

THE MEDIATION OF EMPLOYMENT DISPUTES

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ALTERNATIVE DISPUTE RESOLUTION MOVEMENT IN 1997

A recent Cornell University and Price-Waterhouse survey of corporate counsel indicates that in the last three years 89% of U.S. corporations have used mediation and 79% have arbitrated. Of the 94 U.S. District Courts, 87 have established ADR programs. In February 1997, the ABA House of Delegates passed Resolution 112 endorsing discretion for all judges to use ADR systems. The American Arbitration Association administered 70,516 cases during 1996, nearly double the number of 15 years ago. A survey of four major ADR providers (AAA, CPR, J.A.M.S./Endispute & USA&M) conducted by a team led by Professor Stephen Goldberg of Northwestern Law School found that 78% of 449 cases were resolved in mediation with less time and costs. A survey by Deloitte and Touch of corporate counsel found a shift in favor of mediation over arbitration. In 1997, 65% favor mediation over arbitration from the same survey done in 1993, where 51% favored arbitration.

CPR did a study of the nation's largest law firms (124) and found 65% of the responding firms had formalized ADR within their practice. Over 16 states have, or are in the process, of creating statewide dispute resolution offices. The CPR Corporate Pledge has been adopted by over 4,000 corporations; its Law Firm Pledge by over 1,500 firms.

Mediation and arbitration have been common in unionized workplaces for over 50 years. Over 99% of collective bargaining agreements contain a grievance provision culminating in binding arbitration. In the last few decades, more companies have implemented mediation, peer review, ombudsman and arbitration programs for their non-union employees.

WHY MEDIATION

A fundamental axiom of conflict resolution is the concept that the stronger the past, present or future relationship of the disputants, the more susceptible the dispute is to successful resolution via the mediation process. In societies with strong work ethics, what we do to earn a living is often at the center of our self-identity and value-system. The employment relationship often centers our daily lives. An individual usually spends more time at work than any other single activity. Self-esteem and dignity are more than mere by-products of our work. Each of us have a significant mental investment in our employment relationship. Even the lowest level employee of a multi-national company stakes some ownership claim over their specific function. An individual's job is a very personal thing with its own aura of expectations and sense of equities.

In the last three decades the workplace has undergone drastic change as the employment at-will doctrine began to resemble the hearsay rule: simple on its face but governed by exception in actual practice. At the same time, the traditional expectation of mutual lifetime loyalty between employee and employer has eroded into non-existence. Employees could expect to spend long

years of service with one company until retirement, provided that they were honest and did not screw-up; there was a stigma attached to being terminated from employment. Now, the popularity of downsizing has made everyone expendable in both the private and public sectors. A monolithic approach to life-time employment is a delusion for the uninformed and uninitiated.

It is against this backdrop that the surge of statutory employment claims has become a significant focus for employers, administrative agencies and the courts. In light of the high stakes emotional and economic issues at risk, mediation is the most appropriate vehicle for the resolution of workplace conflict. Mediation provides an outlet for emotional venting and a forum for hearing other “soft” issues that would not be admissible in court. Employees and managers both can get a “day in court” without the formality and long delays of litigation or administrative hearings. Since there are many non-economic issues in an employment dispute, mediation provides the best opportunity to generate creative options to meet the interests of the parties. An interest-based principled outcome is not only possible, but likely. This is especially true in the class of disputes involving challenges by current employees against employer practices. The protection of the future relationship between the parties can thrive in a mediative process.

Furthermore, many organizations operate with some form of Total Quality Management which has as a fundamental premise the empowerment of employees to make decisions in the workplace. This convergence of operational philosophy and presumption in favor of dispute resolution by the legislatures and the courts is making mediation commonplace as a prerequisite to litigation.

Most employers have a grievance or complaint procedure which results in an attempt to facilitate resolution internally. In 1991 Supreme Court case of Gilmer v. Interstate Johnson Lane, Inc., 111 S. Ct. 1647 (1991) upheld the arbitration of an age discrimination claim under the Age Discrimination in Employment Act (ADEA) for a securities broker who had signed the industry standard registration form agreeing to arbitrate any dispute arising from the employment relationship. Employers have now aggressively implemented complaint procedures in the workplace which usually have a mediation step prior to voluntary or mandatory arbitration. Ironically, the National Association of Securities Dealers (NASD) system where Gilmer arose has just determined to make binding arbitration of statutory claims voluntary.

