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How Mediation Works: A Guide to Effective Use of ADR

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A growing number of companies have instituted internal dispute resolution programs, mediation as a pre-condition to arbitration appears in many collective bargaining agreements, and the Equal Employment Opportunity Commission and other agencies have adopted a pro-mediation stance to foster more efficient and less expensive resolution of employment disputes. Employment lawyers must become more familiar with alternative dispute resolution (also known as ADR) processes and how to use these procedures to help their clients resolve workplace disputes without the expense and wear and tear of litigation.

With all the internecine warfare in the world today, it may come as a surprise that use of third parties to facilitate negotiations to resolve employment disputes is gaining popularity both domestically and abroad. Survey after survey report the success rates of mediation programs for resolving disputes either before or during the course of litigation. A growing number of companies have instituted internal alternative dispute resolution programs, parties have added mediation as a pre-condition to arbitration in collective bargaining and employment agreements, and the EEOC and other agencies have adopted a pro-mediation stance to foster a more efficient and less expensive way of resolving employment disputes. Employment lawyers in particular must become more familiar with "alternative dispute resolution," also known

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as "ADR," processes and how they can use these procedures to serve the interests of their clients.

WHAT IS ADR?

In a broad sense, alternative dispute resolution, or ADR, refers to a range of options for resolving conflict, typically with the intervention of a trained third-party professional whom both sides to the conflict view as neutral. ADR is used to resolve threatened and/or pending litigation involving domestic relations, commercial matters, employment relations, construction, energy, securities, environment, as well as community disputes involving neighbors, small businesses, landlord-tenant, etc. However, it is particularly well-suited to the employment arena which is governed by a panoply of federal, state, and local regulations, as well as having unique codes of conduct and practices which apply to each workplace. Moreover, most employees spend more time at work than they do at home, making the workplace a common venue for interpersonal disputes that can benefit from "talk therapy" in a facilitated setting.[1]

ADR differs from unassisted negotiation which involves only the people (at least two but often many) enmeshed in a dispute. Through negotiation, they communicate with each other in an effort to reach agreement.[2] There are two kinds of unassisted negotiation: "competitive," in which negotiators seek to maximize their own gains, usually at the expense of other parties, and "collaborative," which is more of a problem-solving approach, commonly described as "win-win."[3]

ADR is a form of assisted negotiation by involving "outsiders to a dispute, who bring the parties together and, most of the time, help them to resolve their own disagreements. They may also attempt to predict the likely outcome if the dispute were to be adjudicated. All decisions remain in the hands of the parties themselves."[4] There are various forms of assisted negotiation: fact-finding, neutral evaluation, and mediation.

FACT-FINDING

A trained neutral third party investigates the circumstances leading to the dispute and issues a report containing "findings of fact." Fact-finding is often used in labor-management agreements as an intermediate step in a grievance-arbitration procedure.

NEUTRAL EVALUATION

Sometimes coupled with fact-finding, a trained neutral third party assesses the facts and the applicable law and provides an opinion as to the strengths and weaknesses of each party's position in a litigation and the likelihood of success on the merits. Early neutral evaluation

programs, in which attorneys with special expertise in a given subject area serve as neutrals, were developed by the federal courts to lead parties to settlement of pending cases.

MEDIATION

A trained neutral third party is selected by the parties (or appointed by a tribunal) to assist the parties in resolving their dispute. Often they are members of a panel or are associated with a dispute resolution organization and they serve pursuant to written mediation agreements. The success of mediation lies in the ability of the mediator to focus all parties on the origins, underlying issues, and potential resolution of the dispute in one (or more) concentrated meeting, during which the mediator can help all involved construct reasonable proposals, provide "reality testing" of the strengths and weaknesses of their competing demands, and provide an occasion for "venting" while tempering emotional and ego-driven commentary and reactions.

