DISPUTE RESOLUTION SECTION

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"*Disputes arise across a broad spectrum of relationships and substantive areas of the law. Alternatives to litigation may best serve client needs for resolving many of these disputes. The NYSBA Dispute Resolution Section has prepared a series of White Papers to set forth some of the special advantages of mediation in the various contexts in which disputes commonly arise."*

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MEDIATION TO RESOLVE WORKPLACE DISPUTES: A USER'S GUIDE

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The use of mediation and arbitration to resolve disputes between private or public employees and their employers has become increasingly important as the courts and clients struggle with the expense and uncertainty of litigating the myriad of statutory and civil claims that arise out of workplace disputes.

Any lawyer asked to handle an employment dispute – whether on the plaintiff's side or employer's side –should consider the alternative of mediation and should also be aware of the possible existence of an agreement requiring mediation or arbitration of a particular dispute. This paper will outline the main alternative dispute resolution issues counsel should be aware of when advising a client involved in an employment dispute.

MEDIATION

To illustrate how mediation can be used to resolve workplace disputes, consider this common workplace scenario:

> ACME Insurance Agency fires Sheila Smith "for performance related reasons" after several years of employment. Although the company had an employee manual requiring progressive discipline, the supervisor, Rob Rawlins, did not document the reasons for the termination, but simply concluded, "Enough is enough. We have to fire this person." Rawlins calls the employee into his office on a Friday afternoon and says, "We have no job for you anymore. Don't come in on Monday." Sheila had no chance to meet with a

> human resources manager or any higher-level manager to offer her view of the situation. Sheila decided to contact a lawyer. Sheila provides the lawyer with her pay stubs, the employee handbook, a positive performance review, and copies of some e-mails she received from Rawlins that contained very offensive language. She also reveals that she has overheard supervisors engage in raunchy conversation and says Rawlins frequently displayed disdain and disgust whenever he had to deal with her. She and the lawyer discuss her belief that she was fired because of her gender and because she wouldn't go along with the harassment she observed and experienced at work. The lawyer sends a letter to ACME, that states that the termination may be unlawful and asks for an opportunity to negotiate a reinstatement or at least a severance package before the employee commences a lawsuit or files a charge with the Equal Employment Opportunity Commission.

This scenario represents a workplace-related dispute that is appropriate for resolution through mediation. While the employer's lawyer may take a hard-line and say, "my client did nothing wrong. Your client was incompetent," such a response may result in the filing of a charge of discrimination with the EEOC, New York State Division of Human Rights, New York City Commission on Human Rights, or a discrimination case in state court. Any one of these proceedings has the potential to result in significant time and expense, even in the initial stages, that far exceed the cost of a severance agreement reached through negotiations. Employers may also opt to resolve these disputes by using ADR.

First, some large employers have policies requiring employees and former employees to submit their concerns and grievances to mediation prior to instituting arbitration or litigation. Therefore, lawyers would be well-advised to review any employment agreement, job application, employee handbook, or other policy statement that describes whether the employer has an internal dispute resolution process that an employee will be required to exhaust before commencing litigation.

Second, some employers will respond to employee claims with an invitation to mediate or will respond affirmatively to an employee's request to mediate.

Third, the federal courts in New York and the Supreme Court of New York, in various counties, have court-annexed mediation programs that provide a panel of mediators to whom a case can be referred by a judge or voluntarily selected by counsel. This process can be initiated at any stage of litigation. Similarly, parties before the EEOC may also request mediation conducted by EEOC mediators.

What is it about mediation that makes it a particularly effective dispute resolution tool for workplace disputes? In mediation, the employer and employee can sit down with each other and their lawyers, and with the help of a neutral third party, review the facts that led to the challenged employment decision and reach a resolution before either side incurs unnecessary legal fees, additional emotional wear-and-tear, and disruption of normal business activities. The unique character of employment disputes, as well as the historical model of third-party intervention in workplace disputes, results in mediation's high success rate for resolution of employment disputes.

