

Mediating Statutory Employment Claims:
A New Role for the Alliance for Education in Dispute Resolution

By:

Arnold Zack, Chairman of the Alliance Executive Committee
September 27, 2000

For the past decade the focus of ADR in the employment field has been on arbitration rather than mediation. Arbitration is what employers imposed on employees in order to avoid litigation. Arbitration under employer promulgated systems before friendly arbitrators was seen as the less expensive antidote to costly litigation, high judgments and devastating punitive damages in litigation involving statutes protecting employees at the workplace. The Gilmer^[1] decision endorsed such procedures, and the intervening years and continuing litigation have kept the focus on arbitration. But many of those employer systems also provide for mediation, which has long been a valued tool for bringing disputing parties to expeditious and mutually acceptable resolution of their disputes. Mediation has been the focus of half a century of conflict settlement by the Federal Mediation and Conciliation Service and that has been the core of dispute resolution in interest disputes in the unionized sector. Mediation has been overshadowed by arbitration as the highlighted system of dispute resolution in the employment field since the Gilmer decision. Nonetheless there is a tendency for disputant parties to employ the services of their arbitrators as mediators. There appears to be a greater range of participant satisfaction likely to result from mediation than arbitration or litigation. That has heightened interest in mediation as the preferred alternative to litigation and even to arbitration in the statutory employment field.

The Alliance for Education in Dispute Resolution was founded to research and stimulate the use of mediation in employment disputes through education, conduct of training courses and efforts to expand the use of mediation in employment disputes. The Department of Labor has recognized the importance of the process by granting the Alliance a \$1,100,000 grant to research the use of mediation to resolve disputes arising over the enforcement of statutes administered by the Department of Labor. This research grant has the potential for making a permanent contribution toward claim resolution within the DOL and may be the seed for the introduction of mediation to resolve enforcement disputes arising from statutes administered by other agencies of the Federal and state governments. As such it may be the key to a broader use of mediation of legal rights disputes helping to reduce the volume of federal and state litigation and helping to relieve the courts of their heavy docket of enforcement cases.

The Collective Bargaining Model

Mediation and Arbitration owe much of their appeal to their success over the decades as the backbone of ADR in the unionized sector of our economy. Since 1947, the Federal Mediation and Conciliation Service has been recognized as the source of mediators of workplace disputes arising

over the negotiation of union management collective bargaining agreements. The occasional strike or lockout only served to underscore the effectiveness of mediation as society's most effective tool in achieving workplace tranquillity. That mediation function over new contract terms was of course accompanied by the evolution of arbitration as the parties preferred means of perpetuating that tranquillity throughout the life of the parties' collective agreement. Universally the parties negotiated for arbitration as the fail-safe to assure expeditious resolution for disputes over the interpretation or application of the parties agreement by using mutually accepted professional arbitrators to render final and binding decisions on such issues. Thus, in the U.S. we have come to expect that the union will file a grievance and continue to work pending appeal to arbitration, while the employer commits itself to adhere to the arbitrators decision.

The effectiveness of this arbitration procedure was guaranteed by the decisions of the United States Supreme Court in the 1960 Steelworkers Trilogy [2] where Mr. Justice Douglas analogized the parties grievance arbitration system to a private judicial structure, with the parties selected as their arbitrators those whom they judged best qualified to interpret and apply the terms of their collective agreement based on their experience and knowledge of the law of the shop. And that private system of dispute resolution had enough support from the participants to continue without change for the intervening half century in the organized sector. One only has to travel in Europe to appreciate the continuity of production and public service that is assured by the parties voluntarily subscribing to and being committed to their negotiated system of contract resolution.

This societal and judicial contentment with the labor management model for collective bargaining may be responsible for the high expectation that mediation and arbitration might be the panacea for reducing or eliminating conflict in other aspects of our society. Despite the fact that the universality of arbitration in the organized sector still covers only 12% of the workforce, the union-management model may indeed underlie the hope for effectiveness of arbitration in resolving employment disputes in the non-unionized sector.

