## TABLE OF CONTENTS

### I. INTRODUCTION

---

### A. THE USE OF MEDIATION AS AN ADR PROCESSES TO RESOLVE WORKPLACE DISPUTES

1. Deborah Henshaw Urbanski & Gloria M. Portela, Workplace Mediation: Are You Helping or Hindering? 70 Tex. B. J. 582, 583 (2007) ................................................................. 1


### B. VARIOUS FORMS OF WORKPLACE MEDIATION MODELS


### C. FACILITATIVE MEDIATION


### D. TRANSFORMATIVE MEDIATION

Heidi Burgess, Transformative Mediation ................................................................. 18

### E. EVALUATIVE MEDIATION


### F. THE BENEFITS OF RESOLVING WORKPLACE DISPUTES THROUGH MEDIATION


3. Kathryn Tyler, Mediating a Better Outcome, HR Magazine, Nov. 1, 2007 ................................................................. 32


### G. LIMITATION OF MEDIATION IN RESOLVING WORKPLACE DISPUTES


II. THE ROLE OF THE MEDIATOR IN WORKPLACE DISPUTES ........................................53
   A. ROLE AND RESPONSIBILITY OF THE MEDIATOR ........................................53
   B. THE MEDIATOR IN THE MIDDLE OF WORKPLACE CONFLICTS ......................54
   C. EMERGING ETHICAL ISSUES IMPACTING NEUTRALS ...................................55

III. THE ROLE OF THE ADVOCATES IN WORKPLACE DISPUTES ...............................55
    A. REPRESENTING CLIENTS IN MEDIATION ....................................................55
    B. EMERGING ETHICAL ISSUES IMPACTING ADVOCATES ................................55

IV. THE MEDIATION PROCESS AND WORKPLACE DISPUTES ....................................56
    A. APPLYING THE SEVEN STAGES OF MEDIATION IN WORKPLACE DISPUTES .......56
    B. GETTING THE MEDIATION PROCESS STARTED .........................................57
    C. STARTING THE MEDIATION PROCESS .....................................................58
    D. POSITION STATEMENT FROM THE PARTIES .............................................59
    E. SORTING OUT WHAT TO DO AFTER THE FIRST MEETING .............................60
    F. WHAT TO DO WITH THE ATTORNEY/REPRESENTATIVE WHO IS REPRESENTING
       A PARTY? .................................................................................................61
    G. ESTABLISHING A POSITIVE EMOTIONAL CLIMATE ..................................62
    H. WHEN DOES THE MEDIATOR PROVIDE AN OPINION? ................................63
    I. WHY HAVE SEPARATE SESSIONS? ................................................................64
    J. TECHNIQUES FOR REDUCING/ELIMINATING INTIMIDATION DURING THE
       MEDIATION SESSION ..............................................................................65
    K. BEHAVIOR GUIDELINES DURING MEDIATION .........................................66
V. DEVELOPING EFFECTIVE MEDIATION SKILLS TO RESOLVE WORKPLACE DISPUTES

A. ENHANCING MEDIATION SKILLS IN WORKPLACE DISPUTES

B. PERSUASION THROUGH EFFECTIVE COMMUNICATION

C. BEING AN EFFECTIVE PROBLEM SOLVER IN WORKPLACE DISPUTES

D. MEDIATION STYLES OF THE MEDIATOR AND ADVOCATES

E. COMMUNICATION TECHNIQUES USED BY THE MEDIATOR AND ADVOCATES

VI. AN OVERVIEW OF EMPLOYMENT LAWS AND REGULATIONS [LECTURE]

VII. MEDIATING COMPLEX WORK PLACE DISPUTES

A. WHAT IS A COMPLEX DISCRIMINATION DISPUTE

B. PREPARING TO MEDIATE A COMPLEX CASE

C. PRE-MEDIATION CONFERENCE IS REQUIRED IN COMPLEX CASES

D. DETERMINING THE RELATIONSHIPS AND DISPUTES BETWEEN THE PARTIES

E. INDENTIFYING THE EFFECTIVE SPOKESPERSON (S) [NEGOTIATION TEAM]

F. IMPACT OF COMPLEX AND UNSETTLED LAW

G. DEVELOPING STRATEGIES TO MANAGE COMPLEX CASES

H. HOW TO MOVE THE PARTIES TOWARD SETTLEMENT

I. POST–SETTLEMENT IMPLEMENTATION


VIII. CULTURAL COMPETENCE: WHAT DO MEDIATORS AND ADVOCATES NEED TO KNOW?

A. WHAT IS CULTURE COMPETENCE

B. ELEMENTS OF CULTURAL COMPETENCE

C. WHY MEDIATORS AND ADVOCATES MUST BE CULTURALLY COMPETENT

D. EXPLORING BIAS AND STEREOTYPES

# IX. MEDIATION OF DISCRIMINATION DISPUTES

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>2.</td>
<td>Judy Mares-Dixon, Mediating Complaints of Discrimination.</td>
</tr>
<tr>
<td>3.</td>
<td>Susan K. Hippensteele, Revisiting the Promise of Mediation for Employment Discrimination Claims.</td>
</tr>
</tbody>
</table>

A. MEDIATING AGE DISCRIMINATION DISPUTES ........................................................................ 96

B. MEDIATING NATIONAL ORIGIN DISPUTES .......................................................................... 96

C. MEDIATING RELIGION DISPUTES ..................................................................................... 96

D. MEDIATING RACE DISCRIMINATION COMPLAINTS ................................................................ 96


E. MEDIATING SEX DISCRIMINATION DISPUTES .................................................................... 111

F. MEDIATING SEXUAL HARASSMENT COMPLAINTS .............................................................. 111


3. Thacker, Rebecca A.; Stein, Mark; Bresler, Samuel J. Mediation , HR Magazine, May 1, 1994. ................................................................. 125


G. MEDIATING DISPUTES INVOLVING DISABILITIES ............................................................. 136


3. ADA Mediation Work Group, ADA Mediation Guidelines, 2000 ............... 143

H. STEPS IN REASONABLE ACCOMMODATION AND MEDIATION ..................................... 148

I. MEDIATING SEXUAL ORIENTATION CLAIMS ................................................................. 148

J. AFFIRMATIVE ACTION DISPUTES ................................................................................... 148
X. MEDIATING EMPLOYMENT DISPUTES ............................................................... 148

1. Wayne R. Outten, Representing the Executive, in Executive Compensation, editors Yale D. Tauber and Donald R. Levy, copyright ....................... 148

2. Joe Epsein, Effective Mediation for Employment Cases, Mediate.com (July, 2002) .................................................................................... 152

3. Steven G. Mehta, Mediating Employment Disputes, November 9, 2009 in Negotiation ................................................................. 160

A. WRONGFUL TERMINATION ........................................................................ 162

B. FAMILY MEDICAL LEAVE ....................................................................... 162

C. FAIR LABOR STANDARDS ACT .............................................................. 162

D. LABOR GRIEVANCES ............................................................................ 162


XI. THE SETTLEMENT AGREEMENT ............................................................. 162

A. THE SETTLEMENT STAGES ................................................................... 162

Lee F. Bantle, How Not to Settle Employment Discrimination Suits ............. 162

B. SETTLEMENTS: ISSUES TO RESOLVE ............................................... 166

C. DRAFTING THE DEMAND LETTER ..................................................... 166

D. DRAFTING THE SETTLEMENT AGREEMENT ..................................... 166

XII. LAWS, REGULATIONS AND GUIDELINES ON WORKPLACE MEDIATION

A. NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT (PROPOSED) .... 166

B. CIVIL RIGHTS ACT OF 1991 .................................................................... 166

C. AAA FOR MEDIATION RULES ........................................................... 166

D. CPR EMPLOYMENT ADR RULES ......................................................... 166

E. JAMS’ MEDIATORS ETHICS GUIDELINES ....................................... 166
XIII. WORKPLACE MEDIATION PROGRAM ................................................................. 170

A. EEOC ............................................................................................................. 170
      Commission, An Evaluation of the Equal Employment Opportunity
      Commission Mediation Program (2001) ...................................................... 170
   2. Patrick McDermott, August 1, 2001, The EEOC Mediation Program: Mediators' 
      Perspective on the Parties, Processes, and Outcomes ............................... 171

B. CORPORATE WORKPLACE MEDIATION PROGRAMS .............................. 181
   1. The Darden Program .................................................................................. 181
   2. The Coca Cola Company .......................................................................... 181
      Suzette M. Malveaux, Is it the “Real Thing”? How Coke's One-Way Binding 
      Arbitration May Bridge the Divide Between Litigation and Arbitration, 2009 J. 
      Disp. Resol. 77, Copyright (c) 2009 Curators of the University of Missouri 
      Journal of Dispute Resolution
   3. University of Pittsburgh Medical Center ................................................. 185
      Turner, Chaton T., Bringing Mediation In-House is Cost-Effective in More 
      Ways Than One, The Legal Intelligencer, June 25, 2009

C. GOVERNMENTAL AGENCIES AND NON-PROFIT ORGANIZATIONS ...... 189
   1. L. Camille Hebert, Establishing and Evaluating A Workplace Mediation Pilot 
      Project: An Ohio Case Study, Ohio St. J. on Dispute Resolution 415 (1999) ......... 189
   2. U.S. Post Service REDRESS Workplace Mediation Program .................... 194
      Tina Nabatchi & Lisa B. Bingham, Transformative Mediation in the USPS 
      REDRESS(R) Program: Observations of ADR Specialists, 18 Hofstra Lab. & Emp. 
      L.J. 399, 405-06 (2001).

D. DESIGN OF WORKPLACE MEDIATION SYSTEMS .................................. 198
   1. Lisa Blomgren Bingham, Cynthia J. Hallberlin, Denise A. Walker, and Won- 
      Tae Chung, Dispute System Design and Justice in Employment Dispute 
      Resolution: Mediation at the Workplace, 14 Harv. Negotiation L. Rev. 1, 
      Winter, 2009 .................................................................................................. 198
   2. Jason Schatz, Imposing Mandatory Mediation of Public Employment Disputes 
      in New Jersey to Ameliorate an Impending Fiscal Crisis, 57 Rutgers L. Rev. 
      1111, Spring, 2005 .................................................................................... 204

APPENDIX ......................................................................................................... 215
MEDIATION OF WORKPLACE DISPUTES

Course Material: Floyd Weatherspoon, Mediation of Workplace Disputes

I. INTRODUCTION

A. THE USE OF MEDIATION AS AN ADR PROCESS TO RESOLVE WORKPLACE DISPUTES


WHY ARE EARLY WORKPLACE MEDIATIONS UNIQUE?

Many experienced employment mediators consider the process of workplace mediation a hybrid of business and family mediation. If a termination of the employment relationship has occurred or is about to occur, the process is closer to divorce mediation than any business matter you may have handled. Both parties to a workplace conflict can be extremely sensitive to the claims against one another. In any workplace role, it is clear that everyone prefers to think that they are accepted, well liked, and that their work is respected by others. When this preferred self-image is challenged by a supervisor or when paperwork is submitted to a federal agency claiming that treatment or practices are discriminatory, both parties will likely experience intense emotions.

Another important characteristic emphasized in employment relationships is the perceived power differential or imbalance. Clearly, all people have different types of power. Some have to do with our positions, our associations, and the type and amount of expertise that we have, but those can shift or become more exaggerated in the employment arena, especially when someone files a complaint about their supervisor’s behavior.

The first strategy is to recognize that you cannot treat workplace mediation advocacy in the same fashion as you would if the parties had entered into any other type of business relationship or if an accident had occurred between two people without a relationship. Then, acknowledge and accept that workplace mediation will be emotional and be prepared to engage in the mediation by embracing that inevitable factor in some positive way.

Next, work at developing your skills in this area via seminars, books, or practicing techniques and by coaching your client to express his or her thoughts as clearly and constructively as possible. If you or your client feels stress, you may let your anger and frustration interfere with your ability to stay calm and reduce your effectiveness. Imagine you are mediating or deciding the outcome to a dispute. One party is visibly upset, keeps interrupting, talks faster and louder, and the other party appears calm and relaxed.
The emotionally charged behavior of the one party can mislead you into thinking that they must be irrational and exaggerating their claims or defenses.

Although a common reflection in conflict resolution training teaches us to separate the people from the problem, this may be far too difficult in some situations of high escalation. Therefore, advocates will find that examining their own skills and learning to exhibit clear, calm, and constructive communication will benefit them in mediation. Identifying the other person as a difficult or high-maintenance person does nothing to solve the problem.

If you find that this is the most difficult part of the process, especially when someone is pushing your buttons, or on days that you cannot take this important step, shift the way that you view the person or problem and tell yourself helpful things to get through the mediation process. (“It is only one day.” “It will be over soon.” “Thank goodness that is not my client.”) Take frequent breaks, if necessary, in an emotional mediation. It is very difficult to multi-task in these mediations, so try to stay focused on the issues in the mediation rather than taking other work to complete when the mediator is meeting with the other party. Most important, learn to feel a trust and comfort level with your mediator so that you can easily ask for their advice and help to reframe any emotionally charged thoughts or behavior into a focused, thoughtful statement, offer, or decline of an offer.

Instead of preparing to listen for the real meaning in the other party’s angry words, addressing their concerns first, and then non-defensively letting them know your needs, advocates are often tempted to immediately ask for a room to separate themselves from the other party. They rationalize this as the way that all mediations work best and have always been done. This may help when too much escalation occurs, but it can also hurt by giving your power away and encouraging behavior that may hinder the resolution process. Separating too quickly in some employment mediations may only serve to “reward” the other party or counsel with a comfortable forum to quickly convey unrealistic demands or offers and make statements to the mediator that are only an attempt to prejudice the mediator about the other party’s motives or behaviors.

**DO YOU KNOW WHERE YOU WANT THE RELATIONSHIP TO GO?**

Everyone knows that breaking up is hard to do, but if a termination of the workplace relationship is in the best interest of either party, there are ways to explore the idea of parting without offending either party or harming your client legally. In the termination of a relationship, one party is generally more ready to end it. They are the one much more prepared than the party who is still counting on staying together or, worse yet, unaware or unwilling to face the fact that the relationship may need to end. Add to the conflict that one party is depending on the relationship for their livelihood, and the stakes rise without even addressing the legal claims and costs.
If you can recall any break-ups you have ever experienced, then you may want to reconsider how you or the other party could have done things to make that process go more smoothly. What if you would have had the opportunity to process that break-up via an experienced mediator?