Employment disputes typically involve both economic and emotional issues

Employment disputes typically involve one or more claims under federal, state or New York City anti-discrimination laws, challenging a discharge or other employment decision. Job loss causes not only economic injury but undermines the former employee's self-esteem and the perceptions of others about the employee's ability to succeed at work. Similarly, employer representatives often feel they have done everything possible to motivate the employee to provide the required job performance, so decision-makers at the company will also have emotional reasons to support his/her belief that the employee was treated "fairly."

A negotiation between lawyers over the phone or outside a courtroom deprives the parties to the dispute – the employer and employee - of the emotional catharsis that is available when both sides can sit down, review what led to the challenged employment decision, the impact on the people involved, and turn toward devising a resolution that will allow both sides to progress toward the future. From the employee's standpoint, the ability to explain his or her side of the story and the economic and emotional impact that the challenged employment decision has had is a turning point that may enable him/her to accept the reality of an employment decision and allow the employee to move on with life. From the employer's standpoint, the mediation gives the employer an opportunity to learn something about the employee, the supervisor, and the workplace that they were not aware of previously, or that they knew of but had not completely or properly addressed. Here is an example of how this works:

> After several hours of mediation, the aggrieved employee asked if a one-on-one meeting with the mediator was possible and counsel agreed. After telling the mediator that she reminded her of a former boss who had been an important mentor, the plaintiff talked about how upset the case had made her. She also talked about how the attorneys' negotiations over dollars were leaving her feeling disassociated from the process and from what she was personally looking to accomplish. The mediator was able to help the plaintiff identify her feelings, think through what she really wanted out of a resolution, and work within the process to accomplish that result. The case settled shortly after their caucus.

In employment disputes, the damages recoverable may be exceeded by the attorneys' fees and costs of litigation, making early resolution more desirable

A unique feature of employment litigation is that the costs of litigation and attorneys' fees often exceed the damages that can be obtained in court even if the employee is successful. Damages in the form of back-pay and front-pay are a function of the employee's compensation; however, the costs of litigation are the same whether the employee was a low earner or high earner. In addition, in employment litigation there are fee-shifting statutes that enable the prevailing party plaintiff to shift responsibility for the plaintiff's attorneys' fees and costs to the employer. Thus, an employer has the risk of footing its own legal fees and the costs and attorneys' fees of the employee should the employee prevail. Some employers have employment practice liability insurance where defense costs and damages awards are covered. However, faced with the prospect of paying the costs and attorneys' fees for both sides, the opportunity to settle in mediation before fees

and expenses climb is an important benefit unique to employment litigation. By the same token, mediation gives the employer an opportunity to convey to the plaintiff, that should the plaintiff lose or receive less in a lawsuit than the employer offers in an “offer of judgment”, the employer may recover its costs of defense . . . an eventuality that may convince an employee to take a settlement even though it is less than the employee hoped he/she would recover in litigation.

A mediator can offer a fresh perspective on the facts and law

Quite often, employment counsel and the client get so involved in the minutiae of moving through discovery toward the ubiquitous summary judgment motion, that they "lose the forest for the trees." Counsel may dread the call from a client wanting an update on the status of a case filed long ago; the client may become dissatisfied with counsel's view of the case, which has migrated from "optimistic" to "doubtful." In such cases, a mediator can provide a "reality check" about the prospects for success at trial that counsel may have difficulty communicating to the client or that the client is having difficulty hearing. A mediator who has employment law experience and is aware of relevant legal developments in the area can help counsel and clients assess and communicate about the strengths and weaknesses of a case. Further, the mediator does not have the same emotional investment in "winning" that the counsel and parties have and is able to provide a dispassionate viewpoint that can move the parties away from a stalemate. Here is an example of how this works:

> A sales representative who had worked for a company for many years was laid-off after a change-in-control. The new company required sales representatives to do a lot more marketing and promoting than they were used to before the buy-out. The sales representative was unfamiliar with power-point and had never felt comfortable using Microsoft Outlook to file contacts, preferring his own “rolodex” method. He was eventually targeted for a lay-off since he was rated “least flexible,” among employees in his classification. He maintained he was terminated due to his age and while his lawyer had uncovered some unexplained statistical disparities in the ages of the employees selected for lay-off, he was having difficulty explaining to his client the perils of proceeding with an age discrimination claim in federal court. In mediation, the mediator used a large flip chart to illustrate the life cycle of an age discrimination case, the complexity of continued discovery and depositions, the time it takes to get to trial, and the limited nature of his potential economic recovery. The mediator let the employee offer alternative scenarios, which the mediator drew on the flip chart in different colors. After the mediator left to caucus with the employer’s-side, the employee focused for the first time on the risks and rewards of continued litigation. Ultimately, he opted to accept a settlement. The plaintiff’s lawyer later remarked that he had not been able to get his client to understand the uncertainties of litigation until the mediator literally “drew a roadmap” for his client.

Parties can obtain in a mediation remedies that may not be awarded in litigation

Mediation is an effective dispute resolution mechanism in employment cases because the parties can fashion remedies that may not be available through litigation. The most common of these remedies are transfers and reassignments, letters of reference,

assistance with out-placement, provision of health insurance, or provision of training. Mediation can also provide an opportunity for apologies that would never be available in litigation. Similarly, in disputes over unpaid wages, commissions, or bonuses, mediation provides an opportunity for both sides to "work through the numbers" without spending inordinate time battling over depositions or expert opinions. So, for example, how did the mediation between the sales representative and the former employer described above end up?

> The sales representative achieved an enhanced severance package, the employer contributed to his attorneys' fee, he received some money toward out-placement, and the employer gave him a letter recognizing his contributions to the business that led to the merger.

Mediation provides confidentiality and avoids publicity

The privacy afforded by mediation processes is a key factor contributing to the success of mediation in resolving employment disputes. Both employers and employees may wish to avoid the glare of public attention and scrutiny that often accompanies employment litigation. The most recent obvious examples of negative publicity surrounding employment litigation include the Anouka Brown verdict against Madison Square Garden, the sexual harassment case against Bill O'Reilly, the sex discrimination case against Morgan Stanley, and the class actions against Wal-Mart and Starbucks.

Airing employment disputes in the press and before a judge or jury may affect personal relationships of the parties and the reputation of witnesses, interfere with the conduct of daily business transactions, and even impact the plaintiff's ability to secure new employment without fear of retaliation. In employment mediation, the mediator and counsel can provide the employee and employer with an opportunity for a private face-to-face confidential conversation that they never had prior to or at the time of termination; that way "unfinished business" can be conducted outside the presence of counsel, a court-reporter, or a judge or jury. Very often, these intimate conversations about issues that only the employer and employee can truly understand pave the way to resolution outside of litigation. The confidentiality provided in the mediation process encourages candor, problem-solving, and creativity in resolving employment-related disputes while avoiding the destructive impact of negative publicity. An example follows:

> Donald, an Executive Vice-President of a Fortune 500 company, had a brief romantic dalliance after a Christmas party, with Jane, a much younger sales assistant. They returned to her apartment after the party where they had sexual relations. They met several times thereafter in bars near the office. When Jane was terminated by another supervisor for poor performance, Jane raised the issue of sexual harassment for the first time in her exit interview. Upon investigation, Donald admitted the conduct, said it was consensual, but asked the Company to resolve the matter so that his wife and children would not find out. The case settled in one day in mediation, both parties acknowledging that the situation was unfortunate but that they needed to put the incident behind them.

Mediation is more predictable than litigation

No lawyer can ethically or practically guarantee a client a particular result in court. Litigation is unpredictable: a document can surface that no one remembers; a witness can crumble on the stand; a jury may not appreciate the nuances of an argument. Particularly in employment litigation, memories fail, the emotional significance of an employment decision fades, and the witnesses may have dispersed to other jobs. In mediation, without rules of evidence or procedure, the parties can use less structured means to convey the heart of a problem to the mediator and the other side which may facilitate settlement discussions, concluding the matter without suffering through the vagaries of litigation.