Even in the non-unionized sector of the economy, employers have unilaterally established dispute settlement procedures providing for the mediation and arbitration of a wide range of employee complaints, including complaints over termination. In some cases such procedures might have been developed as a means of assuring their employees that fairness was used in such actions. The adoption of such procedures might also be viewed as a means of placating their employees to thwart any efforts the employees might initiate to turn to unions to help them achieve workplace justice. Many of these employer promulgated procedures included a mediation step, but the focus of designers was on arbitration, because it was there, as a binding alternative to litigation that the employer intended to preclude resort to litigation. But it was also there that critics of such employer promulgated systems tended to view the whole employer ADR package as a threat to the individuals access to our judicial system.

And indeed it had the potential for being such as many employers undertook to extend the role of arbitration beyond the traditional just cause to require arbitration of disputes involving statutory issues which were thereafter barred from litigation. In its 1991 Gilmer Decision, the U.S. Supreme Court endorsed the acceptability of such employer-promulgated systems as being voluntary and knowing binding contracts between the employer and the individual employee to utilize such procedures for resolving their statutory rights. Thus, employer-promulgated systems, agreed to by the

job applicant at hire, or by an existing employee in order to retain employment, were considered to be mutually acceptable and enforceable contracts. That was the assumption even though the employer might have had the right to assemble the roster from which the employee could choose an arbitrator, even though the arbitrator might not have any experience or familiarity with the statute which the employee claimed had been breached, even though the arbitrator was fully paid by the employer who with acceptable decisions offered prospects of future arbitration work, even though there was no requirement to adhere to the statute or even to issue a written, and potentially appealable decision, and even though the employee might have been denied any right of representation let alone legal representation.[3]

Even though the preliminary steps of such procedures often required mediation between arbitration, the focus continued to be on the litigation alternative: arbitration.

The Neutral Designation Business

In this environment, the designating agencies, such as the American Arbitration Association, JAMS, and CPR made their services available to administer arbitration agreements as they were submitted to them. That role evolved, as did the Federal Arbitration Act[4] from the needs of commercial contractors to have neutral resolve disputes in implementing commercial agreements. If two merchants agreed on the purchase and sale of cloth, and the buyer challenged the quality of the delivered goods they would agree to arbitrate their dispute, turning to one of the neutral agencies to help them in the designation of the decision making arbitrator. The agencies charged administrative fees for their services based upon the amount of money in dispute between the parties. Thus, when employers approached the designating agencies to administer their system including the designation of arbitrators, the agencies relied on the fact that the agreement between the employer and the individual employee invoked their administrative services without looking into the fairness of the agreement or the procedures set forth therein.

Due Process Protocol

It was in recognition that such rigged procedures were unfair to employees, and thus placed the whole institution of arbitration in jeopardy of being viewed as biased or rigged, that the Due Process Protocol was developed. That document evolved from my endeavoring to replicate some of the traditional concepts of grievance arbitration for employer-promulgated structures at the behest of Professor John Dunlop, then Chairman of the Commission on the Future of Worker-Management Relations. It was he who had highlighted the increasing pressure of litigation in the federal courts and had challenged the unfairness of such mandatory systems in his Commission Report.[5][6][7] I presented my initial findings to the Labor and Employment Law Section of ABA in New Orleans in August 1994. That presentation led Chris Barreca and Max Zimny of the Section to propose the development of a group of representatives of interested institutions to establish standards of fairness in such employer promulgated systems. That led to the creation of the Due Process Task Force composed of representatives of the American Arbitration Association, American Bar Association, American Civil Liberties Union, Federal Mediation and Conciliation Service, National Academy of Arbitrators, Society for Professionals in Dispute Resolution, and the National Employment Lawyers Association. The Task Force met for nine months until May 1995 resulting in the promulgation of the Due Process Protocol, which while initiated as a consequence of the problems of unfair arbitration,

was equally applicable to establishing fairness in mediation. Although we were unable to reach agreement on whether the triggering commitment to mediation or arbitration should be pre or post dispute, we did agree that once the procedures of mediation and arbitration were invoked, there were certain basic due process protections, which we all agreed had to be respected. Those included the establishment of a demographically diverse roster of neutrals trained in the processes of mediation and arbitration and in the statutes which were the cause of the dispute, and the right of the employee to select a mutually acceptable mediator and/or arbitrator with access to information as to the neutrals prior experience. Also to be recognized was the right to representation by an individual of the employees own choosing, the arbitrators right to regulate discovery and depositions, and protection of information as to source of the neutral's compensation. Arbitrators in writing their opinions were to follow the law, and be subject to reasonable review.