The hallmark of mediation is that the mediator meets with both sides, in joint and separate caucuses, and guides the parties through exchange of information and exploration of interests and positions in a confidential setting with the goal of enabling the parties to reach agreement themselves. The mediator has no power to render a binding opinion or impose a settlement.[5] Generally, discussions that take place during the mediation are deemed to be confidential in accordance with the parties' mediation agreement or are treated as "settlement discussions" under state and federal evidentiary rules.[6]

A Uniform Mediation Act has been drafted by the National Conference of Commissioners on Uniform State Laws, February 4, 2002 (UMA). The UMA establishes an evidentiary and discovery privilege that defines the parameters of mediation confidentiality in legal proceedings. While some states have enacted the UMA, it has been controversial in other states, including New York, and has not yet been widely enacted. Proponents argue that given the tremendous growth in use of mediation throughout the court system, rules should be established to insure confidentiality of discussions in mediations as well as protect the mediator from being subpoenaed to testify regarding the settlement discussions that took place during mediation. Opponents of the UMA argue, on the other hand, that the UMA is vague and incomplete and should provide other safeguards regarding mediator credentialing, selection criteria, confidentiality, and ethics.[7]

LAWYER'S ROLE IN MAKING MEDIATION AN EFFECTIVE ADR MECHANISM

Unlike litigation where there are many procedural rules and a judge or judicial law clerk controls, or at the least influences, the proceedings and the conduct of counsel, mediation is in most cases a private

matter, where there are none or few procedural rules, no record, and no appeals. Therefore, the mediator and counsel have both the opportunity and responsibility to conduct efficient and effective proceedings. Attorneys should be aware that a different brand of advocacy should be used when participating in mediations. While there has been a proliferation of continuing education courses and materials on mediation advocacy, this article provides some helpful tips for lawyers representing a client in mediation and provides an outline of the issues to consider.

FACTORS TO CONSIDER IN DECIDING WHETHER TO USE MEDIATION

As noted above, mediation has become an increasingly successful tool for resolving disputes thereby avoiding a significant amount of expense, wear and tear, and potentially devastating publicity associated with traditional litigation. In pending litigations or administrative proceedings, the tribunal may order the parties to court or agency-annexed mediation at the decision-maker's discretion, either after an initial scheduling conference, at a pre-hearing conference, settlement conference, or upon request of the parties. In such cases, counsel has little input in deciding whether or not mediation is appropriate. However, in other litigations, where the tribunal either does not have an ADR program or is not inclined to order parties to mediate, counsel for one or both parties may elect to raise the possibility of mediation at some stage of the litigation.

It is a matter of professional judgment whether to raise the idea of mediation and at what stage of the litigation. Factors to consider include: budget, ability of counsel or the parties to negotiate settlement directly, stamina of the parties for litigation, timing (*e.g.*, time to trial, degree of complexity of discovery, expense of motions), and interest in preserving confidentiality. Some lawyers are "mediation-friendly" and will suggest mediation as a matter of course even at the "demand letter" stage. Others believe that mediation is most useful following exchange of pleadings, after at least preliminary discovery, when motions are pending, or after summary judgment has been denied, that is, on the eve of trial preparation or trial itself.

Lawyers should dispense with the notion that raising mediation as an option to explore settlement is a sign of weakness. Mediation has become such a favored ADR procedure in the employment relations field that it is incumbent on lawyers to consider mediation in order to save their clients fees and expenses in the first instance. Some lawyers minimize the potential for weakening their negotiating posture by suggesting to their adversary that they have a practice of discussing mediation with their adversaries at the beginning of all litigations.

HOW TO CONVINCE CLIENTS OF BENEFITS OF MEDIATION

Lawyers should be familiar with mediation processes and have both anecdotal and statistical evidence of the success rates of mediation in order to convince clients of the benefits of mediation. While some cases settle in a single mediation session, others may settle at some stage following a mediation session, through facilitated follow-up telephone calls with the mediator. In other cases, the mediation session, while not resulting in an agreement at the mediation itself, "greased the wheels" and enabled counsel or the parties to negotiate a settlement directly further down the line. Some mediation programs boast an 80 percent success rate.[8] Some private mediators provide a success rate with their promotional material; however, the practice of doing so is disfavored by many dispute resolution professionals, and ethics rules may preclude attorney-mediators from suggesting that success in prior cases is any indication of success in the future.

