

# Creative advocacy in voluntary alternative dispute resolution

*Resolving employment disputes without going to trial can serve your client well.*

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Litigation is great for creating courtroom drama and testing lawyers' analytical and theatrical skills. One of the reasons TV and movies often depict lawyers as heroes is that we are trained to enter the courtroom like skilled duelists, seeking to right the wrongs done to our clients. In employment cases, the idea of the lawyer as champion, advancing not only his or her client's interests but also those of the general public, is particularly appealing.

Despite the importance of winning cases at trial, some cases are best resolved in less confrontational ways, one of which is known as alternative dispute resolution (ADR). ADR can range from informal settlement discussions and voluntary mediations with a neutral third party to mandatory arbitration.

Here, the term focuses on voluntary methods of resolution, since being forced into an arbitral forum is only a change in forum, not a change in the method of resolution. When parties enter voluntarily into a mediation, they can obtain many of the benefits of a formal fact-finding while a more meaningful resolution is crafted.

In employment cases, where plaintiffs often need a speedy and meaningful resolution, ADR can make a lasting difference in your client's life and should be

considered early on. Unfortunately, too few lawyers—on both sides of employment disputes—seek truly creative results for their clients. Many defendants and their counsel believe that writing a check is the only way to resolve a dispute in employment cases.

If plaintiff attorneys approach ADR creatively, they may be able to educate defendants to look beyond dollar signs to the parties' real motivations. Doing so can avoid expensive conflict and achieve meaningful resolution.

There is certainly a place for litigating disputes in civil court, with either a judge or a jury as the neutral decision-maker. But in certain circumstances, ADR is the better choice. Why and how should you and your client undertake voluntary efforts to resolve a problem?

## The why

A plaintiff's right to a trial by jury—and a lawyer's delight in a potential Perry Mason moment—need to be balanced against the plaintiff's need for a positive, meaningful closure of an unpleasant experience. Early on, plaintiff lawyers need to outline for their clients every alternative to filing suit and proceeding to a jury trial—and why they should consider these options. Some reasons to pursue ADR follow.

### Showing good faith and rationality.

Exploring the plaintiff's willingness to settle the dispute early is crucial. Doing so will educate the client about the unpleasant realities of litigation down the road.

Also, if the plaintiff is willing to discuss a quick resolution but the defendant is intransigent, you will have a basis for obtaining full fees and expenses in a fee-shifting case. Unreasonable defense objections to your client's proposed resolution will establish the necessity of any time and expense you put into the case.

**Public policy.** As most employment law practitioners know, finding a reasonable accommodation through the "interactive process" outlined in the implementing regulations of the Americans with Disabilities Act<sup>1</sup> (ADA) is a strong signal that parties in disputes over disabilities and accommodations should work things out.<sup>2</sup> Congress has also promoted ADR as a method of resolving citizens' disputes with various federal agencies, stating that if the parties agree to a dispute resolution proceeding, the agency may use it.<sup>3</sup>

The U.S. Supreme Court's decisions in *Faragher v. City of Boca Raton*<sup>4</sup> and *Burlington Industries, Inc. v. Ellerth*<sup>5</sup> sent parallel messages. The message for employers was that they cannot ignore sexual ha-

harassment, and although complainants can pursue sizable remedies for that behavior, employers can take affirmative steps to lessen their liability exposure by issuing clear policies and acting appropriately if a complaint is raised.

A separate message from these opinions was for employees: They should not only object to harassment but also report it. These cases hold that where a clear and effective company policy is in place,<sup>6</sup> employees who believe they have been subjected to sexual harassment must try to resolve the situation using the employer's grievance procedures before filing a complaint.

Thus, both the Supreme Court and Congress have endorsed an ADR framework for putative litigants in two significant areas of employment discrimination. Certainly, plaintiffs should file necessary complaints and prosecute them fully, but if the dispute can be worked out, public policy appears to favor doing so.

