t]he statutory employment anti-discrimination provisions reflect and express the intention by legislators that employees receive special protection from discriminatory conduct by employers. Such statutory rights are an important part of this country’s efforts to prevent discrimination. It is reasonable for the NASD to determine that, in this unique area, it will not, as a self-regulatory organization, require arbitration.”

The New York Stock Exchange went even further. Effective January 1, 1999, the NYSE declined to provide a forum for any “pre-dispute” agreement to arbitrate statutory discrimination claims. Not only was the Form U-4 arbitration requirement eliminated for such claims, but so were all employer-imposed mandatory arbitration requirements.

In addition to these rule changes, some leading employers in the securities industry, (e.g., Merrill Lynch) have announced that they will not impose arbitration of statutory discrimination and harassment claims.

F. HYBRIDS OF MEDIATION AND ARBITRATION.

Mediation and arbitration are fundamentally different in form and substance. Mediation requires a cooperative, problem-solving approach with the mediator and the other side; arbitration calls for a more adversarial approach, as each party tries to convince the arbitrator to rule in its favor. Nonetheless, some aspects of mediation and arbitration can overlap.

1. Mediation with Testimony.

In some mediations, one party may want to have witnesses (particularly, the employee) “testify” in the presence of the mediator and the other side. This allows the witnesses to have their “day in court” and enables the observers to assess them as

possible trial witnesses. After such a “mini-trial,” the parties can then turn to conventional mediation.

2. Mediation-Arbitration.

So-called “med-arb” entails the neutral acting as a mediator to bring about a settlement and then, if mediation fails, acting as an arbitrator to decide the dispute. Experienced attorneys and neutrals uniformly consider such a procedure to be a distortion of both mediation and arbitration. The mediation process is corrupted because the parties and their attorneys will be reluctant to be open about their needs, wants, and interests and about the weaknesses of their positions and the strengths of the other side’s positions. The arbitration process is corrupted because the arbitrator will have learned many things about the parties and their positions that would not have been admitted into evidence in a hearing.

3. Arbitration-Mediation.

“Arb-med” avoids those problems. In such a proceeding, the parties arbitrate the case in the usual way and the arbitrator prepares an award; the award is sealed. Before unsealing the award, the arbitrator can act as a mediator to help the parties reach a settlement, rather than relying on the unknown award. An advantage of this approach is that the arbitrator has had the benefit of a full adversarial hearing and therefore has a good sense of the strengths and weaknesses of the parties’ positions. Moreover, in this situation, the parties negotiate during the mediation with the real and immediate realization that, absent a settlement, a resolution will be imposed by the arbitrator.

4. Baseball Arbitration.

This form of arbitration is used to resolve pay disputes between baseball owners and players. After the arbitration hearing, each party submits its best “offer” to the other side, and the arbitrator is required to select one of the two “offers” as the award.

5. Non-Binding Arbitration.

Sometimes called “advisory arbitration,” this process involves the parties going through an arbitration and receiving an award. Each party remains free to litigate the case in court. The result of the arbitration may or may not be admissible in court, depending on the parties’ agreement. Similarly, the parties might agree that, if one party rejects the arbitration award and goes to court (while the other party accepted the award), the rejecting party may have to pay the costs and/or attorneys’ fees of the other party if the rejecting party does not achieve a better result from the court.

Similar to the dynamics of “arb-med”, a non-binding arbitration award may lead to a settlement, based on the terms of the arbitration award itself or other negotiated terms.

6. Partially-Binding Arbitration.

Under this process, the arbitrator's award may be binding as to only part of the case (e.g., liability and/or causation but not damages) or as to only one party (e.g., the employer). Some employers with dispute resolution procedures have arbitration as the final step under which the company is bound by the result but the employee is not. This process mitigates many of the problems caused by mandatory "pre-dispute" binding arbitration because the employee retains the right to take the claim to court. On the other hand, to the extent that this process is "mandatory," it may impose undue hardships on the employee (e.g., attorneys' fees in prosecuting the arbitration).

Substantial experience with such programs demonstrates that very few employees exercise the right to go to court after the arbitration. This might be because the employee was satisfied with the result (even if it was less than the employee wanted). Or it might be because the employee felt that, whatever the outcome, he or she had a "day in court" and had a fair opportunity to present the case. Or it might be because the employee was exhausted, emotionally or financially, and was unable or unwilling to continue the fight. Whatever the reasons, some companies have concluded that this process works to resolve once and for all virtually all claims.