That Due Process Protocol has been given wide distribution and has been widely accepted, not only by the AAA, JAMS, CPR, and various governmental agencies, but has also been considered by the courts as the standard of reasonableness against which such mandatory procedures are to be assessed. Throughout the last five years, the emphasis has been on the fairness of the arbitration forum with less attention being paid to the effectiveness of mediation in resolving workplace disputes. But mediation remains the best hope of resolving such workplace disputes.

Mediation as a “Voluntary” Process

Mediation, while a prerequisite to arbitration in most employer promulgated structures, has been exempt from the scrutiny of the courts because even if a mandatory process, it only works if both parties voluntarily reach agreement. Thus, since any resolution reached in the mediation process is voluntary and mutually acceptable, it is unlikely to have any detractors or protesters among its participants. And with arbitration as the fallback in the absence of negotiated or mediated agreements, it would then be triggered as the mandatory alternative for any failed mediation, and thus be likely to bring the final end to any dispute in which mediation had been unsuccessful.

Yet, the experience seems to indicate that just as parties to traditional litigation tend to resolve their disputes through negotiation on the courthouse steps, those facing arbitration are also looking to avoid the process of negotiating a settlement. But when facing arbitration, as distinguished from facing litigation, the parties have already placed their reliance on their own choice of the individual to be their arbitrator. While they might not repose such faith in their imposed assignment of judges, even if they had access to judges as mediators, they enter this scene with awareness that neutrals who generally serve as arbitrators are likely to have extensive experience in mediation as well. Thus, it is easier for the parties, or their chosen arbitrator to suggest mediation as a prelude to arbitration, than it would be in a litigation setting. And indeed what might be perceived as a prelude to arbitration to “narrow the issues” or discuss depositions or discovery options, may itself become the main ring, with many disputes not even getting to the litigation phase. That has been the experience in the Massachusetts Commission Against Discrimination[8] where the majority of the cases are in fact resolved through mediation, even though initially signed up for arbitration.[9]

With the advent the of the Due Process Protocol, the designating agencies assumed a more responsible posture, committing themselves to administer cases only where the employers procedures lived up to the standards of the Protocol. By writing the components of the Protocol into their rules,

the designating agencies sent word to employers that they could no longer proclaim to their employees that their draconian mandatory system was fair just because it was being administered by the employers' choice of designating neutral organization. Now, employers with unfair systems were forced to abandon their claim that their system was fair merely because it was administered by a respected neutral agency which was itself fair. With heightened standards of due process adopted by the agencies the unscrupulous employers were forced to thus self-administer their systems without the protective hue of the neutral agency. Alternatively, they could revamp their procedures to meet the new Due Process thresholds now adopted by and demanded by the agencies. Most did the latter, making the administration of the arbitration systems far fairer than they were before the due Process Protocol. When one considers the number of employer systems now being administered by neutral agencies, or by agencies such as NASD which have adopted the Protocol, it is likely that its protections now run to as many private sector employees as are currently represented by AFL-CIO unions.