**Closure.** An important factor favoring voluntary mediation is that the plaintiff can propose his or her preferred resolution and obtain closure of an employment dispute. This is especially effective in cases where your client has, for example, moved on to a new job, and vindication of the alleged wrong is no longer his or her central aim. A prompt resolution also allows the client to be compensated relatively quickly. Both points are frequently more important to clients than pushing a principle through the court system.

**An opportunity to have a say.** ADR is better than litigation at defusing emotions and finding a resolution because it provides a forum conducive to laying out the facts in the dispute and the parties' concerns. Not only does ADR usually occur early in the case, before positions have hardened, but the parties are there voluntarily and thus are open to engaging in a discussion.

Defendant employers often have goals similar to those of plaintiff employees, because early resolution is more cost-effective than trial. An out-of-court settlement also sends a positive message to present employees that the employer is willing to work with employ-

ees and look to the future. That is particularly true where, in the wake of ADR, the employer revises its procedures and improves its handling of employment-related disputes.

**A meaningful result.** Most important, ADR gives plaintiffs an opportunity to obtain the results they need when they need them, structured in the most beneficial way possible.

For example, in financial settlements you and your client can work with your opponent and a mediator—within the

every method works in each case. When you learn to use ADR well, you can adapt the following techniques to particular employment disputes you handle.

**Prepare thoroughly.** Mediation is an opportunity to present your best case on your terms, without having to conform to courtroom procedure or deal with aggressive defense tactics. Make sure your client understands this, so that he or she will better value your efforts to resolve the case without trial. As with any mediation, prepare your client

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limits of the present convoluted tax law<sup>7</sup> and the scope of your pleadings and facts<sup>8</sup>—to apportion damages to non-taxable events and provide something of value to the client without increasing his or her tax liability. Payments that are related to workers' compensation benefits or damages on account of personal physical injuries may be excluded from taxable income.<sup>9</sup> And it may be possible to split the settlement proceeds into payments to be made over time, helping your client to budget for the future. In any case, have your client work closely with his or her tax adviser in working out any resolution.

ADR can also address the client's non-monetary needs. I have either participated in or know of negotiations that resulted in letters of apology or reference, transfer of property, cleansing of personnel files, or other steps that resolved the disputes in ways that benefited the plaintiffs more than money could.

### **The how**

No matter why you and your client choose ADR, engaging in it effectively is key to its success. Unproductive or counterproductive discussions waste time and money that could be better used preparing for trial. There are many ways to resolve conflicts, but not

for the process.

As you do when preparing a case for jury trial, prepare your client to make a good impression, since the mediator and opponent will be sizing him or her up as a possible witness on the stand. Also, draft a statement of the facts and law on your side. You might also consider assembling an exhibit book for the mediator and your opponent, to show how effectively you would be able to present your case to a jury.

You need to convince the mediator of the legitimacy of your client's claims, so the mediator can advocate for your client when meeting with your opponent. What holds true in litigation is also present in mediations, and the best mediations focus on the seminal issues and facts.

**Determine, and act on, your client's needs and desires.** Most employment cases can settle with the simple payment of money. However, some defendants never want to pay enough, and some plaintiffs want too much. Especially in employment litigation, plaintiffs often have other agendas and concerns, since so much of any plaintiff's time, energy, and emotions are invested in his or her

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job. A resolution that addresses those concerns—by, as noted above, providing a letter of apology or removing certain records from a personnel file—may lessen the amount of money needed to settle, making it easier for the defendant to meet your client's needs.

Creatively addressing your client's true concerns should be the main thrust of your negotiations. In some cases, your client might need medical care, health insurance, or job placement services

often treated as part of your client's taxable income.<sup>10</sup>

Until the tax laws are changed, you need to alert your client to the tax ramifications of any settlement and encourage him or her to retain an independent tax adviser. Consider inserting into monthly billings a paragraph suggesting that your client do this and refer him or her to the advocacy page on the Web site of the National Employment Lawyers Association ([www.nela.org](http://www.nela.org)).

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that a defendant who balks at an outright cash settlement may be willing to pay for.