The reality is that neither the employer nor the average employee is eager for a courtroom brawl exposing their “dirty laundry” or prior conduct. It is stressful for the non-combatants, such as co-workers, to testify about events that happened in the workplace years ago. It is a breeding-ground for divided loyalties, pitting employee against manager and former colleagues against each other. The transactional costs, and the toll on morale, can be devastating to the mission of the organization. Verdicts for either side are usually pyrrhic, with losing lawyers quoted in the newspaper that they are confident they will win on appeal while the “winner” bemoans the high transactional costs.

WHEN TO MEDIATE

Alternative Dispute Resolution is specifically authorized and encouraged by many of the employment statutes such as the Civil Rights Act of 1991 and the Americans with Disabilities Act. Mediation is favored by the Equal Employment Opportunity Commission (EEOC), Department of

Labor (DOL) and other agencies charged with administering employment statutes. Many of these agencies have established their own mediation programs, usually involving referrals to outside mediators. The EEOC in a July 10, 1997 Policy Statement, reiterated its opposition to binding arbitration as a condition of employment. The EEOC believes that there are inherent disadvantages to employees because the employer designs and/or administers the system, arbitrators are not bound to follow the law and the employers are more likely to be "repeat players. Although the EEOC has been successful in several District Courts, most circuits, including the 5th, 6th, 11th and D.C. U.S. Circuit Courts of Appeal have upheld the arbitration provisions.

There is little doubt in my own mind that employees will have to "exhaust administrative remedies" such as mediation prior to seeking redress in court. As mediation becomes institutionalized in the workplace, the mediator will increasingly be drawn into the fray at an earlier and earlier stage in the conflict.

Many cases already in litigation are being referred to mediation by the disputants themselves or the courts. It is not necessary that discovery or an administrative agency investigation be concluded prior to mediation. The manner in which pending employment litigation cases end-up in mediation is not strikingly different than how tort and other commercial disputes are processed to mediation. Mediation occurs at all stages of the dispute. As a general proposition, the earlier the mediation, the more opportunity for a successful resolution since parties will not have become entrenched in their positions and significant sums have not been expended on discovery and attorney fees.

WHICH MEDIATOR

Although mediation process expertise is always the first attribute any advocate should seek in a mediator, substantive knowledge of the employment laws and practice is also very important. This is especially true in cases where the representatives themselves may not be fully versed in the statutory and regulatory scene. In most jurisdictions, personal injury lawyers are aggressively undertaking employment cases with little real understanding of the field. For example, there are often Employment Retirement Income Security Act of 1974 (ERISA) issues regarding health and welfare benefits and pensions which have to be considered in any termination or reinstatement cases. In claims involving individuals covered under collective bargaining agreements, there may be contractual and Labor-Management Relations Act (NLRB) implications of any settlement. Furthermore, some familiarity with worker's compensation practice and social security law is often critical in resolving certain type cases like ADA and age claims.

Many advocates attempt to match the mediator with the demographics of the claimant., for example, seeking minorities for Title VII cases, females for sexual harassment and older persons for age claims. My own experience leads me to be dubious of this approach; on a daily basis mediators of all backgrounds are successfully mediating discrimination cases. There is also speculation that this demographic approach may "backfire" if the employer believes the mediator is identifying too closely with the claimant, causing a loss of credibility in the mediator by the party who generally has less risk of impasse. Almost all employers can survive an unfavorable court verdict since they have superior resources, while a bad outcome for an individual employee may be devastating on an economic and emotional basis.

There is also a legitimate concern that appointing agencies and private entities (both profit and non-profit) that administer cases may be violative of federal law if they respond specifically to a request based upon gender or other protected status. For example, if an employer had a race discrimination case pending, and contacted a dispute resolution provider seeking older white males as neutrals, it is doubtful if anyone would question the impropriety of an affirmative response honoring this request by the entity. I am not certain why the corollary proposition, that is the assignment of cases to mediators based solely upon similarities in demographics to the parties, is not equally improper. My own informal conversations with regulatory agency personnel confirms that composing panels based upon demographic factors is problematic, if not illegal. At the same time, there have been court and other informal challenges to panels of neutrals in employment cases based upon lack of cultural or demographic diversity. As in any case, the parties should retain the individual with the best mediative skills and carefully consider the extent of substantive knowledge desired on an *ad hoc* basis.

There is always substantial debate concerning a facilitative versus an evaluative approach to mediation. My opinion is that the parties to employment disputes are generally seeking some reaction or opinion from the neutral. In any mediation process, the parties and the mediator should address these expectations as soon as practical. My style is to start with a facilitative methodology with a gradual shift towards a more activist approach during the later stages of the process. It is not uncommon for me in employment cases to float a settlement figure or proposal if my perception is that either or both of the parties will accept the recommendation.