Training the Neutrals

The requirements of the Due Process Protocol also required adjustment in the pre-existing system of designating mediators and arbitrators. The neutrals had to be trained in the statutes and the panels had to be demographically diverse. Those standards were met in the case of the arbitrators, who were selected from advocates and professional arbitrators from the union management field familiar with employment law. But in both instances, the skills of the employment law advocates and the skills of the collective bargaining arbitrators were readily adaptable from their prior experience with advocacy to the adjudicative format of employment arbitration. The arbitrators may have faced new problems in working in an environment where they no longer had the comfort two experienced advocates or representatives representing union and management, since plaintiffs would be tending to appear pro se. They might also face problems with demand for more complete disclosure of potential conflicts of interest compared to the labor management field where the arbitrator sector is small, and every one tends to know one another and the advocates were likely to be frequently reusers. For those coming from employment advocacy, adjustment was also necessary; they were clearly familiar with the statutes and with handling witnesses, although their responsibilities to conduct a fair and smooth hearing and their decision making and decision writing skills might need development. Thus, for the arbitration component, the prior roles of the new employment arbitrators required minimal adjustment. But the problem of providing a qualified cadre of employment mediators proved more difficult. Certainly, there were mediators available, some serving as employer in-house ombudspersons. But, neither they, nor the traditional labor management mediators, let alone mediators of other types of disputes, had the requisite familiarity with the employment statutes at issue.

In the case of the mediators, as distinguished from arbitrators, there was less effort made by designating agencies to recruit let alone to train employment mediators. Unlike the employment arbitration field, where the lawyers and labor arbitrators could readily adapt to the adjudicative model, there were no pre-existing cadres of individuals identifiable as recognized employment mediators. The FMCS traditionally focused on mediation of interest disputes in the collective bargaining field, where they worked with employers and unions representing the bargaining unit of enterprise employees. Labor arbitrators often did some mediation, but were seldom required to invoke or apply statutes since their jurisdiction was usually confined to the four corners of the

parties' agreement. Thus, it was left to those arbitrators, comfortable with labor management mediation, who had gained experience in the employment field serving as employment arbitrators, to fill the void for employment mediators. There were no credible training institutions to bring potential employment mediators the process and substantive skills necessary to make them acceptable to disputing parties. The evidence soon showed that the parties instead of looking for experienced employment mediators often requested their employment arbitrators to mediate the matters in dispute. The designating agencies declined to undertake meaningful training programs for mediators. They often relied instead on small cadres of mediators experienced in other realms of conflict to create mediation rosters without making a determined effort to undertake the statutory and/or process training expected by the Due Process Protocol.

The Appeal of Employment Mediation

There is no way of measuring the present, let alone the future demand for mediators of employment disputes. The evidence shows that those selected as employment arbitrators are usually called upon to mediate. The evidence of clogged judicial dockets, of the high cost of litigation with threatened delays and appeals, and of pricey retainers for lawyers undertaking contingency cases, shows that the present adversarial system is not meeting the needs of claimants seeking to resolve disputes over employment statute violations. The problem is compounded by the expansion in recent decades of legislation affording employees expanded individual rights. Unfortunately, the promise of court victory in such cases of claimed violations as in the case of the Family and Medical Leave Act too often involved minimal financial reward designed not to encourage litigation let alone win over the support of costly attorneys. To this mix must be added the intensified pressure of the courts on any disputing parties to resolve their dispute prior to litigation.

Mediation as the preferred forum for resolution of such statutory disputes has not been accorded its rightful recognition. Certainly it is less expensive, and less time consuming than litigation or even arbitration. And it does not require the services of an attorney either in the mediator seat or as representatives of the parties. The prospect of resolving a dispute in mediation with a minimal role for lawyers may also contribute to undoing the appeal of mediation particularly when it may be an attorney who is in the role of choosing among mediation, arbitration or litigation for processing a dispute. Litigation with prospects of discovery, depositions, jury selection, and multiple appeals holds the promise of greatest financial returns for the advocate. Arbitration, with surrender of right of appeal may be somewhat less rewarding for the practitioner, but without doubt; mediation is the least remunerative prospect. Indeed, there are those who proclaim it is best done without lawyers at all.

Yet, what is so appealing about mediation as a dispute resolution tool? Two elements readily come to mind. The first is the opportunity for the claimant to directly partake in the proceedings. Mediation is not a forum where the lawyers or the law or procedures control. In court, the claimant, bearing the burden of being the victim of the wrongdoing may never even get to the stand to articulate his or her emotions or feelings. On the other hand, mediation is participatory, and has a cathartic value, which may, in many cases, constitute the prime relief the claimant is seeking. The other, and stronger argument in support of mediation is that it is participant, not outsider, controlled. The mediation continues only as long as both parties wish it to, and at the end any agreement is of the parties own making and not a decision imposed by some outside third party, arbitrator or judge. The parties retain control throughout including the form and content of the resolution they deem satisfactory, and can

walk away from the process at any time, even opting for arbitration or litigation if they deem those for a more likely of an acceptable decision.