Experienced employment neutrals have observed that the advocates that consistently obtain resolution and maximize results for their clients in employment terminations use similar strategies before, during, and after mediation, including the following:

• They attempt to understand the other party’s anger and complaints quickly rather than labeling them;
• They ask and want to know whether the other party really feels that the relationship can ever be what they need it to be or healed from a severe conflict;
• They discuss options with the mediator before mediation and ask the mediator if the other party has said anything about terminating the relationship, or may even request that the mediator ask about the party’s thoughts on terminating the relationship;
• They begin all meetings and mediation by using empathy to set the stage for a trusting, open dialogue;
• They respect the party’s viewpoint, but correct any of their misconceptions quickly as they become apparent;
• They are straightforward about what their client wishes to accomplish;
• They make sure that everyone knows when they feel that the other party’s requests cannot be accomplished, and that they are still willing to explore other options;
• They acknowledge the other side’s pain about the past and reward any positive contributions to the parting process and the future;
• They avoid extreme positions or unrealistically high or low negotiations early in the process;
• They approach all dialog as if it were a cooperative endeavor, and keep the mediator in the loop as part of the team.

Mediators can help parties devise creative solutions and may communicate proposals without attribution to either party. Once you make the decision to mediate, here are some practical tips to maximize a successful outcome in all employment disputes:

It’s Not About You

Too many lawyers spend valuable time in the opening session making dramatic opening statements or closing arguments to a jury, or showing their proficiency with elaborate PowerPoint presentations. This is not about impressing anyone with your lawyering skills. Instead, focus on establishing trust and civility with the opposing party and counsel. (Starting with a handshake never
hurts.) A focused, firm opening without histrionics can be very effective, but skip the part about “being here in good faith.” Finally, let your client do some of the talking -- after all, it’s all about them.

**The Mediator Is Not Your Audience.**

The opening session may well be your first (and, in some cases, only) chance to speak to the other side directly. Look at them, speak to them (and their spouse or partner, if one is there), and forget about the mediator. The mediator will get to spend lots of time with you later in the day, and their feelings won’t be hurt if you ignore them during the opening session. If you or your client should have said or asked something directly of the other party, rethink whether a subsequent joint session may be appropriate and discuss it with your mediator.

**Who’s the Decider?**

Problems of “authority,” both financial and emotional, continue to bedevil mediators. The conventional wisdom is that it’s only a money problem on the employer side. Wrong. A discussion of non-monetary issues on the defense side often requires the approval of people who aren’t present and aren’t available during the mediation.

On the employee side, there may often be a person with emotional authority who is either on the other end of a cell phone or not available at all. Most often, that person is a spouse or partner, but it can also be a therapist or counselor. Both authors recall an ultimately successful mediation that had to be recessed at the end of the first day so the plaintiff could return with his therapist present to bring decision-making and emotional closure.

**Who Brought the Place Cards?**

Some complex employment mediations have a lot of moving parts and require the presence of business decision-makers, such as in-house counsel, benefits specialists, relocation advisors, or a supervisor who is going to have to live with the decision made that day. Lining up these folks early – and making sure they’re available when you need them – may be critical to “getting a deal done.”

**Give the Lady (or Gentleman) What She Wants.**

In virtually every employment mediation, there is an item of peculiar value to one side that would cost the other side very little to grant. For example, an employee eligible for retirement may be willing to accept the severance package offered by the company if they can have the long-awaited lunch, dinner, or party that customarily is given to retiring employees.

One of the authors had a case that settled with a motorcycle jacket changing hands. Other
examples abound. Your task, as an advocate, is to identify these items and make sure they don’t become meaningless deal breakers.

**Settling Up**

Finding closure is important. However, this is the part of the day when everyone is worn and tired and trying to get to his or her child’s game. Even though you may have disagreed all day about the past, you are now at the place where everyone needs to carefully craft a sound agreement about the future. This can be a recipe for disaster if the lawyers aren’t careful enough to help craft a settlement that will be binding on all and not subject to remorse or rescission. Often, advocates will wish to leave important drafting to their mediator, but the better practice is to be prepared with your own short release that can be modified as appropriate with someone in your office to help facilitate this task no matter the time or time zone.

Some employment mediation programs such as the one at the EEOC have required boilerplate language to ensure closure of the charge at their agency. Although EEOC mediators may mediate non-jurisdictional claims in addition to charges of discrimination, those items must be referenced in a separate side agreement. Also, certain terms may not be allowed in agreements signed by the commission and must be included in a side agreement. A final joint session is often the safest and fastest way to finalize the terms of an agreement, and this is a tool that you may want to consider using more often in employment mediations. It will help you avoid misunderstandings and possible breach claims about timing, payments, and other features of the settlement.

Some lawyers achieve consistent success in employment mediations. There is no one key to the door of their success, but they tend to be flexible and do not view the employment mediation process as a one-size-fits-all exercise.

**QUESTIONS AND DISCUSSIONS**

1. How is workplace mediation advocacy different from business mediation advocacy?

2. What strategies should advocates use to have successful outcomes during mediations?

3. Who should come to the settlement agreement and why?

4. Can you think of other examples of what was described as “give them what they want”? 

In recent years, two major changes have been taking place in the job environment. These involve the nature of the workplace as well as the nature of workplace disputes over claimed violations of anti-discrimination laws. Together, these changes have had a profoundly negative impact on the ability of litigation brought under Title VII of the Civil Rights Act of 1964, and similar statutes, to address job-connected complaints.

First, globalization and other trends have undermined the traditional model of long-term, often lifetime, employment at one firm. Previously, an employee would typically work his way up the career ladder until he retired, gold watch in hand. Now, mutual loyalties have loosened; the new paradigm is free agency. Apart from employment tenure, moreover, both job definition and workplace structure have been undergoing key transformations. Second, claims of discriminatory failure-to-hire have largely given way to claims arising from discharge, non-promotion, and other on-the-job complaints. To a great extent, discrimination has “gone underground:” in a growing number of cases, an objective person would have trouble distinguishing between unlawful bias and garden-variety unfair treatment. Illegality has, therefore, become more difficult to prove.

CHANGES IN THE WORKPLACE AND WORKPLACE COMPLAINTS: HOW THEY UNDERMINE LITIGATION OF CLAIMS OF EMPLOYMENT DISCRIMINATION

CHANGES IN THE WORKPLACE

For many employers, both paternalistic benevolence and shrewd self-interest counseled good treatment of employees – the human capital in which they had so heavily invested. In some companies, workers and managers could, without too much of a stretch, envision the firm as a daytime family. A young man – of course, the prevailing model was male – could sign-on after graduation from high school or college. With the years would come friendships and alliances that might well outlast a marriage; “divorcing” one’s firm might seem, financially and emotionally, as drastic a move as divorcing one’s spouse.

By the end of the twentieth century, however, business conditions had significantly altered. Globalization has broadened the field of competition, blurring the distinction between internal and external markets, forcing companies to pay ever greater attention to the bottom line. In the face of ongoing technological change, qualities such as flexibility, adaptability, and capacity to lower short-term costs increasingly separate the “sheep from the goats” of industry. Fidelity to employees, however, has no similar effect on success.
In this environment, the lifetime employment paradigm has been replaced by “precarious employment.” Businesses hire growing numbers of “temps” and part-timers, who do not get benefits, and outsource erstwhile in-house tasks to various independent contractors. For many employees in this new universe, changing jobs has become a routine or, at least, not uncommon, feature of life. Job-hopping can be a benign phenomenon where the worker voluntarily quits in order to pursue career advancement. But where the worker is terminated, stress and anxiety can be expected, especially if she is older. Such feelings are only enhanced by the current economic downturn and consequent scarcity of substitute positions.

The old world of employment also offered considerable opportunities to men who had a strong back rather than intellectual talents; the present one, though, affords few. The United States, like other developed nations, focuses not on production and assembly but instead on “knowledge and service work.” More than ever, a good brain and possession of skills, especially the skill of learning new skills, characterize the successful worker. Loyalty – staying put – does not.

In addition, the structure of many firms, and of the jobs within these firms, has been changing. An increasing number of companies reject the traditional hierarchical model of top-down decision-making and orderly progression along “job ladders,” embracing instead what Professor Stone calls “microlevel job control.” This regime entails a “flattening of management positions” and a concomitant “shift in authority to cross-functional work teams.” The members of such teams cooperate with each other in exercising power with respect to matters previously confined to supervisors, such as pay, evaluation, promotion, and assignments. Accordingly, members wield considerable influence over the work life of their colleagues. Organization along these lines is thought to enhance the firm’s productivity and flexibility. The emerging self-governance paradigm predictably stresses the values of teamwork and consensus.

This transformation of the working environment has bred a “new psychological contract.” Instead of promising employment security, it offers “employability security.” This consists, among other things, of furnishing general skills training as well as networking opportunities. These make the worker more marketable both inside and outside the firm. Portable capital is vital, of course, to an employee who expects to switch positions and companies a number of times in the course of her career. Being afforded the means to acquire it may, therefore, exceed in importance the precise amount of one’s current salary.

All this being said, I emphasize that many businesses still follow traditional patterns. We should not overestimate the degree of change at the present time. What we have is evolution, not revolution, in the working world; some segments of the economy manifest it more than others. Yet neither should we underrate the significance of the post-modern firm’s development. Its features represent the wave of, at least, the foreseeable future. Moreover, these features interact with changes in the most common
complaints made by employees and increasingly cast doubt on the ability of litigation to resolve such claims satisfactorily.

**CHANGES IN WORKPLACE COMPLAINTS**

Employee discontent arises from many different sources, not only (or even mainly) from biased employer behavior. Yet for a gripe to mature into a cause of action – and my focus at the moment is on litigation – it has to rest on a legal foundation. Typically, the worker who cannot get his employment dispute resolved in the workplace and, therefore, files an administrative charge or complaint in court must invoke one or more of the civil rights laws barring employer discrimination on grounds such as race, national origin, gender, or age. These include the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, as amended (Title VII), the Age Discrimination in Employment Act of 1967 (ADEA), the Americans with Disabilities Act of 1990 (ADA), and similar state and local provisions.

As background, it is crucial to note a major cause of these statutes’ centrality in litigation by employees. Apart from the ban on discrimination noted above, non-unionized workers have only some general regulatory laws, such as the Fair Labor Standards Act of 1938 and the Occupational Safety and Health Act of 1970, and a few special purpose laws – for example, the Employment Retirement Income Security Act of 1974 (ERISA) – to protect them.

At-will” employment prevails in every state but Montana. Under this rule, of which most workers are unaware until trouble strikes, an employer may fire an employee for any reason or no reason so long as it does not act on the basis of impermissible discrimination. Not many non-union employees have the clout to negotiate for greater security: tenure except for dismissal for cause or, at minimum, a stated term of years. Moreover, given the progressive de-unionization of the work force (in 2000, collectively bargained contracts applied to just 13.5% of workers), most employees hold their jobs solely at their employers’ discretion. Finally, termination aside, employers have always had free reign over whom to hire and how to run their organizations, subject again to the caveats for illegal bias-driven conduct and terms in union-management contracts.

In the early post-Civil Rights era, the concern was getting minority applicants a foot in the door; hence, litigation primarily targeted discriminatory failure-to-hire. By the close of the twentieth century, the focus of litigation had switched from workplace entry to workplace exit as non-traditional employees – initially admitted, then booted out – increasingly complained of terminations allegedly based on discrimination. These employees have also protested non-promotion, lack of training, harassment by bosses or fellow workers, and other inequalities in the terms and conditions of employment. Commentators have dubbed such grievances “[s]econd-generation” complaints. In light of the rise in job insecurity aggravated by hard times, and reflected in the new psychological contract, one can expect that
this trend will continue and even intensify.

The second generation workplace yields many fewer instances of deliberate and blatant discrimination. For example, except in certain blue-collar, sex-segregated industries, women and minorities rarely suffer total exclusion from the workplace. Turndowns of qualified employees from protected groups who seek promotion, in favor of less (or no more) qualified male Caucasians, often seem due to simple cronyism rather than overt bias. By the same token, we seldom encounter the “N-word” or other racial or ethnic slurs—and when we do, it is almost never at a mid-management or higher level. Even much milder, “politically incorrect” speech is becoming relatively rare.

Anecdotal evidence drawn from my own mediation practice largely confirms these observations. Notably, of approximately sixty employment cases I have handled in the past five years, only one involved discrimination in hiring. A young African-American attorney, call him Derek, seeking employment at a small law firm with no minority professional staff was ultimately rejected by the senior partner, Morris. The latter voiced suspicion at the fact that Derek had not received an offer from a larger firm, since “they love to hire tokens,” and made other unambiguously biased remarks. Predictably, perhaps, the guilty individual belonged to an older generation (Morris was in his mid-seventies). In some sense, even this incident seems more second-generation than first: until quite recently, the dearth of minority law school graduates virtually precluded such litigation.

Yet prevailing forms of bias tend much more than in earlier days to be subtle, complex, and frequently unconscious, reflecting a largely unspoken organizational culture. No longer enduring wholesale exile from shop or office, women and other outgroup members now protest being “frozen out of crucial social interactions.” They also complain of receiving less attractive work assignments, poorer training, harsher assessments of their capabilities, hyper-scrutiny of their performance, and non-acknowledgment of their achievements.

THE IMPACT OF CHANGE ON THE EFFICACY OF EMPLOYMENT CIVIL RIGHTS LITIGATION

As suggested above, with reference to claims of denial of promotion, the worker in the second-generation world may routinely have trouble determining whether to attribute his problems to discrimination. The line between subtle or unconscious bias and mere bad management, miscommunication, insensitivity, or “equal opportunity” nastiness is often indiscernible. As a co-worker said of the white boss of one of my African-American complainants: “Barbara just wasn’t a nice person; that’s what it boils down to.” Current sources of workplace friction may also relate to economic and class issues beyond the purview of statutory bans.

Although the affected employee doubtless suffers regardless of how one characterizes the source
of his or her difficulties, labels matter. If a complaint cannot be couched in terms of bias, the worker will usually have no remedy. Title VII and similar laws do not enact a “generalized code of workplace civility.” Further, even if the employee decides to claim discrimination (whether sincerely or in an effort to shoehorn her problems into a recognized legal category), she may find it hard to persuade a decision-maker (judge, jury, or agency official) of the accuracy of her designation.

Prevailing on employment discrimination complaints is generally tough; more than ninety-five percent of them fall under the rubric of “disparate treatment.” In order to make out a cause of action, the plaintiff must demonstrate that the employer treated the employee – because of his protected trait – worse than other workers who did not possess that characteristic; in other words, he must show an intent to discriminate. If, as is usual, he has no direct evidence of biased motivation, he must satisfy the so-called McDonnell Douglas schema. This requires the plaintiff to meet the preliminary burden of establishing a prima facie case of discrimination. That being done, the burden of production shifts to the employer to rebut the presumption of discrimination by articulating – not proving – “some legitimate, nondiscriminatory reason” for its conduct, a light burden virtually any employer can satisfy. The onus then shifts back to the plaintiff, who bears the ultimate burden of persuading the finder of fact that prohibited bias caused his discharge or other adverse job action— in other words, that the defendant’s explanation is pretextual. This can be a daunting task.