The best way to convince clients of the benefits of mediation is to offer them the strong possibility that the expenses of the mediation and the likelihood of settling far outweigh the expenses and uncertainty of continued litigation. Further, with mediation, the parties have a high degree of control over the process and its outcome.[9] In addition, the speed, confidentiality, and informality of mediation also are attractive alternatives to the grueling and expense process of achieving one's proverbial day in court.

HOW TO SELECT MEDIATORS: PICK MEDIATORS WITH THE PERSONALITY, PRIOR EXPERIENCE, AND TRAINING TO GET THE JOB DONE

At present, there are no national governmental credentialing entities for mediators and no licensing requirements for mediators. Credentialing and licensing are subject to the rules of different jurisdictions and dispute resolution providers. Many mediators are lawyers, but others are certified social workers, college professors, or have worked as dispute resolution professionals for the government or private industry. The federal and state courts have panels of mediators who must have a minimum number of years of practice and must complete government-sponsored training programs or their equivalent. Most government ADR programs have information on their neutral panels available on Web sites. In addition, the American Arbitration Association, JAMS, CPR Institute for Dispute Resolution, Martindale-Hubbell, Mediate.com, Federal Mediation and Conciliation Service, Cornell Institute of Dispute Resolution, and other provider-organizations have neutral panels, entry to which depends on experience, training, and reference requirements. Still other mediators practice privately, eschewing the often complex administrative mechanisms involved in selecting, retaining, and

compensating mediators. Thus, mediator selection is very much an ad hoc process based on who the lawyers know and word of mouth. One of the nation's leading mediators, Kenneth R. Feinberg, famous for serving as the Commissioner of the 9/11 Victims Compensation Fund, has described the characteristics needed to mediate disputes: "The keys to forging a settlement were empathy (let them vent), doggedness, preparation, creativity, and flexibility."[10]

Lawyers should consider the mediator's neutrality when selecting mediators. While the mediator does not make a binding decision, potential for bias, or conflicts of interest, could compromise the mediator's appearance of neutrality and the trust of the parties and thus, interfere with the mediator's effectiveness. It is imperative for counsel and the mediator to explore any such issues and disclose them during the selection process so there is no surprise at the mediation session.

Lawyers embarking upon the process of mediator selection should also be aware that mediator styles vary widely. Some adopt an "evaluative" approach, where the mediator shares with the parties his or her opinion as to likely outcomes and uses persuasive powers to cajole the parties to a settlement zone. Former judges and mediators with a specialized substantive expertise tend to practice the "evaluative" style. Other mediators, often with a social work or more psychological-orientation, use a "facilitative" approach which avoids any evaluative assessment and limit their "involvement to assisting the parties in their communication by enhancing and enabling a more effective discussion."[11] Most experienced mediators will use a combination of evaluative and facilitative approaches as the mediation progresses.

Whether selection of mediators is ad hoc, by prior agreement, or subject to panel requirements, most capable mediators provide biographical information, have written or spoken on related subjects, and are known by other mediators and attorneys in the employment bar. In the selection process, visit mediators' Web sites, ask for references, and review evaluations of their work through on-line rating services, such as *www.positivelyneutral.com* and other data maintained by dispute resolution providers. Prospective mediators can also be interviewed to determine whether they have the personal style and attributes that are right for the job.

Again, lawyers should assess their own personalities and those of their clients, as well as the nature of the dispute, when deciding on which mediator and which style would be most effective for a particular matter.

MEDIATION AGREEMENTS

Parties should not embark upon the process of mediation without a written mediation agreement. As noted above, there is no uniform

mediation law, so the parties must provide the ground-rules for the mediation themselves. Courts and agencies with mediation programs provide form mediation agreements. Private mediation agreements should at a minimum provide for: name of the parties; the mediator's name; the place, date, time; the mediator's compensation rate and fee structure; the confidentiality provisions; mediator immunity from serving as a witness in subsequent proceedings; document retention; etc.