Impediments and shortcomings in the mediation process

Mediation is not a panacea for all hotly contested employment cases; there will be those extremely emotional current or former employees who won't back down and those cases where an employer won't settle unless a court order is entered against them. Some employers are concerned that the availability of mediation will encourage frivolous complaints. Others are concerned that mediation simply adds a layer of time and expense when a case does not settle. Other attorneys have also expressed the concern that mediation is often used as a form of discovery or an attempt by insurance companies to tease out an adversary's "bottom-line" from which new negotiations will later proceed.

Lawyer's Role in Making Mediation an Effective ADR Mechanism

Prepared for both the pros and cons of mediation, attorneys can address the following issues in order to maximize the effectiveness of mediation of employment disputes.

-Factors to consider in deciding whether to use mediation

In pending litigations or administrative proceedings, the tribunal may order the parties to court or agency-annexed mediation either after an initial scheduling conference, at a pre-hearing conference, settlement conference or upon request of the parties. In other circumstances, counsel for one or both parties may elect to raise the possibility of mediation at some stage of the litigation.

It is a matter of professional judgment whether to raise the idea of mediation and at what stage of the litigation. Factors to consider include: budget, ability of counsel or the parties to negotiate settlement directly, stamina of the parties for litigation, timing (e.g., time to trial, degree of complexity of discovery, expense of motions), and desirability for confidentiality. Some lawyers are "mediation-friendly" and will suggest mediation as a matter of course even at the "demand letter" stage. Others believe that mediation is most useful following exchange of pleadings, after at least preliminary discovery, when motions are pending, or after summary judgment has been denied. Lawyers should dispense with the notion that raising mediation as an option to explore settlement is a sign of weakness. Mediation has become such a favored ADR

procedure in employment litigation that lawyers should consider mediation in order to save their clients fees and expenses in the first instance.

-Process of selecting mediators and criteria used in selection process

At present in New York, other than criteria to serve on court-annexed mediation panels or the panels of private dispute resolution providers, there are no governmental credentialing entities for mediators and no licensing requirements for mediators. Many mediators are lawyers, but others are certified social workers, college professors, or have worked as dispute resolution professionals for the government or private industry. The federal and state courts have panels of mediators who must have a minimum number of years of practice and must complete government-sponsored training programs or their equivalent. In addition, the American Arbitration Association, JAMS, The International Institute for Conflict Prevention and Resolution (CPR) Martindale-Hubbell, Mediate.com, Federal Mediation and Conciliation Service, and other provider-organizations have neutral panels, entry to which depends on experience, training, and reference requirements. Still other mediators practice privately. Thus, mediator selection is very much an "ad hoc" process based on who the lawyers know and "word of mouth."

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

Lawyers embarking upon the process of mediator selection should also be aware that mediator styles vary widely. Some adopt an "evaluative" approach, where the mediator shares with the parties his/her opinion as to likely outcomes and uses persuasive powers to cajole the parties to a settlement zone. Former judges and mediators with a specialized substantive expertise tend to practice the "evaluative" style. Other mediators, often with a social work or more psychological-orientation, use a "facilitative" approach which avoids any evaluative assessment and limits the mediator's role to helping the parties communicate effectively. Most experienced mediators will use a combination of "evaluative" and "facilitative" approaches as the mediation progresses.

-Mediation Agreements

Parties should not embark upon the process of mediation without a written mediation agreement. As noted above, there is no uniform mediation law in New York, so the parties must provide the ground-rules for the mediation themselves. Courts and agencies with mediation programs provide form mediation agreements. Private mediation agreements should at a minimum provide for: name of the parties; the mediator's name; the place, date, time; the mediator's compensation rate and fee structure; the confidentiality provisions; mediator immunity from serving as a witness in subsequent proceedings; document retention; etc.