Co-mediation models work for employment cases as well, if not better, than in other substantive areas of the law. It is my strong opinion, however, in non-class action cases, it is preferable to work with a single neutral. If co-mediation is to be utilized, it should be with established teams who work with each other on a regular basis. For the garden-variety claim, I work alone.

WHERE TO MEDIATE

Usually both employees and employers want sessions conducted at a neutral location. The employee is embarrassed or uncomfortable being on the premises while the employer does not want the workplace buzzing about the "event" taking place. Furthermore, it is customary to have confidentiality agreements, so on-site negotiations undermine privacy concerns.

As in any mediation, it is important that the surroundings be comfortable for not only the lawyers, but the claimants. I prefer multiple rooms some distance from each other that I shuttle to and from carrying the actual proposals. In cases involving ADA claims, special accommodations may have to be made for persons with disabilities. Under the ADA itself, it is likely that mediators themselves, and certainly the dispute resolution entities, are subject to the same reasonable access and anti-discrimination regulations as everyone else. The premises for the mediation should have reasonable access for persons with disabilities.

HOW TO SCHEDULE

_____ Since these claims are highly emotional and fact intensive, one full day per each claimant should be reserved. It is not uncommon to work in more than eight hours segments. Although I have scheduled cases in 1/2 day formats, I often felt "rushed" even though all of these 1/2 day cases did in fact settle.

WHO SHOULD BE THERE

It is important that not only the claimant be present, but also any family members, counselors or friends from whom they are receiving advice. They should participate in the mediation process as well. It is rare that a terminated employee is not relying upon family or friends for financial and emotional support. Spouses should almost always participate; settlements have been scuttled by the absent spouse or confidant who has unrealistic economic expectations of settlement. For the employer, it is critical to have the client's themselves present, especially a human resources representative. As in any mediation, the person with power to authorize a final resolution should actively participate in the process. In a case involving allegations of harassment, it is usually counter-productive to have the alleged harasser present at the mediation session.

HOW TO PREPARE

Pre-session submissions are particularly helpful in employment cases. My own practice is to request that they be submitted on a confidential basis only, at least one week prior to the scheduled session. It is not uncommon to get them faxed the day before, so I would encourage everyone to be aggressive about enforcing the deadlines. I do not recommend exchange of submissions in an employment case. The parties are well aware of the facts and each of their respective positions; an exchange just encourages posturing and precludes openness with the mediator. I do not find pleadings to be helpful, but often the EEOC charge contains useful details in a concise format. Specifics on the compensation history, including fringe benefit packages, must be included by both parties in their packet. Many employer advocates are in-house or national counsel from outside the jurisdiction, so for Pennsylvania cases I refer them to of the Pennsylvania mediation confidentiality provision, Act No. 1996-3, approved 2-7-96 found at 2 PA Consolidated Statutes 5949. For cases in other jurisdictions, I may copy the statute or ask counsel to include it in their own submissions.

One recommended format for submissions follows:

1. The status of litigation and/or administrative agency involvement
2. The claimant's employment history, including compensation and benefits
3. The causes of action and any ancillary proceedings
4. Damages, specify what are available under federal and state statutes, including caps and limitations and calculations of future economic

5. History of settlement proposals, including unconditional offers of reinstatement
6. Any performance appraisals, medical or other expert reports
7. Any statistical analysis, data or demographics on the workforce
8. Brief summary of key case law on contested issues
9. Summary of cases disposed by summary judgment and jury verdict amounts
10. Mark all documents as confidential and produced for the purposes of mediation

_____ Note that the EEOC maintains its own webpage containing the text of civil rights laws that the agency administers, annual reports and telephone numbers of headquarters and field offices. The URL is <http://www.eeoc.gov> for the site.

WHAT HAPPENS AT MEDIATION

It is critical for the mediator to make a detailed opening statement in employment cases regardless of how much information and dialogue has taken place before the joint session. My practice is start with claimant's counsel making an opening. I will often divide the presentations into factual presentations, theory and application of the law and finally damages, allowing each advocate to speak on each area separately rather than one long presentation on all three points. I prohibit the advocates from discussing any prior settlement proposals; it is made clear in my opening that all negotiations and proposals will occur using a caucus-shuttle methodology and that no economic terms or proposals should be addressed in the joint session.

_____ The mediator should use strategies and techniques which have proven successful in family or commercial disputes involving a past, present or future relationship. Both parties come seeking ratification and affirmation of their respective positions. Unlike tort practice, where concepts of comparative fault are ingrained in the expectations of compromise, employment disputants tend not to recognize nor acknowledge publicly the shades of gray. Successful employment mediators are empathetic while legitimizing each of the parties emotional positions. Both claimants and managers want, and need, to vent, especially to the mediator. The mediator and advocates must allow sufficient time to let everyone tell their story.