Most mediators will provide a basic mediation agreement. Lawyers should review these agreements with their clients in advance of the mediation especially to underscore the confidentiality aspects of the mediation. Mediators generally review the mediation agreement again with all attendees at the beginning of the mediation session.

PRE-MEDIATION COMMUNICATIONS—CONVERSATIONS BETWEEN COUNSEL AND MEDIATOR

Unlike judicial and administrative proceedings, *ex parte* contacts are permissible in the process of mediation. The better practice is to advise counsel in advance that the mediator may conduct a joint pre-mediation session or speak to both parties separately and privately before the mediation. The mediator will have these pre-mediation discussions in order to prepare for the mediation session and also as a way to encourage the counsel and the parties to prepare for the mediation. Some counsel come to a mediation session with the same expectations that they have when they come to a deposition or oral argument on a motion. However, this type of litigation-stance may not be useful in mediation: the goal is not to convince the mediator of the merits of a position in litigation, but to consider how to advance settlement discussions. Thus, counsel should be prepared to share with the mediator their view of the main issues in the case, obstacles to settlement, who will attend the mediation, whether there is personal animosity between counsel or between parties and witnesses, and any personality issues that may arise during the course of the session. The mediator will also encourage the parties to come to the table with full settlement authority, or at the least, the ability to contact the source of settlement authority during the session.

It is a mistake to wait until the day before, or even the day of, to prepare for mediation. Thorough familiarity with the facts, documents, the claims and assertions of both sides, and the applicable law will go a long way toward setting the stage for the mediation. If the mediator doesn't mention pre-mediation procedures, ask the mediator to read a written submission and conduct pre-mediation telephone calls, in order to maximize the readiness of all participants for a productive and successful mediation session.

WRITTEN SUBMISSIONS

In most court and agency-annexed mediation programs, the parties are required to provide the mediator with the pleadings and a brief position statement prior to the mediation. This practice should also be used in private mediations. This presents an opportunity to prepare for both the mediator and counsel. Counsel should share with the mediator essential information and case-law, as well as any pivotal documents that would assist the mediator with preparing for the mediation and brain-storming settlement options. It is a matter of professional judgment whether to provide settlement offers in this submission. Generally, the pre-mediation submissions are not exchanged with adversaries, but again this is a matter of professional judgment. Skilled mediators will work with the parties to share information both before and during the mediation that will help shed light on the strengths and weaknesses of both parties' cases.

PREPARING FOR MEDIATION

Counsel should approach the mediation having familiarity with the pleadings, background of the case, relevant case law, and enough information to assess the costs and risks associated with proceeding with the litigation. Further, it is essential to come to the mediation with settlement authority. As with any negotiation, counsel should have a good sense of their clients' "BATNA" or "Best Alternative to a Negotiated Agreement."[12]

Obviously, to make best use of the time at the mediation session, counsel should meet with their clients in advance of the mediation and plan a strategy and assemble the information and documents they wish to have available at the mediation. The party who does the most thorough preparation is likely to be able to influence strongly the outcome of the mediation.[13]

ATTENDANCE OF PARTY, WITNESSES, EXPERTS, "SIGNIFICANT OTHERS"

In preparing for the mediation, counsel should also seriously consider who should attend the mediation in order to make the session most effective. Certainly, the party or party representative with settlement authority should be present or available. Mediations do not succeed when just counsel for a party attends, and most mediators require a party or party representative to be present. When emotions are particularly involved, the presence of certain party representatives can be obtrusive and counsel should consider whether their presence will foster or present an obstacle to settlement. Thus, for the company,

typically the manager involved, a human resources representative or other employee with knowledge of the facts and familiarity with company practice should attend. For the aggrieved employee, they may ask a supportive family member to attend in addition to counsel or other representative.

Counsel should encourage parties to prepare an opening statement, in their own words, setting forth their view of how the dispute arose, its impact on them personally (or for the company), and what they hope to achieve through the mediation process. Even if the attorney or party representative chooses to deliver the opening remarks, statements made in the parties' own words are extremely effective in opening the lines of communication, focusing the client on his or her goals, and clarifying the work that remains to be done.