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

-Pre-Mediation Communications

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

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

-Attendance of party, witnesses, experts, "significant others"

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

In addition, some attorneys believe that the presence of an "expert" or a party representative with unique knowledge of a particular issue involved in the case can contribute to the progress of the mediation. For example, if lost income is an issue, a labor

economist who may advise the parties on job market trends, data on income replacement, and wage and salary data, may be an appropriate attendee. Similarly, if stock valuation is an issue, an accountant or stock options specialist might help to advance the discussion. These "experts" may provide critical objective standards to assist the parties in entering a settlement zone. In addition, if one side brings such an expert, it may give the other side an idea of the nature of the case that will be needed if the litigation proceeds.

-The Mediation session

Most mediations proceed in the following way:

(1) Initial Joint Sessions— The mediator will introduce himself/herself to the parties and counsel and general introductions will be made. The mediator will review the procedure for the session, review the confidentiality agreement, and ask for initial presentations. A skilled mediator will assess the mood and make whatever opening remarks are necessary to foster a settlement climate. Some mediators will also address at the initial session whether the participants will have a break for lunch, and whether any of the participants have time constraints. Mediation is usually a lengthy process, so counsel and their clients ought to be prepared to give as much time as is necessary to facilitate a successful mediation.

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

(3) Caucuses: Separate & Joint—what goes on in the other room?

Following initial opening statements, the mediator may conduct questioning of both sides in the presence of both sides. There may be some additional fact-gathering and issue exploration that can proceed with all parties in the room. However, it is also common for the mediator to speak with the parties and counsel in "separate caucuses" where the real work of determining additional facts, relevant law, and the "interests" of the parties behind their "positions" can take place. It is not unusual for the mediator to spend significantly more time with one side than the other, depending on the issues involved. These separate caucuses also provide an opportunity for counsel to work on their client's settlement range, expectations with regard to probability of success, and other case preparation issues. Caucuses also present a continuing opportunity to review the file and do critical fact-gathering.

(4) Negotiating the Price of Settlement

At some point, the tough work of negotiating the economic (and non-economic) terms of a potential settlement will start. Counsel should consider in advance their reaction

to initial “extreme” offers and counter-offers. Before the mediation, counsel should have some idea of whether their adversary will be a "hard-bargainer" or a more "reasonable" negotiator. "While parties expect a 'reasonable amount of unreasonableness' in the other side's opening proposal, they react badly to what they perceive to be an extreme position." D. Golann, "Insulting First Offers, and How to Deal with Them," JAMS Dispute Resolution Alert, Vol. 2, Number 3 (Jan./Feb. 2002), at 1. The work of the mediator is to keep the parties engaged in the negotiation even where the parties appear hopelessly far apart. The mediator will continue to question the parties about the facts, relevant law, interests, and will attempt to get the parties thinking about the strengths and weaknesses of their case as well as their adversaries' case. Some mediators will use a "decision-tree" which maps out the costs and expenses of continuing with the litigation and the numeric risks associated with each stage of the process, together with an analysis of likely outcomes. Mediators will ask one side how they think the other side will respond to a particular proposal: will they counter, will they "walk"? Counsel should not be surprised, and should prepare their client for any of the following comments: "I'm not bargaining against myself!" "We're leaving!" "I don't think they really want to settle." "This is a waste of time." Mediators are experienced with these declarations and will continue with the process of going back and forth with offers and demands, until the gap shrinks. When this does happen, the "miracle" of mediation is experienced and the parties should turn to the process of memorializing a settlement.

(5) Concluding the mediation

Even after spending many long hours negotiating a settlement, counsel should be reluctant to leave mediation without at least a hand-written summary of the terms agreed upon signed by all parties. Many lawyers come to mediation with a draft of a settlement agreement and fill in the terms if there is an agreement. It is a matter of professional judgment whether to make the draft subject to final form or whether the document generated at the mediation will be enforceable.

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

Conclusion

In sum, counsel in employment cases should recognize that there are alternatives to traditional litigation as a means to resolve such disputes. Indeed, counsel can often save a client significant time and money by first determining whether there is a mandatory mediation agreement or policy in place before commencing litigation. Even in the absence of a pre-dispute mediation procedure, counsel is well-advised to consider using mediation in advance of, or during the course of pending litigation.

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