In addition to doctrinal hurdles, workers alleging discrimination encounter a number of practical problems. For example, in my experience employers in general receive better, or at least more consistent, representation. Indeed, the would-be plaintiff may have trouble hiring any lawyer. Without one, and facing the defendant’s counsel, the worker stands virtually no chance of victory.

Most employees cannot afford, as can their opponents, to pay an attorney by the hour. Thus, the plaintiff must locate a lawyer willing (perhaps, with a small retainer) to take his case on a contingent fee basis and “front” the expenses of litigation. The lawyer, in turn, must rate the likelihood of success, a sizeable judgment, and statutory attorneys’ fees as high enough to justify the investment of her time and money. To be sure, some attorneys gamble on dubious claims, but ordinarily, those who do aim to dispose of the matter quickly, for nuisance value, leaving the client with only two-thirds of an already paltry sum.

If the employer resists settlement and the plaintiff’s lawyer decides not to incur the costs of thorough discovery, the suit will probably be dismissed. For discovery is, on the whole, more crucial to the complainant than the defendant. The latter usually employs most of the potential witnesses for both sides; it also possesses all or most of the relevant documents. Therefore, at the very least, the defendant can assess the strength of its position before much formal disclosure takes place.

The employer enjoys other strategic advantages, too. Supervisory employees will almost always back up the company. The same is true of the plaintiff’s co-workers: few employees still on the job will
take the risk of supporting a colleague who is often long-since gone. Moreover, advised by counsel specialized in handling discrimination claims, as well as by Human Resources staff, many employers build an elaborate paper trail (for example, of an employee’s errors) for use in the increasingly common event of litigation. Most employees are less than perfect; savvy bosses can create a “plausible record” to cover unlawful motivation.

Finally, employers – as defendants and corporate litigants – generally profit from delay, endemic in an age of teeming court and agency dockets. The individual plaintiff, by contrast, normally finds waiting stressful, at times so much so that he or she will settle for a pittance in order to avoid further frustration. This step may be very tempting to ex-employees who, out-of-work or underemployed, are feeling the immediate financial pinch of a lost salary and other benefits.

In short, the worker who would sue his employer, past or present, embarks on a fairly perilous venture. Brief reflection will reveal, moreover, that this assessment applies in spades to typical second-generation complaints.

As we have seen, these rarely yield a “smoking gun.” Hence, the employee must run the McDonnell Douglas course and hope that circumstantial evidence of biased motives will overcome the company’s usually reasonable-sounding explanation for its conduct. And where prejudice is unconscious, the employee will not be aided by evidence of lies or cover-ups on the employer’s part. In these circumstances, judges and jurors understandably find it hard to detect a boundary between unknowing and nonexistent discrimination – particularly as they, too, may harbor negative stereotypic views of persons in the plaintiff’s group.

SECOND-GENERATION EMPLOYMENT MEDIATION: CURRENT ISSUES AND FUTURE DIRECTIONS

THE INCREASING POPULARITY OF MEDIATION

In recent years, mediation has been widely touted as an option superior to litigation. Its advertised virtues include, first, its problem-solving orientation: making matters right for the future replaces fixation on whom to blame for past occurrences. In addition, it maximizes party autonomy, allowing the affected individuals – in a confidential environment – to fashion an agreement that tailors relief to their own situation and incorporates terms beyond what a court or agency could order. Such an accord is apt to be seen as fairer than one imposed by third persons. Mediation, thus, offers the possibility of integrative, “win-win” solutions that meet the interests and needs of both sides. Sometimes, too, it gives an opportunity for emotional catharsis, helps to preserve or repair relationships between the parties, and provides a broader education in conflict management.

Faster and simpler than litigation, mediation also yields both monetary and non-monetary
savings. Monetary savings include reductions in costs connected with using attorneys, conducting discovery, and diverting parties and witnesses from their usual productive activity. Non-monetary savings are exemplified by reductions in the amounts of stress and anxiety that are typically produced by legal proceedings. Mediation can, in addition, pare backlogs in courts and agencies.

Most of these benefits could, theoretically, be achieved by unassisted negotiations. Realistically, though, the presence of a neutral who can make judicious use of the confidential caucus dramatically improves the bargaining process. For example, a mediator can provide a needed reality-check, helping the parties evaluate the strengths – and weaknesses – of their case. She can enhance the chances of settlement because she knows more about a party’s bottom line and, in general, his thoughts and concerns than does his opponent. Also, she is able to advance a participant’s suggestion as her own, thereby avoiding “reactive devaluation” and reflexive rejection by the other side. Frequently, too, she has the best judgment regarding those persons required to be at the table. She can, for example, involve family members or friends who possess a stake in the conflict, who have some degree of decision-making power, or are able to furnish needed support to the plaintiff, enhancing his or her capacity to make an informed and voluntary choice. Simply put, the mediator adds value to the negotiating process.

For one thing, the federal government’s use of ADR has grown substantially because of the passage of laws directing or encouraging its establishment. These include the Civil Justice Reform Act, the Administrative Dispute Resolution Acts of 1990 and 1996, and the Alternative Dispute Resolution Act of 1998. The EEOC, on its part, has committed itself to ADR. For instance, its “Agency Program to Promote Equal Employment Opportunity” mandates that federal agencies provide ADR to their employees and attempt to resolve complaints as early as possible. Virtually all federal agencies now offer ADR.

Mediation of employment-related disputes has become prevalent in the private sector as well. “Increasingly more employers recognize that the use of mediation makes good business sense.” A 1995 Government Accounting Office study reported that fifty-two percent of large private employers have ADR programs for non-union personnel; another study, also published in 1995, “found that 57% of . . . large manufacturing firms had instituted some form of ADR.” Most often, these programs are mandatory and multi-step, with review by the human resources department, management panels, and mediation being the steps most frequently used.

Some mediation initiatives, moreover, involve the government in non-governmental employee conflicts. For example, programs run by the federal courts mediate employment-discrimination charges, in addition to other types of matters, pursuant to a judge’s order. In my experience, sometimes the court merely ratifies what the parties request; at other times, it twists arms to obtain consent or mandates the process regardless of the participants’ wishes.
QUESTIONS AND DISCUSSIONS

1. In what ways has the traditional model of employment changed? How might it impact the type of resolutions negotiated by the parties?

2. What are some challenges that plaintiffs face in pursuing a claim of discrimination? How can these challenges be used in mediation to resolve disputes?

3. How can mediators assist the parties in resolving employment disputes?

4. What is the difference between first and second generation workplace disputes? What is the impact on mediation?

B. VARIOUS FORMS OF WORKPLACE MEDIATION MODELS


Mediators around the country find themselves uncomfortable with what is being called mediation in their own and other areas. Accusations are made that one or another approach to mediation is not “real” mediation or are not what clients wanted. In addition, many clients and attorneys are confused about what mediation is and is not, and are not sure what they will get if they go to mediation.

Facilitative Mediation

In the 1960's and 1970's, there was only one type of mediation being taught and practiced, which is now being called “Facilitative Mediation”. In facilitative mediation, the mediator structures a process to assist the parties in reaching a mutually agreeable resolution. The mediator asks questions; validates and normalizes parties' points of view; searches for interests underneath the positions taken by parties; and assists the parties in finding and analyzing options for resolution. The facilitative mediator does not make recommendations to the parties, give his or her own advice or opinion as to the outcome of the case, or predict what a court would do in the case. The mediator is in charge of the process, while the parties are in charge of the outcome.

Facilitative mediators want to ensure that parties come to agreements based on information and understanding. They predominantly hold joint sessions with all parties present so that the parties can hear
each other's points of view, but hold caucuses regularly. They want the parties to have the major influence on decisions made, rather than the parties’ attorneys.

Facilitative mediation grew up in the era of volunteer dispute resolution centers, in which the volunteer mediators were not required to have substantive expertise concerning the area of the dispute, and in which most often there were no attorneys present. The volunteer mediators came from all backgrounds. These things are still true today, but in addition many professional mediators, with and without substantive expertise, also practice facilitative mediation.

**Evaluative Mediation.**

Evaluative mediation is a process modeled on settlement conferences held by judges. An evaluative mediator assists the parties in reaching resolution by pointing out the weaknesses of their cases, and predicting what a judge or jury would be likely to do. An evaluative mediator might make formal or informal recommendations to the parties as to the outcome of the issues. Evaluative mediators are concerned with the legal rights of the parties rather than needs and interests, and evaluate based on legal concepts of fairness. Evaluative mediators meet most often in separate meetings with the parties and their attorneys, practicing “shuttle diplomacy”. They help the parties and attorneys evaluate their legal position and the costs vs. the benefits of pursuing a legal resolution rather than settling in mediation. The evaluative mediator structures the process, and directly influences the outcome of mediation.

Evaluative mediation emerged in court-mandated or court-referred mediation. Attorneys normally work with the court to choose the mediator, and are active participants in the mediation. The parties are most often present in the mediation, but the mediator may meet with the attorneys alone as well as with the parties and their attorneys. There is an assumption in evaluative mediation that the mediator has substantive expertise or legal expertise in the substantive area of the dispute. Because of the connection between evaluative mediation and the courts, and because of their comfort level with settlement conferences, most evaluative mediators are attorneys.

**Transformative Mediation**

Transformative mediation is the newest concept of the three, named by Folger and Bush in their book *THE PROMISE OF MEDIATION* in 1994. Transformative mediation is based on the values of “empowerment” of each of the parties as much as possible, and “recognition” by each of the parties of the other parties' needs, interests, values and points of view. The potential for transformative mediation is that any or all parties or their relationships may be transformed during the mediation. Transformative mediators meet with parties together, since only they can give each other “recognition”.

In some ways, the values of transformative mediation mirror those of early facilitative mediation, in its interest in empowering parties and transformation. Early facilitative mediators fully expected to
transform society with these pro-peace techniques. And they did. Modern transformative mediators want to continue that process by allowing and supporting the parties in mediation to determine the direction of their own process. In transformative mediation, the parties structure both the process and the outcome of mediation, and the mediator follows their lead.

**Pros and Cons**

Supporters say that facilitative and transformative mediation empower parties, and help the parties take responsibility for their own disputes and the resolution of the disputes. Detractors say that facilitative and transformative mediation takes too long, and too often ends without agreement. They worry that outcomes can be contrary to standards of fairness and that mediators in these approaches cannot protect the weaker party.

Supporters of transformative mediation say that facilitative and evaluative mediators put too much pressure on clients to reach a resolution. They believe that the clients should decide whether they really want a resolution, not the mediator.

Supporters of evaluative mediation say that clients want an answer if they can’t reach agreement, and they want to know that their answer is fair. They point to ever-increasing numbers of clients for evaluative mediation to show that the market supports this type of mediation more than others. Detractors of evaluative mediation say that its popularity is due to the myopia of attorneys who choose evaluative mediation because they are familiar with the process. They believe that the clients would not choose evaluative mediation if given enough information to make a choice. They also worry that the evaluative mediator may not be correct in his or her evaluation of the case.

**Strong Feelings**

Mediators tend to feel strongly about these styles of mediation. Most mediation training still teaches the facilitative approach, although some attorney-mediators train in the evaluative model, and Folger and Bush have a complement of trainers teaching the transformative approach. Many mediation standards (from national and state mediation organizations, and state legislative and judicial mediation programs) are silent on this issue; others prohibit evaluation, and a few require it. For example, the Mediation Council of Illinois Standard IV (C) Best Interests of Children states: “While the mediator has a duty to be impartial, the mediator also has a responsibility to promote the best interests of the children and other persons who are unable to give voluntary, informed consent......If the mediator believes that any proposed agreement does not protect the best interests of the children, the mediator has a duty to inform the couple of his or her belief and its basis.”

Another example of these strong feelings is that in 1997, Florida’s professional standards for mediators were reviewed, and the committee got stuck on the issue of evaluation in mediation. The
current rule says “a mediator should not offer information that a mediator is not qualified to provide” (Rule 10.090(a)) and “a mediator should not offer an opinion as to how the court in which the case has been filed will resolve the dispute” (Rule 10.090(d)). The committee came out with two options for a new standard on this issue: Option One would prohibit giving opinions except to point out possible outcomes of the case; Option Two states that the mediator could provide information and advice the mediator is qualified to provide, as long as the mediator does not violate mediator impartiality or the self-determination of the parties. After receiving comments on these two options, both were withdrawn and the committee is trying again. The comments were many and strong. Early in 2000, the new rule was written to reflect Option Two.

Concerns

There seem to be more concerns about evaluative and transformative mediation than facilitative mediation. Facilitative mediation seems acceptable to almost everyone, although some find it less useful or more time consuming. However, much criticism has been leveled against evaluative mediation as being coercive, top-down, heavy-handed and not impartial. Transformative mediation is criticized for being too idealistic, not focused enough, and not useful for business or court matters. Evaluative and transformative mediators, of course, would challenge these characterizations. Sam Imperati, for example, sees evaluative mediation as ranging from soft to hard: from raising options, to playing devil’s advocate, to raising legal issues or defenses, to offering opinions or advice on outcomes. He therefore believes that it is not appropriate to assume that evaluative mediation is necessarily heavy-handed. Folger and Bush, on the other side of the discussion, see transformative mediation as ultimately flexible and suited to all types of disputes.

Another concern is that many attorneys and clients do not know what they may get when they end up in a mediator’s office. Some people feel that mediators ought to disclose prior to clients appearing in their offices, or at least prior to their committing to mediation, which style or styles they use. Other mediators want the flexibility to decide which approach to use once they understand the needs of the particular case.

Styles vs. Continuum

Samuel Imperati and Leonard Riskin believe these styles are more a continuum than distinct differences, from least interventionist to most interventionist. The Northwest Chapter SPIDR Survey and other less formal surveys have noted that most mediators use some facilitative and some evaluative techniques, based on individual skills and predilections and the needs of a particular case. Folger and Bush see more distinct differences in styles, particularly the difference of “top-down” vs. “bottom-up” mediation. That is, they believe that evaluative and facilitative mediation may take legal information too
seriously, and that resolutions coming from the parties are much more deep, lasting, and valuable. However, in informal discussions, many practitioners who utilize the transformative model state that they mix facilitative and transformative techniques rather than using one or the other exclusively. It would seem that in general mediators are on a continuum from transformative to facilitative to evaluative mediation, but are not squarely within one camp or another.