Plan your opening demand or offer and think about where you want to end up. Parties should have prepared mathematical and financial analyses of best case/worst case scenarios, costs of proceeding with litigation, potential outcomes, and settlement range. You should try to strategize your moves and responses in order to be prepared for the negotiations that will take place. Inflexibility, unwillingness to put more on the table than was offered before the mediation, taking money off the table, and extreme demands that are not based on objective reality, will be difficult to overcome and will not advance the cause of settlement.

In addition, some attorneys believe that the presence of an "expert" or a party representative with unique knowledge of a particular issue involved in the case can contribute to the progress of the mediation. For example, if lost income is an issue, a labor economist who may advise the parties on job market trends, data on income replacement, and wage and salary data, may be an appropriate attendee. Similarly, if stock valuation is an issue, an accountant or stock options specialist might help to advance the discussion. These "experts" may provide critical objective standards to assist the parties in entering a settlement zone. In addition, if one side brings such an expert, it may give the other side an idea of the nature of the evidence and testimony that will be needed if the litigation proceeds. In any event, counsel should be sure that the mediation agreement addresses the confidentiality of the information presented.

WHAT HAPPENS AT THE MEDIATION SESSION?

Most mediation sessions proceed in the following way.

Initial Joint Sessions

The mediator will introduce himself or herself to the parties and counsel and general introductions will be made. The mediator will

explain the schedule for the session, review the confidentiality agreement, and ask for initial presentations. A skilled mediator will assess the mood and make whatever opening remarks are necessary to foster a settlement climate. Some mediators will also address at the initial session whether the participants will have a break for lunch, and whether any of the participants have time constraints. Mediation is usually a lengthy process, so counsel and their clients ought to be prepared to give as much time as is necessary to facilitate a successful mediation.

Opening Statements

In a mediation, it is perfectly appropriate for counsel to abdicate their role of making "opening statements" to their clients. Sometimes, depending on the case, clients are their own best advocates and an articulate and well-planned opening statement can be very effective. Counsel should prepare their clients to avoid interrupting adversaries' opening statements and to appear attentive and courteous, regardless of the tenor of the litigation to date.

Caucuses: Separate and Joint—What Goes on in the Other Room?

Following initial opening statements, the mediator may conduct questioning of both sides in the presence of both sides. There may be some additional fact-gathering and issue exploration that can proceed with all parties in the room. However, it is also common for the mediator to speak with the parties and counsel in "separate caucuses" where the real work of exploring additional facts, relevant law, and the "interests" of the parties behind their "positions" can take place. It is not unusual for the mediator to spend significantly more time with one side than the other, depending on the issues involved. Of course, experienced mediators will prepare the parties for this eventuality so that there is no concern about the mediator's neutrality. Counsel should prepare their clients for separate caucuses, and encourage clients to bring newspapers or other reading material to pass time during caucuses. These separate caucuses also provide an opportunity for counsel to work on their client's settlement range, expectations with regard to probability of success, and other case preparation issues. Caucuses also present a continuing opportunity to review the file and do critical fact-gathering.

Negotiating the Price of Settlement

At some point, the tough work of negotiating the economic (and non-economic) terms of a potential settlement will start. Counsel

should consider in advance their reaction to initial "extreme" offers and counter-offers. Before the mediation, counsel should have some idea of whether their adversary will be a "hard-bargainer" or a more "reasonable" negotiator. "While parties expect a 'reasonable amount of unreasonableness' in the other side's opening proposal, they react badly to what they perceive to be an extreme position."[14] The work of the mediator is to keep the parties engaged in the negotiation even where the parties appear hopelessly far apart. The mediator will continue to question the parties about the facts, relevant law, interests, and will attempt to get the parties thinking about the strengths and weaknesses of their case as well as their adversaries' case. Some mediators will use a "decision-tree" which maps out the costs and expenses of continuing with the litigation and the numeric risks associated with each stage of the process, together with an analysis of likely outcomes. Mediators will ask one side how they think the other side will respond to a particular proposal: will they counter, will they "walk"? Counsel should not be surprised by, and should prepare their client for, any of the following comments: "I'm not bargaining against myself!" "We're leaving!" "I don't think they really want to settle." "This is a waste of time." "This is our final offer." Mediators are experienced with these declarations and will continue with the process of going back and forth with offers and demands, until the gap shrinks. When this does happen, the "miracle" of mediation is experienced and the parties should turn to the process of memorializing a settlement.