Clearly, the ability to bring disputing parties together to agreement through mediation requires unique skills. That is particularly true where there is a desire to have the claimant feel the procedure has resolved some personal need. It is of course easy for the mediator to serve as an evaluator to proclaim an anticipated outcome if that case went to litigation, or to pressure the parties into what the evaluating mediator believes to be a reasonable settlement. A far more effective and more demanding use of mediation is to meet the deep felt needs of the two parties and to endeavor to shape a future relationship rather than penalize or pay off a prior wrongdoing. That role takes a great deal of sensitivity and higher skills than does mere advocacy. That role is made all the more difficult in employment mediation where the mediator must also have sufficient knowledge of the pertinent statutes to assure the playing field remains level, and to protect the unrepresented claimant from inaccurate and perhaps even misleading conduct and statements from the employer or its representative. And all this with the sensitivity to assure that the mediator is not being perceived by either party as advisor or advocate for the weaker participant.

Genesis of the Alliance

Despite the treatment of mediation as the stepchild of litigation, and despite the lack of focus on it by designating agencies it is unquestionably the preferred procedure for resolving many employment disputes. Yet there must be recognition that mediation of employment disputes requires competent trained mediators with sensitivity, and statutory knowledge as well as all the other attributes traditionally ascribed to mediators. Early in 1998, I met with David Lipsky, former Dean of the New York State School of Industrial and Labor Relations at Cornell to develop a program of research and education to help fill the need for qualified mediators for employment disputes. With the assistance of a grant from the Hewlett Foundation, and with the administrative support from Cornell, we assembled a group of schools, organizations and institutions sharing the goals of research and education in the field of ADR. They also shared an interest in helping to train mediators with competence in the process of mediation as well as knowledge of the substantive area of statutory employment law. Inherent in our joint effort was the goal of developing a mutually acceptable standard of what should go into mediation training. We also sought to protect against those commercial exploiters of the demand for mediators who might hold out the prospect of a two or three day course culminating in the award of a Qualified Mediator Certificate as the easy ticket to qualify “walk ins” as employment mediators. Adapting the 40-hour training model, which had been used to secure certification for mediators in several states, we opted for a five-day 40-hour course composed of training in process and in substantive law, with emphasis on those two elements varying with the prior experience of the participants. Those who completed our training were to be then listed with their biographies and experience on a web-based roster where parties could select them directly and without administrative cost for mediation service. This approach we also felt the most effective way of showcasing minority mediators who might have greater prospects of selection by pro se or self represented claimants through a web listing instead of following the more traditional route of being selected by lawyers or party representatives. Our goal has been to bring together under the umbrella of the Alliance all those institutions, which subscribe to our goals and are willing to assist in using the Alliance to achieve them. Hopefully, by increasing the size and coverage of the umbrella we will develop a consortium of all the main players in mediation training and mediator designation. We are

also planning conferences among the diverse training organizations on core competencies to be taught in mediation as well as ethical standards to be followed by mediators of statutory disputes. At the time of writing, the Alliance members are Cornell University, Georgia State University, MIT, Ohio State University, Pepperdine, University of California at Los Angeles, University of Illinois, University of Missouri, Willamette University, the Labor and Employment Law Section of the American Bar Association, the Federal Mediation and Conciliation Service, Federal Society of Labor Relations Professionals, Industrial Relations Research Association, National Academy of Arbitrators, National Bar Association, and the Society of Professionals in Dispute Resolution. The day to day activities of the Alliance are conducted under the direction of the Alliance Executive Director, Rocco Scanza, a former Senior Vice President of the American Arbitration Association with responsibility for neutral development. He is advised by an Executive Committee of the Alliance which at this writing is composed of Sara Adler representing the ABA, Richard Barnes representing the FMCS, Leslie Hough representing the Usery Center of Georgia State University, David Lipsky representing Cornell, and me representing the National Academy of Arbitrators, currently serving as Chair.