Conclusions

There is room in mediation practice for many styles, including facilitative, evaluative and transformative mediation. Each has its usefulness and its place in the pantheon of dispute resolution processes. Imperati believes that most mediators use a combination of these styles, depending on the case and the parties in mediation, as well as their own main approach to mediation. Some sophisticated mediators advise clients and attorneys about the style they think would be most effective for their case. Some parties and attorneys are sophisticated enough to know the difference between types of mediation and to ask mediators for a specific type in a specific case. It appears that it would be helpful for mediators at the very least, to articulate to parties and attorneys the style(s) they generally use, and the assumptions and values these styles are based on. This will allow clients to be better and more satisfied consumers, and the field of mediation to be clearer on what it is offering. It can only enhance the credibility and usefulness of mediation.

QUESTIONS AND DISCUSSIONS

1. Outline the elements of each model of mediation.

2. What are the primary differences among the models?

3. What are the advantages and disadvantages of each model? Which model would you recommend to resolve workplace disputes?
C. FACILITATIVE MEDIATION


“A facilitative model of mediation is designed to overcome conflict by way of active listening and sharing emotions. As a facilitator, the mediator promotes the flow of information between the parties, and assists them in understanding the conflict, encouraging them to closely probe the factors that led to the dispute. It is the mediator's role to help the parties get past their preconceived notions about the other party. As a facilitator, the mediator is responsible to guide the dialogue so that the parties can rise above the barriers created by the conflict and overcome the underlying issues hindering their communication.

A facilitative mediator does not share her opinion regarding possible solutions. A mediator who shares her opinion too early in the process may “impair impartiality.” A facilitative mediator is responsible for providing the parties with a “reality check” by “help[ing] the parties understand each side's position and the consequences of not [reaching a mutually satisfying resolution].” The mediator does this by assisting the parties to “generate and assess proposals designed to accommodate those interests and positions.”

D. TRANSFORMATIVE MEDIATION

Heidi Burgess, Transformative Mediation

WHAT IT IS

Though transformative mediation has roots that go back to the 1970s, the term and approach have been brought to the fore by the publication of Baruch Bush and Joe Folger’s book The Promise of Mediation in 1994. This book contrasts two different approaches to mediation: problem-solving and transformative. The goal of problem solving mediation is generating a mutually acceptable settlement of the immediate dispute. Problem solving mediators are often highly directive in their attempts to reach this goal--they control not only the process, but also the substance of the discussion, focusing on areas of consensus and “resolvable” issues, while avoiding areas of disagreement where consensus is less likely. Although all decisions are, in theory, left in the hands of the disputants, problem solving mediators often play a large role in crafting settlement terms and obtaining the parties’ agreement.

The transformative approach to mediation does not seek resolution of the immediate problem, but rather, seeks the empowerment and mutual recognition of the parties involved. Empowerment, according to Bush and Folger, means enabling the parties to define their own issues and to seek solutions on their own. Recognition means enabling the parties to see and understand the other person’s point of view--to
understand how they define the problem and why they seek the solution that they do. (Seeing and understanding, it should be noted, do not constitute agreement with those views.) Often, empowerment and recognition pave the way for a mutually agreeable settlement, but that is only a secondary effect. The primary goal of transformative mediation is to foster the parties’ empowerment and recognition, thereby enabling them to approach their current problem, as well as later problems, with a stronger, yet more open view. This approach, according to Bush and Folger, avoids the problem of mediator directiveness which so often occurs in problem-solving mediation, putting responsibility for all outcomes squarely on the disputants.

**KEY CONCEPTS: EMPOWERMENT**

“Empowerment” is used by Bush and Folger in a way that differs from common usage. It does not mean power-balancing or redistribution, but rather, increasing the skills of both sides to make better decisions for themselves. Specifically, Bush and Folger use the term “empowerment” to mean “The restoration to individuals of a sense of their own value and strength and their own capacity to handle life’s problems.” In a latter publication, they further explain that through empowerment, disputants gain “greater clarity about their goals, resources, options, and preferences” and that they use this information to make their own “clear and deliberate decisions.”

Clarity about goals means that parties will gain a better understanding of what they want and why, and that their goals are legitimate and should be considered seriously. Clarity about resources means that the parties will better understand what resources are available to them and/or what resources they need to make an informed choice. In addition, parties need to learn that they hold something that is of value to the other party, that they can communicate effectively with the other party, and that they can utilize their resources to pursue their goal(s).

Clarity about options means that the parties become aware of the range of options available to them, they understand the relative costs and benefits of each option, and that they understand that the choice of options is theirs alone to make.

Clarity about preferences means that the parties will reflect and deliberate on their own, making a conscious decision about what they want to do, based on the strengths and weaknesses of both sides’ arguments and the advantages and disadvantages of each options.

In addition to these forms of empowerment, Bush and Folger add skill-based empowerment to the list, meaning that parties are empowered when they improve their own skills in conflict resolution, or learn how to listen, communicate, analyze issues, evaluate alternatives and make decisions more effectively than they could before.
Empowerment occurs in transformative mediation when the mediator watches for opportunities to increase the parties’ clarity about or skills in these areas, but does so in a way that the parties maintain control of both the process and the substance of the discussions. Unlike problem-solving mediators, transformative mediators are careful to take a secondary role, rather than a leading role in the process—they “follow the parties” around, and let the parties take the process where they want it to go.

RECOGNITION

By “recognition,” Bush and Folger mean considering the perspective, views, and experiences of the other: recognition, they say, “means the evocation in individuals of acknowledgment and empathy for the situation and problems of others.” Thus recognition is something one gives, not just something one gets.

Given the importance of empowerment, however, transformative mediators allow the parties to choose how much they want to recognize the views of the opponent. They may do so to the point that complete reconciliation takes place, or they may do so to a much lesser extent, just momentarily being willing to “let go” of their interest in themselves and focus on the other person as a human being with their own legitimate situation and concerns.

COMPARING TRANSFORMATIVE TO PROBLEM SOLVING MEDIATION

There are many differences between transformative and problem solving mediation. The only similarity is that each uses a third party to assist the disputing parties to begin dealing with the dispute in a new way. What that “new way” is, however, differs considerably from one process to the other. Problem-solving or “settlement-oriented” mediation, which is by far the dominant approach in the field today, is just what the name implies—it is focused on solving a problem by obtaining a settlement.

The settlement-oriented mediator usually explains that this is the purpose at the outset and defines a process that will assist the parties to work toward that goal. All of the mediators actions also are designed to facilitate that outcome. Emotions which might escalate anger and thus prevent a settlement are controlled. Issues that are non-negotiable are diverted, while parties are encouraged to focus on negotiable interests. Mediators tend to discourage a discussion of the past, as that often involves blame which can make progress more difficult. Rather, parties are encouraged to focus on what they want in the future, and develop ways in which their interests can be met simultaneously.

Sometimes the settlement-oriented mediator acts more like an arbitrator than a transformative mediator, proposing a solution and working hard to “sell” it to the parties. (An arbitrator’s decision is binding, he or she does not have to “sell” it. However, the settlement oriented mediator sometimes acts like an arbitrator when he or she takes the role of the “expert,” and comes up with the settlement
provisions for the parties.) Settlement-oriented mediators often try to keep the parties moving forward, encouraging them to move from one “stage” to the next as quickly as possible and using a deadline as an inducement to come to an agreement.

Transformative mediators work very differently. They explain in the opening statement that mediation provides a forum for the parties to talk about their problem with a neutral third party present. This can be helpful, it is explained, to clarify the nature of the problem from both parties’ points of view and for developing a range of options available for dealing with the situation. This process should help the clients make better choices about how to proceed and may help them better understand the views of the other person. This understanding may enable the clients to reach a mutually satisfactory solution, or it may suggest other approaches for handling the situation. Thus settlement is presented as one, but clearly not the only possible successful outcome of mediation.

Usually, transformative mediators will then work with the parties to develop goals, ground rules, and a process they want to use. Mediators will make suggestions about process and ask questions (usually to encourage either empowerment or recognition of the other), but they will not direct the conversation, nor will they suggest options for settlement. This is the parties’ job. Bush and Folger describe the mediator’s job as “following the parties around,” helping them clarify for themselves and for the other what their real concerns are and how they want to see them addressed. Sometimes, recognition by the other is all that is really needed to reach mutual satisfaction. Other times, parties must go beyond this to negotiate interests. Interest-based negotiation is, of course, allowed in a transformative process--but it usually shares center stage with the discussion of feelings and relationship issues.

The definition of success also differs in the two kinds of mediation. Typically, settlement-oriented mediation is not considered successful unless a settlement is reached. Transformative mediation, however, is successful if one or both parties becomes empowered to better handle their own situation and/or the parties better recognize the concerns and issues of the other side. Very often, the empowerment and recognition gained by the parties allows them to develop a mutually agreeable outcome. However, according to Bush and Folger, the opposite is not as often the case--the settlement-oriented mediation process does not lead to empowerment and recognition, as it tends to ignore the relationship issues in favor of the narrower and more concrete interests. A further comparison between the two processes is presented in the figure below.
COMPARISON OF TRANSFORMATIVE AND PROBLEM SOLVING MEDIATION

Note: These are idealized descriptions. Actual mediators hold these ideas and follow these actions to lesser or a greater degrees.

<table>
<thead>
<tr>
<th></th>
<th>Transformative Mediation</th>
<th>Problem Solving Mediation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assumptions about conflict</td>
<td>Conflict is an opportunity for moral growth and transformation</td>
<td>Conflict is a problem in need of a solution</td>
</tr>
<tr>
<td></td>
<td>Conflict tends to be a long-term process</td>
<td>Conflict is a short term situation</td>
</tr>
<tr>
<td>Ideal response to conflict</td>
<td>Facilitate parties’ empowerment and recognition of others</td>
<td>Take collaborative steps to solve identified problem; maximize joint gains</td>
</tr>
<tr>
<td>Goal of mediation</td>
<td>Parties’ empowerment and recognition of others</td>
<td>Settlement of the dispute</td>
</tr>
<tr>
<td>Mediator role</td>
<td>Secondary: parties are seen as experts, with motivation and capacity to solve own problems with minimum help</td>
<td>Mediator is expert, who directs problem solving process</td>
</tr>
<tr>
<td></td>
<td>Mediator is responsive to parties</td>
<td>Mediator directs parties</td>
</tr>
<tr>
<td>Mediator focus</td>
<td>Mediators focus on parties’ interactions, looking for opportunities for empowerment and/or recognition of the other</td>
<td>Mediators focus on parties’ situation and interests, looking for opportunities for joint gains and mutually satisfactory agreements</td>
</tr>
<tr>
<td>Use of Time</td>
<td>Time is open-ended; parties spend as much time on each activity as they want to. No pre-set “stages” as in problem solving mediation</td>
<td>Mediator sets time limits, encourages parties to move on or meet deadlines. Mediator moves parties from “stage” to “stage.”</td>
</tr>
<tr>
<td>Mediation: definition of success</td>
<td>Any increase in parties’ empowerment and/or recognition of the other--”small steps count”</td>
<td>Mutually agreeable settlement</td>
</tr>
</tbody>
</table>

© Heidi Burgess, Transformative Mediation
E. EVALUATIVE MEDIATION


The debate over whether mediators should “evaluate” revolves around the confusion over what constitutes evaluation and an “evaluative” mediator. The following examples describe two situations in which the mediators operate in an evaluative capacity.

During the course of an employment termination dispute, Eric Green “tells both sides privately that, in his opinion, $600,000 . . . is the settlement value of the case.” Green pushes the employer towards settlement by saying, “It was your corporation’s responsibility to live up to its moral obligations.” When the former employee resists the $600,000 figure, Green’s responds, “How greedy can you get?” In the second example, during a divorce mediation, the husband appears friendly and gregarious while the wife is calm and poised, but somewhat cool. The mediator repeatedly favors the husband in a manner indicating that she enforces the ground rules. When the wife mentions her debilitating health problems, the mediator laughs and says, “You don’t have to act sick to get what you want.”

In the first example, Green evaluates by assessing a fair settlement value of the case and pressing the parties to accept that settlement value. In the second example, the mediator evaluates by making and articulating a judgment that the party is acting sick as a ploy to advance her position.

An “evaluative” mediator gives advice, makes assessments, states opinions -- including opinions on the likely court outcome, proposes a fair or workable resolution to an issue or the dispute, or presses the parties to accept a particular resolution. The ten reasons that follow demonstrate that those activities are inconsistent with the role of a mediator.

THE ROLES AND RELATED TASKS OF EVALUATORS AND FACILITATORS ARE AT ODDS

Evaluating, assessing, and deciding for others is radically different than helping others evaluate, assess, and decide for themselves. Judges, arbitrators, neutral experts, and advisors are evaluators. Their role is to make decisions and give opinions. To do so, they use predetermined criteria to evaluate evidence and arguments presented by adverse parties. The tasks of evaluators include: finding “the facts” by properly weighing evidence; judging credibility and allocating the burden of proof; determining and applying the relevant law, rule, or custom to the particular situation; and making an award or rendering an opinion. The adverse parties have expressly asked the evaluator -- judge, arbitrator, or expert -- to decide the issue or resolve the conflict.

In contrast, the role of mediators is to assist disputing parties in making their own decisions and evaluating their own situations. A mediator “facilitates communications, promotes understanding, focuses the parties on their interests, and seeks creative problem solving to enable the parties to reach their own
agreement.” Mediators push disputing parties to question their assumptions, reconsider their positions, and listen to each other’s perspectives, stories, and arguments. They urge the parties to consider relevant law, weigh their own values, principles, and priorities, and develop an optimal outcome. In so doing, mediators facilitate evaluation by the parties.

These differences between evaluators and facilitators mean that each uses different skills and techniques, and each requires different competencies, training norms, and ethical guidelines to perform their respective functions. Further, the evaluative tasks of determining facts, applying law or custom, and delivering an opinion not only divert the mediator away from facilitation, but also can compromise the mediator’s neutrality – both in actuality and in the eyes of the parties – because the mediator will be favoring one side in his or her judgment.

Endeavors are more likely to succeed when the goal is clear and simple and not at war with other objectives. Any task, whether it is the performance of an Olympic athlete, the advocacy of an attorney, or the negotiation assistance provided by a mediator, requires a clear and bright focus and the development of appropriate strategies, skills, and power. In most cases, should the athlete or the attorney or the mediator divert their focus to another task, it will diminish their capacity to achieve their primary goal. “No one can serve two masters.” Mediators cannot effectively facilitate when they are evaluating.

EVALUATION PROMOTES POSITIONING AND POLARIZATION, WHICH ARE ANTITHETICAL TO THE GOALS OF MEDIATION

When disputing parties are in the presence of an evaluator – a judge, an arbitrator, or a neutral expert – they act (or should act) differently than they would in the presence of a mediator. With an evaluator, disputants make themselves look as good as possible and their opponent as bad as possible. They do not make offers of compromise or reveal their hand for fear that it weakens the evaluator’s perception of the strength of their case. They are in a competitive mind-set seeking to capture the evaluator’s favor and win the case.