My general approach is to have the representatives make detailed oral opening statements and defer to the advocates what they are comfortable with having their clients state in the joint session. Often, the true venting occurs in the caucus. There is usually a substantial amount of "he said-she said" explanations that have nothing to do with the legal claims at issue. The more skillful mediators will explore these areas and not stifle points the disputants think are important.

_____ Formal acknowledgment and apology often play a significant role in resolving these claims. These can be oral communications, but may also take the form of a letter from a high ranking individual at the corporate level. The mediator should not end the session until the specific language, use and permitted scope of dissemination and all details of any document are agreed upon by all parties. Similarly, the handling of future employment references and the purging of employment files are key elements of any final settlement. The U.S. Supreme Court on February 18, 1997 ruled in a unanimous decision, resolving a split among the federal circuits, that Title VII retaliation protection extends to former employees and a negative reference is actionable. Robinson

v. Shell Oil Company, 117 S. Ct. 843 (1997). Most large employers have now gone to a practice of only confirming dates of employment, job titles and salary history; this case will encourage the expansion of that trend to all employers. The Employer will also insist on a prohibition against application for re-hire and a waiver of any potential retaliation claims.

_____ A "risk analysis" exploring the strengths and weaknesses of the case should follow the information gathering and venting stages of the process. Outcomes in employment cases are at least as unpredictable, if not more so, than in other areas of the law. Most employers file motions for summary judgment; numerous causes of action, and sometimes whole cases, are dismissed by the federal judges. Consideration of the probability of various outcomes should be at the core of what the mediator explores in caucus when it comes time to focus on risk versus reward. Employment cases are expensive for both parties to bring to verdict. Prevailing plaintiffs are entitled to attorney's fees from defendants. Often defendants make a Rule 68 Offer of Judgment placing claimants at risk for litigation costs, including reasonable counsel fees under 28 U.S.C. 1988 should defendant prevail or plaintiff obtain a verdict less favorable. See, Marek v. Chesney, 473 U.S. 1, 105 S. Ct. 3012 (1985).

_____ Claimants are frustrated by the delays and backlog of the courts and administrative agencies. They lack confidence in the system, and often, their own counsel. Mediators should be sensitive to these dynamics and avoid the "clubiness" and "exclusionary" dynamics of lawyers talking to lawyers. By all means, legal jargon should be explained in lay terms or avoided whenever possible. My own practice is to attempt to avoid any contact with the claimant's counsel outside the presence of their entire team. This is the employee's, not their counsel's, day; all communication should begin and end with them, with the others feeling a ripple effect.

_____ By the time claimants get to a mediation, there is a natural tension between seeking justice via economic vindication or retribution, and the desire to just conclude it. They often are tired or worn down by the whole litigation process. Just being at the mediation session creates an expectation and momentum for settlement; the "overness" factor generates inertia for resolution. The parties often become more polarized if mediation does not break the impasse.

_____ The final settlement agreement tends to be a lengthy document which neither admits nor denies liability. Some advocates bring draft documents to the mediation or have access to a computer to handle all details while in the presence of the mediator. My practice is to review all terms and conditions orally with each party and to offer to make myself available by telephone should the advocates be unable to formalize their agreement between themselves.

LET' S MAKE A DEAL: TERMS, ISSUES; CHECKLIST

1. Continued employment or reinstatement
2. Backpay; Frontpay; Wage Continuation
3. Compensatory Damages (fully taxable)
4. Punitive Damages
5. Acknowledgments and/or apologies; posting notices
6. Employment Records
7. Prohibitions against re-application for rehire, subsidiaries; successor companies

8. References; letters; contact person
9. Outplacement services
10. Return of documents; proprietary information protection; non-competes
11. Sensitivity and other training programs for workplace
12. Tax consequences and indemnifications
13. Confidentiality
14. Disposition of administrative charges and other claims
15. Mutual non-disparagement provisions; no contact with current employees
16. Attorney fees
17. Liquidated damages and/or remedies for breach of settlement agreement
18. Dispute resolution mechanisms for alleged breach of settlement agreement
19. Probationary periods of employment
20. Employee benefits; health insurance; pensions; stock options; vacation; sick pay
21. Publicity releases
22. Donations to charity; public service
23. No admission of liability
24. Mutual general releases; no assignment of claims
25. Document jointly drafted by both counsel
26. Choice of law; controlling law
27. Older Worker's Protection Benefit Act 7 day revocation period for age

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