Within the past year, the Alliance has undertaken four training programs. The first with the cooperation of the National Academy of Arbitrators in October 1999, focused on statutory training for participants who were largely experienced in mediation. The second in April 2000, at Georgia State University was evenly divided between process and statute, components, and emphasized minority participants, one of whom attended as a William Usery fellow. The third program was held in Washington, DC in September 2000, with sponsorship of the American Bar Association focused on process training, since most of the participants were experienced in employment law as advocates. The fourth training program scheduled in NYC in November 2000 and under the direction of Cornell focuses jointly on process and statutory training. For forthcoming programs we expect to have specialized minority training sponsored by minority bar organizations. Each course has been operating with about 20 participants, and we hope to keep attendance at that level for future programs. In addition to these programs, which are open to members of the participating organizations, we are about to conduct an advanced training program for individuals with knowledge of mediation process and statutory law who have mediated at least 10 employment mediation cases. Those experienced individuals will also be added to the Alliance Roster. In addition to the foregoing, we are committed to providing annual refresher training and statutory updates utilizing teleconferencing and advanced Internet training tools such as videostreaming.

It is our expectation that employers providing mediation within their employer-mandated dispute settlement machinery will permit their employees to select their choice of mediator from the Alliance roster. Additionally, we hope that neutral designating agencies such as the American Arbitration Association, CPR, JAMS, and NASD will enlist some of our trained participants for inclusion in their rosters of mediators for employment disputes.

The need for mediators trained in process and substance such as employment law we believe is manifest as the most expeditious and most hopeful prospect for resolving statutory disputes in the work place. The desirability of that goal was highlighted by the recent decision of the U.S. Department of Labor to approach the Alliance with the offer of a non-competitive grant of \$1,100,000 to establish and operate a two-year research project on mediation of disputes arising out of statutes enforced by the Solicitors Office of the DoL. That grant, announced in September 2000, was offered to the Alliance as the umbrella organization representing all the main players in the

employment law field. Under that grant, the Alliance is to develop a DoL roster of employment mediators to be administered by the FMCS from applicants selected from the Alliance roster and the FMCS/ADR roster. Cases to be mediated will be selected by the Office of the Solicitor of the DoL whose staff has been given an extensive training by the FMCS on the use of mediation in employment disputes and have been trained in mediation advocacy for those cases to be submitted to the mediation process. Once the Solicitors Office has secured the agreement of the participants to utilize mediation, the Alliance will be contacted and a panel of three mediators selected at random from the New DoL/Alliance roster for the parties to alternately strike names to reach agreement on their designated mediator. It is expected that the cases to be mediated will involve ERISA, the several whistle-blower statutes administered by the Dept., Family and Medical Leave, OFCCP and Wage and Hours issues that would otherwise be subjected to litigation by the Solicitors Office. Professor Thomas Kochan of MIT who evaluated the ADR initiative of the Massachusetts Office of Dispute Resolution, and who has done considerable evaluation and research work for the FMCS, SPIDR, and IRRA, is expected to conduct the evaluation of the DoL program. If the two-year program deemed successful, it is the expectation of the DoL that the program will become a regular part of its claim settlement efforts.

Prospects for the Future

Even if mediation were not the wave of the future, it has an important role to play in reducing the heavy reliance of our society on litigation, particularly of statutory disputes. The foresight of the DoL in awarding us the grant recognizes that mediation is a valuable tool for resolving statutory enforcement issues and should be considered as an essential means of helping other government agencies to bring speedy, sensitive resolution to a wide range of individual complaints against employers and other enterprises which would otherwise be abandoned because of the cost and delay of litigation, or which could, if litigated, be lost in the quagmire of our administrative and judicial enforcement and appeal machinery. That need for expanding the opportunity for early statutory claim resolution, is also apparent in state governments where recent Supreme Court Decisions have closed the door to reliance on federal courts to enforce federal employment statutes against state employees. Through offering programs of statutory mediation, state governments could demonstrate their compliance with federal protective employment legislation, either through making mediation available on a state by state basis or through developing mediation machinery as an element of their collective bargaining agreements with their unionized employees.