While adversarial confrontations between parties are helpful to a neutral who must judge credibility and clarify the choices he or she must make, such confrontations are not helpful to collaboration. Adversarial behaviors run counter to the mediator’s efforts to move parties towards a different perception of their own situation and of each other. While parties typically enter the mediation process in a hostile and adversarial stance, the mediator seeks to shift them towards a collaborative posture in which they jointly construct a win-win solution. An atmosphere of respectful collaboration is a necessary foundation for creative problem-solving.
The ethical codes explicitly include a preference to keep processes “pure.” The Model Standards of Conduct for Mediators highlight party self-determination as being the fundamental principle of mediation. The committee that created the Model Standards rejected mediation as an evaluative process. The comments to the Model Standards state that “[a] mediator should . . . refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes.”

QUESTIONS AND DISCUSSIONS

1. What is the role of an evaluative mediator?

2. What skills should an evaluative mediator have?

3. How does the concept of “self-determination” conflict with the evaluative model of mediation? Is there really a conflict?
F. THE BENEFITS OF RESOLVING DISPUTES THROUGH MEDIATION

REDUCE COST OF PROCESSING COMPLAINTS/CASES

REDUCE THE AMOUNT OF TIME TO PROCESS COMPLAINTS/CASES

ENCOURAGE MANAGEMENT AND EMPLOYEES TO RESOLVE ISSUE

IMPROVE IMAGE OF MANAGERS, ENFORCEMENT AGENCIES, COURTS, ATTORNEYS, AND THE HUMANS RESOURCE DEPARTMENT

REDUCE THE NUMBER OF REPRISAL COMPLAINTS

ELIMINATE MERITLESS AND FRIVOLOUS COMPLAINTS

REDUCE NUMBER OF CASES TO BE INVESTIGATED, ANALYZED AND LITIGATED

REDUCE TENSION BETWEEN EMPLOYEES AND MANAGEMENT

ASSIST THE PARTIES IN LEARNING HOW TO COMMUNICATE WITH EACH OTHER

A WIN-WIN RESOLUTION

CONTINUING AND STRENGTHENING WORK RELATIONSHIPS

PARTIES HAVE MORE CONTROL OVER RESOLVING THEIR DISPUTE

ELIMINATE OR REDUCE BACKLOG OF COMPLAINTS/CASES

Can you add to this list? (Review previous articles)

1.

2.

3.

4.

How can the benefits also be an “interest” of the parties?

1.

2.

3.

4.

GENERAL SUPPORT AND CRITICISM OF THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN CIVIL RIGHTS CONTROVERSIES

While the specific areas of environmental controversies, ADA controversies, and employment controversies provide a good starting point for examining the positives and negatives of the use of ADR in the civil rights context, it may be helpful to delve a little deeper into the pros and cons of the use of ADR in the civil rights context before examining the propriety and effectiveness of the use of ADR by the ACLU.

1. Support for the Use of ADR in Civil Rights Controversies

The use of ADR is generally endorsed by the American Bar Association, federal and state legislators, corporate counsel, and some legal educators. These proponents of ADR believe that it is a much more efficient process when compared with the formal legal system, resulting in saved time and money. According to these supporters, ADR is less time-consuming than formal legal procedures because it “eliminates many formalities of judicial proof…, decision-makers often are familiar with the subject matter of the dispute, and because jurors need not be selected and educated.” Costs are reduced because mediators and arbitrators are typically paid less than judges or other formal decision-makers, and ADR does not require the extensive support system of clerks, court reporters, bailiffs, and other law enforcement personnel associated with the adjudicatory system. Also, the parties involved in ADR may save money, as attorney representation is not required, and in some cases, attorney representation may not even be permitted.

These savings in time and money make ADR mechanisms much more accessible for a claimant. It is argued that complainants who cannot afford the expense or delay associated with filing a claim through the formal litigation process may be able to use ADR mechanisms to seek redress. Also, individuals may feel more comfortable using informal procedures such as ADR instead of formal court procedures which may be unfamiliar and intimidating. ADR is beneficial in this sense, as it arguably places more control into the hands of the parties involved, and thus facilitates a greater degree of party participation. This may take on great significance in the civil rights context, where minorities who feel threatened or intimidated by the formal adjudicatory system may be more eager and willing to file a claim alleging a civil rights violation.

In addition, proponents of ADR believe that the formal legal process is not necessarily suited to address certain kinds of disputes. More specifically, where there is an established, long-term relationship between parties, the adversarial process is arguably the least effective means of dispute resolution, “for it
focuses only on the symptoms of a problem and makes little effort to delve into its source.” However, because ADR procedures have a more holistic approach that focuses on such things as community values, interpersonal relations, and compromise, ADR may be more appropriate for addressing disputes that arise between individuals who must continue to deal with each other long after the dispute is resolved. This could prove crucial in cases involving a civil rights dispute between an employer and employee, where the employer wishes to continue employment with the employer after the controversy is resolved. Also, ADR may produce more complex solutions that are perhaps better tailored to addressing the parties’ needs than traditional adjudicatory processes. This stems from the fact that in ADR, the mediator or arbitrator can look to the future, as well as the past, and may involve more parties than the traditional legal system will permit - this allows ADR to produce solutions that are more responsive to the needs of both parties and non-parties. This contrasts greatly with the formal legal system, which may only examine past facts in resolving a dispute, despite the fact that it will be attempting to produce a solution for the future. Thus, while the court system may effectively establish precedents for future claimants, ADR may be more beneficial to one whose civil rights have been violated in that it has the potential to provide a more comprehensive and individualized change in the life of the complainant, and perhaps even for those who follow, than would a blanket ruling by the formal legal system.

2. Criticism of the Use of ADR in Civil Rights Controversies

Two main criticisms of the use of ADR in civil rights controversies are the lack of procedural safeguards present in ADR, and the lack of precedent associated with ADR decisions. Both of these shortcomings have the dangerous potential of depriving an aggrieved individual of an appropriate means for redressing any civil rights violations he may have experienced.

(a.) Lack of Procedural Safeguards in ADR

One can make several valid arguments against the use of ADR in civil rights disputes. For one thing, opponents of ADR argue that the use of ADR may facilitate racial or ethnic bias in the resolution of disputes, due to the lack of procedural safeguards in place. The formal legal system has a number of safeguards in place to ensure that the decision-maker applies justly the applicable rules of law. Judges are appointed for lengthy terms, sometimes for life, and thus are not exposed to outside political or societal pressures which could influence their decision-making process. Also, judges are trained to analyze a lawsuit in terms “of the legal and factual issues presented,” rather than based upon the characteristics of the parties to a dispute – “for example, as a pedestrian-intersection accident case, rather than one of a black victim suing a white driver.” In addition, the basic concept of stare decisis prompts the judge to analyze similar cases in a like manner, and the results of this analysis are subject to appellate review. Finally, judges are required by the Code of Judicial Conduct to disqualify themselves from any case
where their impartiality may be at issue, and disqualification is essential where the judge feels animus or prejudice towards a party to the case. In terms of the jury, the process of voir dire allows for the removal of jurors, with cause, by the judge and/or the parties to the dispute, while parties may use peremptory challenges to remove jurors suspected of bias without case. Such procedural safeguards do much in the way of “recognizing inequality and attempting to compensate for it by making both parties conform to the same standards.” The use of these procedural safeguards stems from the principal that the formal legal system presumes that inequality exists between parties to a suit, and thus implements a matrix of rules and other such mechanisms designed to protect the weaker party. In contrast, the informal procedures implemented in ADR “deemphasizes these concerns – they presume “that the people or entities that interact outside formal legal institutions are roughly equal in political power, wealth, and social status.” However, the reality is that inequalities do exist, and thus ADR disadvantages the weaker party to a suit – in civil rights controversies, this is often the minority or the poor individual who has been discriminated against. The procedural safeguards entrenched in the formal legal system attack this inequality head-on and force both parties to adhere to the same standards of practice in an attempt to compensate for disparities in power or wealth. However, where these procedural safeguards are absent, such as in ADR procedures, the weaker party in a civil rights controversy, or other such dispute, will have little or no success at redressing the wrongs committed against them.

However, these the likelihood of bias resulting from a lack of procedural safeguards in the ADR setting may be offset, [1] by providing rules that clearly specify the scope of the proceedings and forbid irrelevant or intrusive inquiries, [2] by requiring open proceedings, and [3] by providing some form of higher review and [4] the third-party facilitator or decision-maker should be a professional and be acceptable to both parties.

These safeguards may increase the costs of ADR, but, on balance, these costs seem worth the benefit of ensuring the civil rights of aggrieved individuals will be adequately protected.

(b.) Lack of Precedent Associated With ADR Decisions

“No discrimination dispute is merely an individual dispute.” Where race or gender discrimination is evident, the race or gender of the aggrieved individual is naturally brought into the conflict, and this leads to the involvement of that racial or gender group in the civil rights dispute. In other words, though a civil rights violation “commences as a personal injustice ... [this] should not obscure the intrinsic group nature of the injustice.” Race or gender discrimination should be perceived as a threat to the civil rights of all members of the group, even though only a single individual may be directly affected by the dispute at hand.

Although an apparently isolated act of discrimination seems to affect only the single individual, it in fact affects all members of the individual’s racial or gender group - these members are shown that
“discrimination is pervasive and that each is a potential target of discrimination.” Thus, the whole community has some interest, or even some stake, in the outcome of the civil rights dispute of an individual complainant. The danger lies in the fact that if the individual agrees to a remedy “that leaves discriminatory institutions, structures, procedures, or people in place,” the individual may in fact place himself, and his group, at risk of future discrimination.

However, what if the remedy obtained by the individual complainant is beneficial, and could prove beneficial for his entire community? Therein lies the problem with ADR - the lack of precedential value garnered by its decisions. This means that any advancements made are done so on an individual, rather than a group, level. This is because an agreement reached through arbitration, mediation, or settlement does not have the same level of legal significance as a court decision, and does not create any sort of jurisprudence for future complainants to build upon and use in effectively forming and shaping their claims. Proof of a pattern of discrimination may be essential to a complainant's level of success, and the existence of this pattern may be critical in establishing “a structure whereby victims can be identified and made whole.” However, ADR and its individually tailored remedies do little to provide such proof. But such a pattern of discrimination cannot be established, given the often private or confidential nature of ADR proceedings. In fact, some ADR methods, such as settlement agreements, may subvert the public interest in favor of reaping monetary damages, thereby neglecting to appreciate the legal significance of the issues presented by the claim at hand. By giving the individual claimant the leeway to accept a mediocre compromise at the expense of the group, ADR effectively diminishes the “judicial development of legal rights for the disadvantaged.” In other words, the development of law in certain disfavored or unpopular areas would be almost completely stifled. For example, while the civil rights movement made great strides during the 1960s and 1970s, “imagine…the impoverished nature of civil rights law that would have resulted had all race discrimination cases…been mediated rather than adjudicated.” Thus, opponents of ADR argue that some hesitation should be used before applying ADR to resolve a civil rights dispute.

This lack of precedent opens the door for the presence of so-called “repeat players.” In litigation, repeat players, such as Wal-Mart, have a distinct advantage over adversaries. Namely, these repeat players are more sufficient in the mobilization of legal and other resources, which increases the benefit they receive from engaging in formal adjudication. Such benefits include the ability to develop “advance intelligence” (i.e., an ability to understand how certain issues will play out in court under applicable laws), and the ability to effectively “plan for future engagement.” Repeat players may also develop long-term working relationships with “institutional incumbents” such as clerks or judges. If these advantages for the repeat player translate from the litigational to the ADR setting, they could prove extremely detrimental to the complainant citing a civil rights violation. In the ADR context, the repeat player often
has the leverage to control the forum, decision-maker, and rules in order to gain the most favorable outcome. Often this complainant is already in a disadvantaged position when compared to the alleged offender, and the status of the offender as a repeat player could only enhance the disparity between the power and influence which the parties are capable of exhibiting. Thus, due to the lack of precedence associated with ADR procedures, repeat players are often allowed to re-litigate (in some sense) issues addressed in previous ADR proceedings, and the complainant must deal with the fact that he has no previous decisions upon which to mold or shape his claim, in addition to the other disadvantages he experiences (i.e., wealth, community status, etc). In this sense, ADR could prove extremely detrimental in the civil rights context.

In short, the complainant should participate in ADR if he “wants relief for the immediate problem, and cares little about creating precedent for the future.” However, if the complainant is concerned with establishing new precedent in the area of civil rights in an attempt to thwart future discrimination, ADR seems to be an improper choice for doing so.

**QUESTIONS AND DISCUSSIONS**

1. What are some advantages to resolving workplace disputes (civil rights) through mediation?

2. What are two major criticisms of the use of ADR in civil rights controversies?

3. How would you address each of these criticisms?
ALTERNATIVE DISPUTE RESOLUTION OFFERS AN ANSWER FOR DISPARATE IMPACT AND UNCONSCIOUS DISPARATE TREATMENT

ADR provides a compelling alternative that allows modification of legally legitimate, but racially preferential, policies. Employment discrimination cases brought under adverse impact are better suited to ADR than to courtrooms. In a typical court case, there is a clear-cut winner and loser. Currently, a plaintiff who loses a discrimination suit emerges as the crazy, paranoid minority looking for a handout and the defendant who loses emerges as the backwards, discriminating social pariah. Such an outcome does not further racial reconciliation and understanding. The winner-loser paradigm misses a wealth of surplus the parties could create together in the form of apologies, modified procedures and increased understanding, to name a few. ADR processes do not relinquish the ability to collect damages; claimants may receive money damages as well as other non-monetized goods that serve to make them whole. The parties to the dispute construct their own settlement and speak in their own language about what is important to them and about how and why they felt harmed. ADR provides an opportunity for the disputants to walk away having come to a real understanding, if not total acceptance, of the opponent's viewpoint. Understanding the other's perspective does not necessarily entail accepting it; it signifies an ability to listen, to be heard and to shape one's own future. A court can deliver vindication, but is more limited regarding the distribution of non-monetized goods that ADR is uniquely situated to provide.

3. Tyler, Kathryn, Mediating a Better Outcome, HRMagazine, November 1, 2007, Copyright 2007 Gale Group, Inc.

BENEFITS OF MEDIATION

Employers who have tried mediation generally find that the process results in quicker resolution, minimizes hassles, saves money and preserves relationships.

Quick conclusions. Mediated cases usually are resolved within three months, whereas investigated cases take six to 18 months to resolve. “While that charge is pending, the employee is clearly not happy and may not be productive,” Gross says. “Mediation gets those issues resolved quickly, and gets that employee back to being productive.”