Concluding the Mediation

Even after spending many long hours negotiating a settlement, counsel should be reluctant to leave a mediation without at least a handwritten summary of the terms agreed upon. Many lawyers come to a mediation with a draft of a settlement agreement and fill in the terms if there is an agreement. It is a matter of professional judgment whether to make the draft subject to final form, or whether the document generated at the mediation will itself be enforceable. In the words of a great New York Yankee, "it ain't over til it's over," so counsel should be cautious and prepare a memorandum of agreement signed or initialed by all present regardless of the fatigue and frustration that usually sets in by the end of a mediation.

If the mediation does not result in an agreement, most mediators try to attempt some closure at the end of a session, and will ask the parties if it would be useful to schedule another session or phone call to continue the hard work of hammering out a settlement. Again, this is a matter of mediator style and will depend on the judgment of the parties. Even in the absence of a settlement, the mediation agreement survives the process and the confidentiality provisions and any record

retention provisions should be complied with in accordance with their terms.

CONCLUSION

Employment counsel should encourage their clients to consider instituting mediation as an early intervention to resolve disputes between employees and between employees and managers. Further, counsel should seriously consider recommending mediation to resolve threatened or pending employment litigation. While many litigators relish the idea of a jury trial, few complain when at the end of a single day of negotiations, an employment dispute settles and the laborious work of preparing for discovery or trial is behind them and their clients may return to productive work.

NOTES

1. *See, e.g.,* L. Perlow & S. Williams, "Is Silence Killing Your Company?" *Harvard Business Review* (May 2003).

2. L. Singer, *Settling Disputes*, (Westview, 2d Ed. 1994) at 16.

3. *Id.*

4. *Id.* at 19.

5. In some circumstances, the parties to mediation may authorize the mediator to "arbitrate" the dispute and render a binding opinion. This is known as "med-arb."

6. *See, e.g.,* CPLR 4547; FRE 408.

7. *See generally* "The Uniform Mediation Act and Mediation in New York," Report of the New York State Bar Association's Committee on Alternative Dispute Resolution (Nov. 1, 2002).

8. *See, e.g.*, Center for Effective Dispute Resolution (*www.CEDR.org*) (70–80 percent reach a settlement within one or two days, with a further 10–15 percent settling a few weeks later); EEOC (*www.eeoc.gov*) (70–80 percent); NYSE (as high as 90 percent in 1999 and 2000, but falling to 50 percent in 2002) (*http://apps.nyse.com*).

9. *See* J. Michael Keating, Jr., "Getting Reluctant Parties to Mediate (A Guide for Advocates)," New York State Dispute Resolution Association (*www.nysdra.org/articles*).

10. K. Feinberg, *What is Life Worth?* (BBS Public Affairs 2005), at 12.

11. J. Drucker, "A Brief Overview of Mediation Styles," Cornell University Institute on Conflict Resolution (2001).

12. R. Fisher & W. Ury, *Getting to Yes* (Penguin 1983 ed.), at 101 ("Instead of ruling out any solution which does not meet your bottom line, you can compare a proposal with your BATNA to see whether it better satisfies your interests." *Id.* at 104).

13. For a thorough discussion of the benefits of preparation, *see* J. Silbermann & M. McAllister, "Settlement Conferences Require Solid Preparation," *New York Law Journal* (Mar. 17, 2003), S6, col. 1.

14. D. Golann, "Insulting First Offers, and How to Deal with Them," JAMS Dispute Resolution Alert, Vol. 2, Number 3 (Jan./Feb. 2002), at 1.

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