

**ADR IN EMPLOYMENT CASES:
A PLAINTIFF'S LAWYER'S PERSPECTIVE**

**American Bar Association
Labor & Employment Law Section
ADR Committee**

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NEGOTIATIONS and ADR

I. ALTERNATIVE DISPUTE RESOLUTION: AN OVERVIEW

A. 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.

B. 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.

C. An Escalation Approach.

An 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). The benefits to this approach are that disputes often can be resolved faster and better, with less aggravation for all concerned, than may occur when parties rush into more adversarial forums.

D. Internal Dispute Resolution Procedures.

Over the past twenty years, more and more companies have instituted internal review procedures. Given that these are internal, employees and their counsel may legitimately view such procedures with some skepticism. Companies that are serious about such programs must be aware of such skepticism and should take care to design and run the programs in a way that enhances their credibility; assuring fair procedures and neutral evaluators, for example, are important factors. For companies, these procedures can be excellent for personnel relations, if they are done properly -- not merely as litigation avoidance schemes. In any event, unless the

employee perceives that the internal process is 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.

E. External ADR.

Once an employee decides to take a dispute "outside" the company, various alternatives are available. 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.

F. 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. Mediation is discussed more below.

G. 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. Arbitration is discussed more below.

H. Hybrids.

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

II. MEDIATION OF EMPLOYMENT DISPUTES

A. 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 about 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 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:

- It avoids the expense and delay of litigation.
- It engages the parties in creative problem solving.
- It may lead the parties to adopt solutions that a judge could not or would not direct.
- It helps maintain or repair relationships between the parties.
- It provides the parties a "day in court" and an opportunity to vent.
- It allows the parties to learn from their mistakes and take corrective measures (e.g., employers learning of poor management practices or errant managers).
- It keeps the dispute and its resolution confidential.
- It 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:

- 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.
- 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.
- 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; such forums are discussed below.

B. 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, though 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 (as well as the occasional plaintiff's attorneys who are paid on a full 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 mediations 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 the worst is over and that he or she wants to reciprocate by causing pain to the other side. Or an executive of the defendant employer who has been accused of serious discriminatory, harassing, or other heinous behavior may seek vindication. Early mediation can avoid such developments.

C. 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 Opportunities 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. 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 companies that have internal 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 (e.g., \$2,500) 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/Endispute has offices in many cities, and most cities have firms (such as Wittenberg Shaw & Ross in New York City) 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 \$400 per hour. If the dispute involves substantial claims, such private mediation is generally the best approach.

D. 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 helpful, but not 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.

E. 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. As the employee's attorney, I generally recommend that my client bring his or her spouse or "significant other." Not only can that person provide valuable support at the mediation, but that person should 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 addition or 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. As an employee's attorney, however, I often try to get the employer to pay more than half of the cost, up to 75% to 90%. I am often successful, especially when my client cannot afford the cost and the employer is genuinely interested in trying to settle the case. I do not even try to get the employer to pay 100% of the cost, because I think 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, I usually succeed, if the case settles during the mediation, in shifting all of the cost to the employer as part of the overall 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, etc.

I generally prefer to have my client 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. Thus, well before the mediation, I discuss with my client the outlines of what he or she might say, and I ask the client to prepare a proposed statement (whether in outline form or in text). Then, shortly before the mediation, we review what the client is planning to say.

F. 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 the 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. I generally am willing to share; most defense attorneys prefer not to do so. 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.

G. 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, I generally have my 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 will almost invariably begin caucuses with the parties and their counsel in separate rooms, usually 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.

H. The Settlement Agreement.

When a settlement is reached, it is advisable to reduce it to writing and have it signed by the parties and their attorneys. Ideally, the writing would be a comprehensive settlement agreement containing all the terms and conditions. In reality, the writing is usually a one or two page outline of the key terms, followed by a statement that a comprehensive document will follow.

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 had up to 21 days to consider the release agreement and had seven days to revoke the release; the revocation period cannot be waived.

Often, the mediator is available and able to help the parties to resolve any issues or disagreements that arise during the drafting of the full agreement. Notably, however, standard mediation agreements provide that the parties will not ever 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.

III. ARBITRATION

A. Characteristics of Arbitration.

Arbitration employs a private third-party decisionmaker 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 they 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.

B. 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.

C. 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. Most attorneys for employees have no problem with so-called post-dispute arbitration, i.e., the parties to a dispute enter into an agreement to submit the 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 (particularly in the securities industry) 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.

D. Mandatory Pre-dispute Arbitration.

Pre-dispute arbitration provisions have been the subject of much discussion and debate in the employment law community, especially since 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, especially

¹ 111 S.Ct. 1647 (1991).

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 reach consensus on this point.³

Although most courts that have addressed the issue have held that such pre-dispute agreements are enforceable, several have held to the contrary. See, e.g., Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998), cert. denied, 119 S. Ct. 445. But see Seus v. John Nuveen, 1997 WL 325792 (E.D. Pa.), 77 FRP 761 (3d Cir. 1998) (rejecting Duffield).

E. 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:

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

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).

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 (Effective June 1, 1996) of the American Arbitration Association.

F. 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.

G. SROs.

Pre-dispute requirements to arbitrate employment claims has 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 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 recently in securities industry arbitrations. In 1997, the National Association of Securities Dealers proposed a rule change, which eliminated the arbitration requirement from the U-4 form with respect to statutory discrimination and harassment claims. The rule change was approved by the SEC in 1998 and became effective as of January 1, 1999. The new rule applies to any statutory discrimination or harassment claim filed on or after January 1, 1999; claims for conduct that occurred before that date can be filed in court after that date. Notably, the new rule does not apply to other kinds of employment claims against NASD members (e.g., common law discharge or compensation claims). Moreover, the NASDR will continue 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 the employee and the 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. On December 29, 1998, the SEC approved a rule change, effective January 1, 1999, pursuant to which the NYSE will not 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, Merrill Lynch and PaineWebber, leading employers in the securities industry, announced during 1998 that they will no longer impose arbitration of statutory discrimination and harassment claims.

IV. 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.

A. 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.

B. 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 position 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.

C. 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.

D. 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.

E. 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.

F. 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.