Fewer hassles. Mediation requires a lot less preparation by the HR professional than an investigation does. John Schmelzer, acting director of field coordination programs for the EEOC, says that in an investigation, “we request information from the employee's file. You have to get it and
reproduce it. Then you have to explain [it]. In mediation, you can avoid that. The government isn't going to be looking through files and interviewing [employees]. And, it's successful almost three out of four times.”

The demands of an investigation on HR staff can be a particular burden for small departments, says Melva Tate, PHR, director of HR and administration at Kelly Construction Co. in Trussville, Ala. “The amount of time you spend gathering the material is exhausting. Mediating a claim vs. [being party to an investigation] saves enormous amounts of time.”

**Reduced costs.** Unlike litigation, mediation is free. Angela Rud, interim vice president of HR for International Dairy Queen Inc., a national ice cream franchisor with 2,400 employees, estimates that, since 2004, the company has saved at least $25,000 in legal fees by choosing to mediate and settle early rather than litigate. In addition, mediated cases generally resulted in lower payouts than those that were vigorously defended, Rud says.

Richard P. Hasenauer, vice president and director of HR for Gerresheimer Glass Inc., a glass manufacturer with 1,700 employees and U.S. headquarters in Vineland, N.J., agrees. “It is easy to compare our HR representative's time against [attorneys' fees] and recognize a considerable cost avoidance if you get an agreement,” he says.

**Continued relationships.** Thomas M. Miller, senior labor counsel for Meijer, a nationwide grocery chain, says mediation can help deal with issues affecting current employees who will remain with the company after the charge is resolved. In those cases, he says, amicable resolutions achieved through mediation “can often be more beneficial in the long term than getting a no-probable-cause dismissal.”

**Reaching a Resolution**

Settlements reached in mediation can range from an apology or a neutral letter of reference to significant monetary compensation. Karen. Ballinger, supervisory alternative dispute resolution (ADR) coordinator at the EEOC office in Indianapolis, says, “Any agreement you reach is a no-fault settlement. Just by settling doesn't acknowledge [an employer] did anything wrong. A lot of times [a settlement] is a business decision.”

Because mediation is a less-structured process than an investigation, the discussion can include other issues affecting the employee besides the discrimination charge, says Steve Ichniowski, national ADR coordinator at the EEOC in Washington, D.C.

Ichniowski tells of a travel agency employee who, after working for the company for 25 years, filed a gender discrimination charge. The employee was under a great deal of stress because she felt she was being unduly criticized. “Here was a loyal employee who started having performance problems,” says Ichniowski. Since the employer knew the woman's honeymoon travel arrangements had fallen
through, the company significantly reduced her stress and gained good will by giving her a honeymoon package as part of the resolution. The action helped the company retain a longtime employee.

“A judge isn't going to award that type of settlement,” Ichniowski says. “When it's mandated by a judge, his hands are tied [by the type of compensation he can award].” Other settlement agreements may include departmental transfers, shift changes or retraining.

Myths, Fears and Apprehensions

Although about 85 percent of charging parties agree to go to mediation for an EEOC charge, only about 30 percent of employers agree to mediate, according to the EEOC. The main reasons that employers give for rejecting mediation are:

The charge has no merit. In a 2003 study of the EEOC Mediation Program by E. Patrick McDermott, Ph.D., J.D., primary researcher at the Franklin P. Purdue School of Business at Salisbury State University in Salisbury, Md., the most common reason given by employers is that the charge is baseless.

Dominguez says, “Employers perceive the government won't take on this 'frivolous' charge. However, the government applies different standards than the employer.” She advises HR professionals not to take employees' allegations lightly, “regardless of how you feel about them. They can contaminate the situation and affect other employees.”

Agreeing to mediate is not a validation of an EEOC claim. Instead, it is a gesture of good will demonstrating a company's desire to understand an employee's dissatisfaction. Sometimes, this is enough to appease a disgruntled employee.

The mediator isn't qualified. Three types of mediators handle these cases: in-house mediators working directly for the EEOC; contract mediators, usually lawyers or judges; and volunteer mediators, who usually serve in less-populated areas. Schmelzer says the majority of cases are handled by full-time mediators.

Because some HR professionals say they have had mixed experiences with mediators, experts advise doing a thorough check with other NUAM participants to evaluate the quality of each mediator. Rud says, “Some mediators are good, and others are not.”

Tate, who mediated six EEOC charges for her previous employer, says the quality of the mediator affects “how well the process flow[s] and how successful the outcome [is].” If a mediator is perceived as successful, an employer can request that person for future mediations.

The information disclosed could be used against the company. “Employers fear that something said during mediation will hurt them on the investigative side,” says Dominguez. But, Schmelzer says, a
“protective firewall” separates mediators from enforcement staff. “There are separate files for the mediation and investigation processes,” he explains.

The mediator will force the company to pay a huge settlement. Some employers fear mediation is about a payout, but “that has not been the case for us,” says Ford's Gross. “Neither party has to accept the result. It's not binding arbitration. At the end of the day, if you cannot agree, you can walk away and go through the normal EEOC charge process.”

Moreover, not all resolutions involve money. “About 20 percent of mediation resolutions do not involve any transfer of funds,” Dominguez says. And any compensation must be agreed to by the company.

No HR professional wants to have to face an EEOC charge. But by having a universal agreement to mediate or — at the very least — having an informed opinion about mediation and a plan for addressing employees' discrimination complaints, HR professionals can be prepared to handle such charges if and when they arise.

QUESTIONS AND DISCUSSIONS

1. Why are ADR processes more suited for disparate impact cases?

2. Why do some employees fear ADR?

3. How does the perception of the mediator impact employment mediation?
BENEFITS OF USING ADR IN EMPLOYMENT LAW

There are numerous reasons why an employer would want to engage in mediation or arbitration of employment discrimination and employment-related tort claims. Although the following policy reasons are by no means an exhaustive list, they represent some of the prevalent reasons for using some method of ADR to resolve disputes arising in the workplace.

VOLUME OF CLAIMS

One of the most compelling reasons for using ADR is the increased number of claims resulting from differences in gender, race, age, religious, and mental or physical disabilities. Based solely on projections of workforce composition, it is apparent that the American workforce is changing. The changing workforce gives rise to diversity which, if not understood and managed, can give rise to employment-based complaints.

Managing a diverse work environment requires supervisors and managers to expect disputes relating to diversity in language, religion, work habits, and personal appearance. By virtue of the projected workforce diversity, the number of possible employment-related claims has also increased. As a result of the probable increase in employment-related claims, it is necessary for businesses to plan some means of addressing the increased claims.

COST

Unresolved employment-related claims frequently result in litigation. Not only is litigation, even in its simplest form, an expensive proposition, but our legal system has received considerable public criticism due to backlog within the courts. That backlog has a tremendous adverse effect on the cost of litigation. It is not at all unusual for an employment discrimination lawsuit to be filed and for the parties conduct their discovery and prepare their case and witnesses for trial only to learn that the case will not be tried as scheduled. The case will be reset for trial but generally by the time the new trial date is reached, the parties have to re-do all or most of their trial preparations. With each resetting, the cost of trying or defending the same lawsuit increases.

In addition to actual legal expenses, there is also the cost to each party in terms of lost manpower. This is true not only for an employer who may have to pull employees from its workforce in order for the employees to be prepared to testify for trial but also for a plaintiff-employee who may be required to be absent from his or her employment in order to attend depositions and settlement conferences and to
prepare for trial.

The bottom line is that ADR costs employers less than a full-fledged lawsuit in federal court. Companies that have learned to use either mediation or arbitration have realized the financial benefit with “lower costs and quicker dispute resolutions.” One company that realized the financial benefits of ADR is Chevron. Mediating one in-house employee dispute costs the company $25,000 as compared to an estimated cost of $2.5 million had the case been tried.

A study conducted by the Federal Courts Study Committee revealed that 68% of the wrongful discharge claims that went to trial resulted in a verdict for the plaintiff. The average verdict was $650,000 with a median award of $177,000. While the Civil Rights Act of 1991 did place a cap on the amount of punitive damages and compensatory damages a plaintiff can receive under Title VII, the ADA, the Rehabilitation Act, and many state anti-discrimination laws do not have such caps. In addition, tort claim recoveries are not capped and can be stacked for astronomical recoveries by successful plaintiffs.

**SPEED OF RESOLUTION**

As mentioned previously, the backlog of cases, particularly in the federal court system, can result in case delays of as much as ten years. Back pay can continue to accumulate during that time period. As a result, it is advantageous to employers to resolve the situation as speedily as possible. In addition, as long as conflict exists between the parties, there is an increased probability of additional charges and complaints. In order to minimize these problems, a speedier resolution is needed. Either mediation or arbitration can be scheduled much sooner than most trials. Mediations and arbitrations are not affected by the criminal’s right to a speedy trial which causes many civil cases to be “bumped” off the docket. As a result, mediations and arbitrations generally occur when scheduled. In addition, as stated previously, most arbitrations are not lengthy, and decisions can be obtained fairly rapidly. Mediations may require more time than an arbitration. However, the parties only continue if they wish to do so. Thus, if the parties feel headway is being made, they can continue with the mediation. If one or both of the parties are not pleased with the mediation, either can end the mediation and continue with litigation. If the mediation is successful, resolution of the problem will still be much swifter than if the parties litigated.

**MAINTAINING A WORKING RELATIONSHIP**

Mediation, in particular, has some characteristics that make it especially desirable for addressing workplace disputes. With mediation, each party is required to come to the mediation prepared to try to work with the other party to fashion a mutually acceptable solution. The key phrases are “work with the other party” and “to fashion a mutually acceptable solution.” The reasons why working with the other party is desirable in an employment situation are unlike the reasons for doing so in automobile injury
cases. In automobile injury cases, the parties may have met by accident and have no need for interaction (other than to resolve their claims) because there is no long-term relationship and no desire for a long-term relationship. In cases arising out of employment situations, there may have been a long-term relationship, and it may be in the best interest of both parties to continue the relationship if the dispute can be resolved in a mutually agreeable fashion. Through mediation, the dispute can be addressed far more expeditiously than through litigation. Doing so allows the parties to resolve their differences before ill-will and lack of trust have become the predominant notes in all exchanges between the parties. Mediation avoids the development of a true adversarial relationship between the parties because each party must come prepared to listen and to work together to fashion a mutually acceptable resolution. The point of working together is that neither party gets exactly what they hoped, but each has participated in formulating the solution.

CONFIDENTIALITY

When an employment discrimination claim reaches the federal court system, employers stand to lose more than money. For instance, the multi-million dollar verdict levied against the law firm of Baker & McKenzie resulted in extremely unfavorable publicity for the firm. Had it chosen to mediate or arbitrate the matter, Baker & McKenzie could have required that any award remain confidential, thereby avoiding not only the adverse publicity associated with the lawsuit but also potentially preventing the filing of similar claims by other employees.

Employers have several methods at their disposal to insure confidentiality. In addition to a confidentiality provision contained within an arbitration or mediation clause on an application or within an employment contract, the employer may draft a separate confidentiality provision which is signed as part of the mediation contract.

Employers can enforce confidentiality through such means as requiring the employee-violator to forfeit any monies received as a result of the arbitrator’s award or the mediated settlement upon disclosure of the terms of either. Also, the employee-violator could be held liable for breach of contract. Further, confidentiality could be assured by an agreement requiring the written consent of both parties prior to any release and establishing a monetary fine for violation of the agreement.

EXPERTISE

ADR offers that which a jury of the plaintiff’s peers frequently cannot, i.e., expertise. It is doubtful that many jurors understand the complexity of labor and employment law, especially when it comes to mixed-motive cases or disparate impact cases. Typically, arbitrators are knowledgeable about a certain area of the law and are familiar with the issues that arise in their respective area. Arbitrators
frequently carve out a niche of specialty: labor contract interpretation, discharges or suspensions, seniority, and discrimination. Employers must simply read the arbitrator’s portfolio of cases and decide whether the arbitrator suits the needs of the employer and employee. Further, adding to the expertise of arbitrators and moderators is the fact that many are former judges or retired attorneys. In addition, both mediators and arbitrators are required to follow certain standards not imposed on jurors. For example, in 1992, the AAA, the American Bar Association (ABA), and the Society of Professionals in Dispute Resolution (SPIDR) created a joint committee to draft standards that mediators should follow. The proposed standards have been adopted by the AAA and SPIDR and await adoption by the ABA in February of 1971.

Pursuant to the aforementioned standards, a mediator must recognize that “self-determination” is the foundation for all mediation and must therefore rely on the ability of the disputants to “reach a voluntary, uncoerced agreement.” Therefore, either disputant can withdraw from the mediation at any time. Further, a mediator must be impartial and disclose all actual and potential conflicts of interest reasonably known to him or her and mediate only when he or she has the necessary qualifications to satisfy the reasonable expectations of the parties. Further, the mediator shall maintain the confidentiality of the parties; fairly and diligently conduct the mediation; fully disclose and explain the basis of compensation, fees, and charges to the parties; be truthful in the advertising and solicitation for mediation; and improve the practice of mediation.

CRITICISMS OF USING ADR TO RESOLVE DISCRIMINATION CLAIMS

ADR critics base their contentions on, among other things, the fact that mediators and arbitrators are unregulated. Unlike judges and attorneys, arbitrators have no state supreme courts or boards of professional responsibility to supervise their conduct.

In terms of mediation, the criticisms include the following: (1) the mediator’s opinion is generally not binding; (2) since the hallmark of mediation is self-determination, either party can withdraw from the proceeding at any time; and (3) certain cases such as sexual harassment occurring over a prolonged period of time, involving many targets, are not suited for mediation.

Critics cite the nonbinding nature of a mediator’s decision as one reason to dissuade employers from implementing such a procedure. It is the nonbinding nature of mediation, however, that makes it appealing to employers. If the mediator renders a decision displeasing to an employer, the employer can choose to ignore the mediator’s ruling. Further, if the parties so choose, they may contract to make the mediator’s decision binding. This leads the Authors to the criticism that either party can withdraw from the mediation at any time. Once again, this perceived problem could be cured by a clause in the arbitration agreement stating that each party must complete the mediation process or some agreed-upon
portion thereof before proceeding to another forum to seek redress of their discrimination claims.

Also, critics allege that mediation is not appropriate where an initial investigation uncovers widespread harassment covering a prolonged period of time. This criticism overlooks the very purpose of mediation. Mediation is most beneficial in this circumstance because it could resolve this matter quickly by gathering facts and interviewing the alleged victims and the alleged perpetrators. This task can be completed more rapidly through mediation than in the courtroom, which its requisite barrage of pretrial motions and discovery. Further, mediation protects both the supervisors and alleged victims from public ridicule and exposure. Finally, mediation works well because the parties have an opportunity to explain their motives and “clear the air” of any misunderstandings. Since mediation has a 85% success rate, it offers a greater likelihood that the outcome will be most beneficial to all parties concerned.