This approach has helped settle cases I handled that otherwise appeared incapable of resolution. My clients were able to put their lives back in order and move on. In several cases, the employers learned valuable lessons from the process and improved their procedures, heading off further litigation and unpleasantness for their employees.

**Learn the real value of the settlement.** You may think that you're settling for \$300,000, but your client might net substantially less, leaving him or her embittered. Be careful in calculating the settlement amount and consider these three factors:

First, structuring or delaying payments may be necessary to reach settlement, but any delay will cut into the settlement's monetary value.

Second, your fees and litigation costs will further decrease the total amount the client will receive.

Third, and most important, taxation can affect settlement amounts. As experienced employment litigators know, a settlement may result in an increased tax bill for your client because of the alternative minimum tax and because the federal tax code treats some types of damages as taxable income to the client. Also, your fees and expenses are

At no time should you attempt to determine your client's tax liability. Not only are most plaintiff lawyers not trained in the law of federal taxation, but your fees and expenses may place you at odds with your client. Having your client's tax adviser work out the figures is best for everyone.

**Make sure the litigants attend the mediation sessions.** Your client should always be present: He or she will see how you advocate and how the other side responds, will be able to talk with the mediator, and will better understand the strengths and weaknesses of the case.

The only exception is in sexual harassment cases, where your client may not want to confront his or her employer or harasser directly. Encourage your client to attend at least the initial discussions to look the opponent in the eye and show that he or she is willing and able to follow through with litigation. That may be just enough for the defendant to realize that a settlement would be preferable to a trial.

Even more important, insist that the people on the employer's side who would have to attend a trial are present at the mediation—not just the check writer. Only if they attend the session will they understand the difficulties of their case; only if they make that commitment to mediate will your client value any settlement proposals they make. Just get-

ting the two parties in a room at the same time, even if only for a brief opening discussion, may be fruitful.

The main point is to be serious in your attempts to move toward an early, peaceful resolution of the conflict. The more you focus early on mediation and settlement as an alternative to litigation, the easier it will be for you to effect truly meaningful results for your client.

This does not mean that you should not take your cases to court. In fact, only a lawyer known as a formidable litigator can seriously promote settlement through mediation. Part of the defendant's risk is the possibility of losing at trial; the better a litigator you are, the riskier trying the case will appear to your opponents and the more willing they will be to settle.

If, ultimately, the case cannot be resolved, you and your client will know that you have done everything possible and that you have no alternative but to go to trial. ■

#### Notes

1. 42 U.S.C. §§12101-12213 (1990). The Equal Employment Opportunity Commission's implementing regulations state that an interactive process "may be necessary to determine the appropriate reasonable accommodation." 29 C.F.R. §§1630.2(o)(3).

2. Gary Phelan, *Resolving ADA Cases Through Mediation*, TRIAL, Dec. 1998, at 56.

3. 5 U.S.C. §§571-584, particularly 572(a)-572(c).

4. 524 U.S. 775, 806-07 (1998).

5. 524 U.S. 742, 764-65 (1998).

6. *Id.* See also *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 182-83 (4th Cir. 1998); *Reinhold v. Commonwealth of Va.*, 151 F.3d 172, 176 (4th Cir. 1998).

7. See R.W. WOOD, *TAXATION OF DAMAGE AWARDS AND SETTLEMENT PAYMENTS* (2d ed. 1998).

8. The pleadings will provide a basis for your client's arguments to the IRS about damages arising from a battery or resulting in any medical expenses.

9. I.R.C. §§104(a)(1) & (2); see the discussion of the handling of inclusions and exclusions of income in WOOD, *supra* note 7, at 2.1-2.9.

10. The Supreme Court recently granted certiorari in two cases involving the application of the federal tax law to settlement proceeds from employment discrimination or wrongful discharge cases: *Banks v. Comm'r of Internal Revenue*, 345 F.3d 373 (6th Cir. 2003), *cert. granted*, 124 S. Ct. 1713 (2004); and *Banaitis v. Comm'r of Internal Revenue*, 340 F.3d 1074 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 1712 (2004).