QUESTIONS AND DISCUSSIONS

1. What are some disadvantages of using ADR to resolve workplace disputes?

2. What are some disadvantages of using ADR to resolve workplace disputes?

3. Why do you believe the use of mediation to resolve workplace disputes has an 85% resolution rate?
G. LIMITATIONS OF ADR IN RESOLVING WORKPLACE DISPUTES

- Unequal bargaining power
- Parties unfamiliar with ADR process

**ADR is not a panacea for resolving all workplace disputes**

- Employees unfamiliar with their rights under various statutes
- Employees unfamiliar with their employer’s policies
- More remedies available under civil rights statutes
- Underlying problems not resolved may encourage frivolous complaints
- Unskilled ADR specialist

**Courts want to push all employment disputes to ADR in lieu of litigation**

- Limited discovery/investigation
- Legal precedent may be needed
- Supervisor’s authority usurped
- Those who cannot afford to litigate their claims are pushed toward ADR; whereas the rich get their day in court

**Can You Add To This List? (Review next article)**

1.

2.

3.

4.

My principal concern is that, in our enthusiasm over the ADR idea, we may fail to think hard about what we are trying to accomplish. It is time that we reflect on our goals and come to terms with both the promise and the danger of alternatives to traditional litigation. In this essay I will offer some views on the direction this reflection should take.

THE PROBLEM IN PERSPECTIVE

If alternative dispute resolution mechanisms are most significant as substitutes for traditional litigation, then it is important to assess the specific problems facing our judicial system that ADR seeks to address. Fortunately, the literature on this subject is so extensive that it is unnecessary here to rehash the issues or to resolve the ongoing debate as to whether we are truly an overly litigious society. It is enough to note that, in recent years, the cost of litigation has substantially increased and the number of cases filed in state and federal courts has mushroomed. For example, between 1960 and 1980 the number of filings per capita in federal district courts nearly doubled. Although our judicial systems recently have been adjusted to meet this massive increase in caseload, it is somewhat Pollyanish to view the addition of still more judges as an acceptable solution to our society’s ever increasing demand for judicial resources.

Given the inadequacy of traditional responses to the manifold problems with our court systems, it is not surprising that many commentators believe that we must develop new approaches for dispute resolution in lieu of litigation. Generally, I concur, but I think that there are two critical threshold inquiries that we must make before we leap to embrace any system of ADR. First, we should consider whether an ADR mechanism is being proposed to facilitate existing court procedures, or as an alternative wholly separate from the established system. Second, we must consider whether the disputes that will be resolved pursuant to an ADR system will involve significant public rights and duties. In other words, we must determine whether ADR will result in an abandonment of our constitutional system in which the “rule of law” is created and principally enforced by legitimate branches of government and whether rights and duties will be delimited by those the law seeks to regulate.

In this Commentary, I offer no easy solution to the definitional problem of public/private disputes. I do suggest, however, that there are a number of public law cases that are easily identifiable as such. These include constitutional issues, issues surrounding existing government regulation, and issues of great public concern. The latter category might include, for example, the development of a legal standard of strict liability in products liability cases. Although less easily identifiable than constitutional and regulatory issues, such issues of great public concern can be accommodated so long as ADR
mechanisms are created as adjuncts to existing judicial or regulatory systems, or if these issues can be re-litigated in court after initial resolution pursuant to ADR.

My purpose in creating a public/private law matrix is not to give court administrators a fool-proof method of assigning cases to appropriate dispute resolution systems. Instead, the matrix helps to illuminate those aspects of ADR that should give rise to the greatest concern. In particular, we must focus on the quadrant of the matrix that would allow for the resolution of public law disputes in ADR systems that are totally divorced from courts. ADR mechanisms falling within this quadrant, I believe, are wholly inappropriate.

In the remainder of this Commentary I will explore the hazards and possibilities presented by each quadrant in the matrix, beginning with two quadrants that involve the use of ADR as an adjunct to our traditional court system.

THE ROLE OF ADR WITHIN THE TRADITIONAL COURT SYSTEM

One way to deal with the caseload problem is simply to divert cases from litigation by limiting the jurisdiction of the courts. There are two difficulties with such a “demand-side” approach. First, limiting the jurisdiction of courts may result in diminished rights for minorities and other groups, whose cases in areas like civil rights, prisoner suits, and equal employment are likely to be the first removed from the courts. Second, the jurisdiction-limiting solution fails to recognize the potential role of ADR within the traditional court systems. If we rush to limit the substantive jurisdiction of our courts, we may lose our best opportunity to experiment with the promise of ADR.

Implicitly recognizing these two difficulties, many ADR advocates have suggested the use of ADR as an adjunct to federal and state court systems. ADR would not replace litigation, but instead would be used to make our traditional court systems work more efficiently and effectively. Because the vast majority of all court cases are settled rather than adjudicated, many commentators believe that ADR has an enormous potential for reducing caseloads by enhancing the effectiveness of settlement; at the same time, because ADR would be under the careful supervision of courts, there is far less danger that ADR would become a nefarious scheme for diminishing the rights of the underprivileged in our society.

There are several ways in which the enormous settlement-enhancing potential of ADR can be tapped. Many lawyers insist that a neutral, penetrating, and analytical assessment of a case greatly enhances the prospects of a successful negotiation by offering a realistic view of what could transpire if a case goes to full-blown adjudication. Furthermore, because too many lawyers view the suggestion of compromise as an admission of weakness, mechanisms that place the onus of suggesting settlement negotiations on neither party have tremendous potential for initiating settlement at much earlier stages in the litigation.
OVERRIDING CONSIDERATIONS

Apart from the issues concerning the appropriate application of ADR mechanisms, two additional overriding considerations should affect the employment of ADR. One has to do with research and appraisal, the other with the training and expertise of those who will serve as neutrals in ADR systems. Because the ADR movement is still in the formative stage, there is much to learn about the feasibility of alternatives to litigation. ADR is, as yet, a highly speculative endeavor. We do not know whether ADR programs can be adequately staffed and funded over the long-term; whether private litigants will use ADR in lieu of or merely in addition to litigation; what effect ADR may have on our judicial caseload; whether we can avoid problems of “second class” justice for the poor; and whether we can avoid the improper resolution of public law questions in wholly private fora. In light of these and other uncertainties about ADR, we should continue to view alternative dispute resolution as a conditional venture, subject to further study and adjustment. Every new ADR system should include a formal program for self-appraisal and some type of “sunset” arrangement to ensure that the system is evaluated after a reasonable time before becoming permanently established.

In addition to continued research and appraisal, we must ensure the quality of the suddenly emerging ADR “industry.” Most participants in the ADR movement have joined with pure motives, but this is not true of everyone. There are now a number of self-proclaimed ADR “experts,” with business cards in hand and consulting firms in the yellow pages, advertising an ability to solve any dispute. Unfortunately, those who seek to prey on a new idea may wreak havoc with our systems of justice and destroy the legitimacy of the ADR movement at its inception. One way to limit this problem is to train potential neutrals to ensure their expertise in both substantive areas and in dispute resolution techniques.

There are a number of ADR proponents who appear to believe that a good neutral can resolve any issue without regard to substantive expertise. Our experience with arbitrators and mediators in collective bargaining proves the folly of this notion. The best neutrals are those who understand the field in which they work. Yet, the ADR movement often seeks to replace issue-oriented dispute resolution mechanisms with more generic mechanisms without considering the importance of substantive expertise.

Some would respond that judges are generalists and yet we trust our state and federal judiciary to resolve a broad range of disputes. This argument, however, is deceptive because judges are specialists in resolving issues of law. Law aims to resolve disputes on the basis of rules, whereas alternative dispute resolution mechanisms turn to non-legal values. If disputes are to be resolved by rules of law, the legal experts designated by our state and federal constitutions – that is, the judges – should resolve them. If non-legal values are to resolve disputes, we should recognize the need for substantive expertise.

As we reflect, above all we must remember that the overarching goal of alternative dispute resolution is to provide equal justice to all. “If . . . reform benefits only judges, then it isn’t worth
pursuing. If it holds out progress only for the legal profession, then it isn’t worth pursuing. It is worth pursuing only if it helps to redeem the promise of America.” So long as this remains the paramount goal of ADR and we continue to focus on the essential role of public values reflected in law, the progress of the ADR movement in the next decade will surely surpass that of the last.

QUESTIONS AND DISCUSSIONS

1. What are the major concerns that Judge Edwards has with the expansion and use of ADR processes?

2. What would Judge Edwards’ position be on individuals serving as neutrals in mediating workplace disputes if they lack of substantive knowledge of employment laws and regulations?

3. Do you support Judge Edwards’ thesis, or do you think he is overly concerned? Explain your response.


INTRODUCTION

Mediators and scholars are interested in factors that contribute to a successful mediation. The settlement of the dispute is one measure of success. If one could identify certain key process or outcome variables that caused more disputes to be settled in mediation, a mediator could use this information to maximize settlement potential. We seek to add to this search for the “holy grail” of mediation settlement.

Using an extensive database from the evaluation of the Equal Employment Opportunity Commission (EEOC) we attempt to determine whether certain procedural and distributive factors are significant predictors of case resolution. We also examine whether other factors, such as whether a party was represented at the mediation, are correlated with resolution of the dispute.

LITERATURE REVIEW

Kochan and Jick propose that in public sector labor mediation, “the more aggressive the style of the mediator, the more effective the mediation process.” Lim and Carnevale find that “mediator tactics that are seen as leading to successful conflict resolution in one dispute are seen as irrelevant or even
Lim and Carnevale observed that “mediators who facilitated communication and provided clarifications and insights are most likely to achieve settlement.”

Shapiro, Drieghe, and Brett analyzed why certain mediators are more successful than others. The study is based on self reported data from five mediators for 327 grievance mediations. The study found that while four of the five mediators varied their behavior and tactics across the mediations “all were about equally successful in settling grievances.”

Thoennes and Pearson analyzed the factors that predict outcomes in divorce mediation. They found that “the most heavily weighted predictors were related to perceived mediator behavior – specifically to the role of facilitating communication, and providing clarification and insight.”

Henderson notes that “for the majority of researchers in mediation, however, the most challenging issue to date has been understanding the factors which explain mediation effectiveness.” He then adopts the argument that effectiveness is best measured by settlement rate. Henderson observes that it “remains unclear why some disputes subjected to mediation settle and why other disputes subjected to mediation end up in court.” He notes that the research to date by legal scholars, social scientists, and behavioral theorists, has resulted in “largely contradictory” results.

Henderson proposed three constructs that he believes “pervade the literature” to explain mediation outcome for disputes in the construction industry. These three constructs are situational factors, mediator characteristics/interventions, and the procedural status of the dispute. Situational factors in Henderson’s model include the intensity of the dispute, party characteristics (ability to pay, motivation to settle, unrealistic expectations), type of dispute (value, payment, charges), length and complexity of the dispute, and number of parties in the dispute. The second construct is mediator characteristics, including intervention techniques employed (aggressiveness and diversity of techniques), demographic characteristics (age, experience, and functional specialization), and the overall quality of the mediator(s). The third construct, the procedural aspects of the mediation, included the timing of the dispute, the amount of discovery used in the mediation, the source of the request for mediation (i.e. mandatory or not) and the rules used to guide the process.

Concerning mediator conduct, Henderson found that the diversity of mediation strategies was positively related to the settlement of construction disputes. He found that the one variable that was the best predictor of settlement was the rules used by the parties. When parties used their own rules, they usually settled the case. This finding highlighted the importance of the procedural aspects of mediation.

**OUR STUDY**

Our analysis focused on independent variables relating to procedural due process, substantive due process (distributive), and a few other variables that did not fit into our procedural/substantive
classification. We tested whether these variables influenced the mediation settlement rate. We first identify the various variables that we used to measure participant satisfaction with the mediation. After introducing the results of this research, and these variables, we then use the same variables to measure whether they influenced the settlement rate.

THE PROCEDURAL JUSTICE VARIABLES

We seek to identify if certain measures of procedural justice influence settlement. Procedural justice can be defined as “the perceived fairness of the process through which decisions are made . . . .” The theory of procedural justice posits “disputants prefer procedures that provide them with voice, control over the outcome, and fair treatment by the third party.” Lind, Kanfer, and Early note that early theories of procedural justice associate one’s voice in the process with one’s belief about the instrumental consequences of that input. More recent theories explain procedural justice as resulting from the symbolic and informational consequences of the procedures rather than the procedure’s capacity to provide good outcomes. Under either concept of procedural justice, parties to a dispute must first be given a fair chance to voice their concerns. Second, parties must have control over the outcome of mediation since mediation is about self-determination. Third, the mediator must be perceived as (and be) fair and neutral.

An element of procedural justice is “knowing participation,” i.e., participant understanding of the process. Research in organizational theory has shown that “understanding is an important factor in employee attitudes towards organizational activities.” Hence, understanding of the process is essential for participant satisfaction with the process and for their perception that the process was fair.

The “timing of mediation” and “representation” are two other important variables that affect procedural justice. Prompt scheduling of a program is considered to be an indication of effective program management. The timing of mediation is important since one of the touted advantages of mediation is that it is less time consuming than other methods of dispute resolution. Once the case is referred to mediation, and if it takes place promptly (i.e., before positions harden), a “settlement may be more likely.”

Procedural justice requires that there is opportunity for assistance to the participants. Representation in the form of either attorneys or other knowledgeable persons, for one or both parties, may serve to balance power. It is important not only to let the participants know that they can bring in representatives, but also to notify each party as to who will be representing the other party. There is empirical evidence to support the notion that when one party to a dispute appeared with an unanticipated representative, the other party was concerned about the fairness of the process.

Mediator conduct is also important to the procedural due process aspects of mediation. One of the commonly included criteria in the definitions of mediation is that the mediator be (or be perceived to be) neutral or impartial. Welton and Pruitt observe that while neutrality often contributes to successful
mediation, it is not a *sine qua non* for success. Some researchers point out that “neutrality, as traditionally practiced, actually includes two potentially conflicting qualities: (1) impartiality, which refers to the mediators’ ability to maintain an unbiased relationship with the disputants; and (2) equidistance, which involves the mediator temporarily becoming aligned with each party to encourage disclosure and assist the party in expressing the case.” Mediators must be impartial, fair, and diligent in order to foster trust between the parties and between the mediator and the parties. They must also maintain the confidentiality of the parties.

**DISTRIBUTIVE JUSTICE**

Distributive justice measures include participant satisfaction with the outcome of mediation and participant perceptions regarding outcome. Here participants believe that they have received their fair share of the available benefits. These questions dealt with whether or not the party believed that they had obtained the results they wanted from the mediation.

**THE IMPORTANCE OF PROCEDURAL VS. DISTRIBUTIVE JUSTICE**

The importance of procedural justice to participant satisfaction has been documented. It is not enough for one to believe that they “won” their dispute. Thus, Gordon, in his study of the issues of justice in a union-management grievance procedure, emphasized the importance of procedural justice in workplace dispute resolution. He argued “research on grievances will remain incomplete lacking the perspectives of employees who are themselves subject to the grievance system.” Gordon used a five-point Likert scale that ranged from “Very Satisfied” to “Very Dissatisfied” to survey employees’ overall satisfaction with the grievance system. He found that the overall evaluation of the grievance system was significantly correlated with the measures of perceived procedural and distributive justice. He also found that the correlation was significantly higher for the procedural justice factors as opposed to the distributive justice factors. Thus, his research seemed to support the findings of Folger and Greenberg that the “procedures followed, rather than the outcomes obtained, have the greater influence on the overall evaluation of dispute-resolution systems.”

We now use these measures to determine whether the presence, or absence, of procedural due process and distributive variables are related to whether or not the dispute is settled.

**THE DATABASE**

We used two databases that were drawn from surveys returned by charging parties and respondents in mediation. Our EEOC database for charging parties consists of 687 mediated cases. We excluded 142 cases from our database due to missing variables. Of the remaining 687 cases, there were
542 cases that were settled voluntarily at mediation; 145 cases were not resolved. Our second database was for respondents in mediation. The second database consisted of 584 settled cases and 139 cases that were not resolved. We excluded 106 cases with missing variables.

RESEARCH METHODOLOGY – RESULTS

There were 1683 completed surveys from the charging parties and 1572 completed surveys from the respondents. These numbers include only properly-completed questionnaires. As discussed earlier, in cases where the protocol and the instructions were not strictly followed, the questionnaires were excluded from the final sample. From these questionnaires we examined the mediated cases and developed our Charging Party and Respondent databases.

THE INDEPENDENT VARIABLES – PARTICIPANT FEEDBACK REGARDING THE MEDIATION

The survey questions regarding participant feedback were comprised of two major areas of evaluation: procedural and distributive elements. Questions concerning procedural elements included statements about mediation preparation, comprehension of the process, voice (i.e., opportunity to present views), and the mediator’s role and conduct.

Participant satisfaction with the distributive elements of mediation was measured using four questions concerning the results. More specifically, three questions were asked about participant attitudes regarding the realistic nature of the options developed during the mediation, their satisfaction with the fairness of mediation, and their satisfaction with the results. The fourth distributive question was a “yes/no” question concerning whether the participants obtained what they wanted from the mediation. With the exception of this question, all other distributive and procedural questions discussed above were measured using a Likert scale with a continuum of one to five, one representing strong disagreement and five representing strong agreement.
PROCEDURAL ELEMENTS AND MEDIATION

Four statements were used to measure the participants’ satisfaction with the mediation process. Of these, the first two were “pre-mediation session” or “mediation preparation” statements regarding whether the participants received an adequate explanation from an EEOC representative and whether the session was scheduled promptly. The next two statements asked whether the participants understood the process and had an opportunity to present their views.

<table>
<thead>
<tr>
<th>Statements</th>
<th>Charging Parties</th>
<th>Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Procedural Elements:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>After the mediator’s introduction, I felt that I understood the mediation process</td>
<td>4.35</td>
<td>4.53</td>
</tr>
<tr>
<td>I (or my representative) had a full opportunity to present my views during the mediation process.</td>
<td>4.39</td>
<td>4.57</td>
</tr>
</tbody>
</table>
THE MEDIATOR

The second set of questions regarding procedural due process focused on statements regarding the mediator’s performance. More specifically, participants were asked whether the mediator understood their needs, helped to clarify their needs, remained neutral in the beginning as well as throughout the process, helped to develop options for the resolution of their claim, and used procedures that were fair to them. Table 2 reflects the participant satisfaction with the procedural elements of the mediation on a Likert scale of one to five with five indicating strong agreement.

<table>
<thead>
<tr>
<th>TABLE 2</th>
<th>Participant Satisfaction with the Procedural Elements of Mediation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Statements</td>
<td>Charging Parties</td>
</tr>
<tr>
<td>Procedural Elements: Mediator</td>
<td>Mean (n, %)</td>
</tr>
<tr>
<td>The mediator understood my needs.</td>
<td>4.30</td>
</tr>
<tr>
<td>The mediator helped clarify my needs.</td>
<td>4.25</td>
</tr>
<tr>
<td>The mediator remained neutral throughout the session.</td>
<td>4.42</td>
</tr>
<tr>
<td>The mediator helped the parties develop options for resolving the charge.</td>
<td>4.27</td>
</tr>
<tr>
<td>The procedures used by the mediator in the mediation were fair to me.</td>
<td>4.33</td>
</tr>
</tbody>
</table>

ANALYSIS

The development of realistic solutions by the mediator and satisfaction with the fairness of the mediation session, two distributive variables, are key factors identified by both the charging parties and respondents as assisting in the settlement of the dispute. While satisfaction with the fairness of the mediation is important, we note that it should be expected in a settled case and arguably is a byproduct of settlement. However, of more interest is the mediator development of realistic options. The quality of the intervention technique of option generation, a measure which is related to the overall quality of the mediator, was the best predictor of settlement. This result indicates that mediator skill does influence settlement and underscores that mediator skill can be a key factor in the resolution of disputes in mediation. While we characterized this as a distributive variable in our model, it fits as easily into Henderson’s model as a mediator characteristic, specifically as an intervention technique. This adds to Lim and Carnevale’s observation that facilitating communication and providing clarification and insights.
were most likely to achieve settlement. It may well be argued that quality option generation does provide such clarification and insight. One may also argue that option generation is an evaluative tactic and that it is the quality of the evaluative option generating which contributes to settlement. This then would suggest that quality evaluative mediator conduct is a valued process.

We find it interesting that for those mediations involving an attorney(s) at mediation, a situational factor, for charging parties with representation this factor reduces the chance of resolution of the dispute at mediation. This could be because charging parties’ use of counsel indicates that the case is valued higher and thus may not be amenable to resolution at the EEOC pre-investigation level, because counsel is a barrier to resolution, or may even signal that the mediations resulted in unrepresented charging parties compromising their claims and that the presence of counsel prevents the charging party from “settling cheap.” Additional research is necessary to better understand this dynamic. One interesting question is whether those charging parties who do not settle early will later receive a larger settlement offer or otherwise obtain significantly more money than those who settle early without counsel.

In sum, we found that the likelihood of settlement at mediation significantly correlated with both parties reporting that the mediation was perceived to be fair and the mediator was perceived to have generated realistic options. We also found that charging party representation, but not respondent representation, was likely to reduce the chance of settlement.

QUESTIONS AND DISCUSSIONS

1. A number of studies have been conducted on why mediation of conflicts are very successful? What are those factors?
   a. Thomas Kochan and Todd Jick factors?
   b. Rodney Lim and Peter Carnevates factors?
   c. Shapiro, Drieghe and Brett factors?
   d. Nancy Thoenne and Jessica Pearson factors?
   e. Douglas Henderson’s factors?

2. What variables were used by McDermott and Ervin which influence mediation settlement? Define each. How would they apply in workplace mediations?

3. What is distributive justice?
II. THE ROLE OF THE MEDIATOR IN WORKPLACE DISPUTES

A. ROLE AND RESPONSIBILITY OF THE MEDIATOR

- To provide a forum for management and the employees to participate in to resolve their dispute in an informal atmosphere.
- To identify possible corrective action and/or potential settlement options to propose to management and the complainant. This may depend on the form of mediation.
- To not make findings or suggest that any discrimination occurred or did not occur during the mediation of EEO complaints.
- To encourage all parties during mediation to set forth all the information necessary to identify the issue(s) and to work towards a resolution of each issue.
- To encourage all parties to communicate their concerns openly and to each other.
- To draft the agreement and coordinate the final approval with the appropriate parties where resolutions are reached by the parties. [This may vary within organizations]
- To directly contact division directors, general counsel, labor relations, and other appropriate officials to reach a settlement between management and the complainant. [This may vary within organizations].
- To cease the mediation process when it is clear that the complaint cannot be resolved to the satisfaction of all parties.
- To emphasize that discussions during mediation must remain confidential.

What Is the Role of the Mediator In Your Organization?
B. THE MEDIATOR IN THE MIDDLE OF WORKPLACE CONFLICTS

INTEREST

IDEAS

MEDIATOR

FACTS

POSITION

RIGHTS

CULTURE
C. EMERGING ETHICAL ISSUES IMPACTING NEUTRALS [LECTURE]

III. THE ROLE OF THE ADVOCATES IN WORKPLACE DISPUTES
A. REPRESENTING CLIENTS IN MEDIATION [LECTURE]

1. The Advocate’s Role During Pre-Mediation
   • Explain the Mediation Process
   • Explain the Roles of the Mediator and Advocate
   • Explain the Negotiation Process
   • Identify Interest and Clarify Position

2. Representatives’ Preparation
   • Explore Interest of Other Side
   • Outline Settlement Options and Reasoning
   • Review Case Law and Regulations
   • Consider Weakness and Strength of Case
   • Review Liability and Damages Issues

3. Advocates’ Role During Mediation
   • Presentation of Position
   • Venting the “Drama”
   • Facilitative vs. Adversarial
   • Make Initial Offers
   • Past to Perspective
   • Explore Settlement Strategy

4. Role of Advocates at Impasse
   • Focus on Issues not Party
   • Reality Check
   • Seek Assistance from Mediator
   • Look Outside the Box
   • Consider What Happens If No Settlement

B. EMERGING ETHICAL ISSUES IMPACTING ADVOCATES [LECTURE]
IV. THE MEDIATION PROCESS AND WORKPLACE DISPUTES
   A. APPLYING THE SEVEN STAGES OF MEDIATION IN WORKPLACE DISPUTES

   INTRODUCTION
   PROBLEM DETERMINATION
   SUMMARIZATION
   ISSUE IDENTIFICATION
   GENERATION AND EVALUATION OF ALTERNATIVES
   SELECTION OF APPROPRIATE ALTERNATIVES
   CONCLUSION
B. GETTING THE MEDIATION PROCESS STARTED

INTRODUCTION OF THE MEDIATOR AND THE PARTIES

- Commend the Parties for their Willingness to Cooperate and Seek a Solution to Their Problems
- Definition of Mediation and the Mediator’s Role
- Statement of Impartiality and Neutrality
- Description of Mediation Procedures
- Explanation of the Concept of the Caucus
- Definition of the Parameters of Confidentiality
- Description of Logistics
- Suggestions for Behavioral Guidelines (Discussed Later)
- Answering Questions Posed by the Parties
- Joint Commitment to Begin
C. STARTING THE MEDIATION PROCESS

THE OPENING STATEMENTS:

- THE MEDIATOR

- THE GRIEVANT/EMPLOYEE

- MANAGEMENT

ALLOW THE PARTIES TO TELL THEIR SIDE OF THE STORY
D. POSITION STATEMENT FROM THE PARTIES

The Mediator’s Role

- Ask open-ended questions
- Watch for “signals”
- Calm the parties
- Summarize positions
- Ascertain whether the second party comprehends
- Thank the first party for their contributions

This process is then repeated with the second party.
### Sorting Out What to Do After the First Meeting

- Characterizing the problem
- Establishing priorities
- Developing trade-offs
- Structuring the discussion
- Moving the parties toward a settlement
- What documents are needed?
- How to get the parties to negotiate
- Are the right persons present?
F. WHAT TO DO WITH THE ATTORNEY/REPRESENTATIVE WHO IS REPRESENTING A PARTY?

SHOULD HIS/HER MOUTH BE TAPE?D?

THE ISSUES

• Cooperative negotiation style
• Confrontational negotiation style
• Lacks knowledge of substantive issue
• Lacks ADR skills

Mediators must educate the attorney/representative prior to starting mediation.

• Lacks knowledge of your limitations

How to use the attorney/representative to reach a resolution?

1.

2.

3.

4.

5.
G. ESTABLISHING A POSITIVE EMOTIONAL CLIMATE

- Preventing interruptions or verbal attacks

- Encouraging parties to focus on the problem and not each other

- Translating value-laden or judgmental language of disputants into less emotionally charged terms

- Affirming clear descriptions or statements, procedural suggestions, or gestures of good faith while not taking sides on substantive issues

- Accepting the expression of feelings and being empathic while not taking sides

- Reminding parties about behavioral guidelines that they have established

- Diffusing threats by restating specific threats in terms of general pressure to change
H. WHEN DOES THE MEDIATOR PROVIDE AN OPINION?*

- The mediator believes that one party is taking advantage of the other (unequal bargaining power)

- The parties are reaching an agreement that in the mediator’s view appears to be sufficiently unfair that it would be a miscarriage of justice (unconscionable)

- The mediator believes that a court or the EEOC would not accept the agreement if appealed

- The agreement cannot be implemented

- The agreement violates the organization’s policies/procedures

- The agreement does not resolve the issues

*NOTE: Depending on the mediation program, the mediator may be prohibited from ever giving an opinion.*
I. WHY HAVE SEPARATE SESSIONS?

Don’t Forget to Tell the Parties Up Front That There May Be Separate Caucuses

- Discover the underline issues
- Prioritize the parties’ issues and remedies
- Honestly discuss settlement options
- Determine the level of trust/credibility of mediator
- Determine the parties’ bottom line
- Allow parties to release emotions
- Gives the mediator a chance to plan next step
- Continue to build trust
- Cool-down period
- Clarify their positions
- Determine if they want to “test” a possible proposal
- Explore alternatives

Feedback:
- Focus settlement
- Realistic

WHEN TO MEET SEPARATELY WITH ADVOCATES?

- The parties are about to explode with emotion
- The mediation session is off track

Identify the underlining problem that is causing the anger and hostility.
J. TECHNIQUES FOR REDUCING/ELIMINATING INTIMIDATION DURING THE MEDIATION SESSION

THE MEDIATION SESSION

- Have a number of pre-mediation sessions with the parties

- Emphasize to the hostile individuals that their conduct may prohibit the conflict from being resolved

- Have a number of separate meetings with the hostile individuals during mediation

- Encourage the hostile individuals to air their feelings in a separate session with the mediator

- Explain to non-hostile individuals that it’s ok for parties to release anger

- Acknowledge that the employee has right to file a complaint and civil suit

- Strictly control who speaks and when they speak
K. BEHAVIOR GUIDELINES DURING MEDIATION

BEHAVIORAL GUIDELINES THAT SHOULD BE CONSIDERED BY MEDIATORS AND PARTIES

- Decisions about how the background of the problem will be examined
- Speaking order of the disputants
- How disagreements over data will be managed
- Time frames for the negotiation session or sessions
- Agreements on observers and witnesses
- Rules preventing slanderous statements
- Rules regarding interruptions
- Procedures for intermissions