The Alliance approach is not a panacea for societal statutory ills. But it does point out the desirability and marketability of mediation as an effective procedure for resolving statutory disputes, and as a vehicle for bringing more minorities into the corps of mediators. It also underscores the valuable role that mediation can serve in bringing acceptable resolution to many of those societal issues for which cost and delay of litigation results in deprivation of equal protection of the law.

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fees for their services based upon the amount of money in dispute between the parties. Thus, when employers approached the designating agencies to administer their system including the designation of arbitrators, the agencies relied on the fact that the agreement between the employer and the individual employee invoked their administrative services without looking into the fairness of the agreement or the procedures set forth therein.

Due Process Protocol

It was in recognition that such rigged procedures were unfair to employees, and thus placed the whole institution of arbitration in jeopardy of being viewed as biased or rigged, that the Due Process Protocol was developed. That document evolved from my endeavoring to replicate some of the traditional concepts of grievance arbitration for employer-promulgated structures at the behest of Professor John Dunlop, then Chairman of the Commission on the Future of Worker-Management Relations. It was he who had highlighted the increasing pressure of litigation in the federal courts and had challenged the unfairness of such mandatory systems in his Commission Report.^{[5][6][7]} I presented my initial findings to the Labor and Employment Law Section of ABA in New Orleans in August 1994. That presentation led Chris Barreca and Max Zimny of the Section to propose the development of a group of representatives of interested institutions to establish standards of fairness in such employer promulgated systems. That led to the creation of the Due Process Task Force composed of representatives of the American Arbitration Association, American Bar Association, American Civil Liberties Union, Federal Mediation and Conciliation Service, National Academy of Arbitrators, Society for Professionals in Dispute Resolution, and the National Employment Lawyers Association. The Task Force met for nine months until May 1995 resulting in the promulgation of the Due Process Protocol, which while initiated as a consequence of the problems of unfair arbitration, was equally applicable to establishing fairness in mediation. Although we were unable to reach agreement on whether the triggering commitment to mediation or arbitration should be pre or post dispute, we did agree that once the procedures of mediation and arbitration were invoked, there were certain basic due process protections, which we all agreed had to be respected. Those included the establishment of a demographically diverse roster of neutrals trained in the processes of mediation and arbitration and in the statutes which were the cause of the dispute, and the right of the employee to select a mutually acceptable mediator and/or arbitrator with access to information as to the neutrals prior experience. Also to be recognized was the right to representation by an individual of the employees own choosing, the arbitrators right to regulate discovery and depositions, and protection of information as to source of the neutral's compensation. Arbitrators in writing their opinions were to follow the law, and be subject to reasonable review.

That Due Process Protocol has been given wide distribution and has been widely accepted, not only by the AAA, JAMS, CPR, and various governmental agencies, but has also been considered by the courts as the standard of reasonableness against which such mandatory procedures are to be assessed. Throughout the last five years, the emphasis has been on the fairness of the arbitration forum with less attention being paid to the effectiveness of mediation in resolving workplace disputes. But mediation remains the best hope of resolving such workplace disputes.

Mediation as a "Voluntary" Process

Mediation, while a prerequisite to arbitration in most employer promulgated structures, has been

exempt from the scrutiny of the courts because even if a mandatory process, it only works if both parties voluntarily reach agreement. Thus, since any resolution reached in the mediation process is voluntary and mutually acceptable, it is unlikely to have any detractors or protesters among its participants. And with arbitration as the fallback in the absence of negotiated or mediated agreements, it would then be triggered as the mandatory alternative for any failed mediation, and thus be likely to bring the final end to any dispute in which mediation had been unsuccessful.

Yet, the experience seems to indicate that just as parties to traditional litigation tend to resolve their disputes through negotiation on the courthouse steps, those facing arbitration are also looking to avoid the process of negotiating a settlement. But when facing arbitration, as distinguished from facing litigation, the parties have already placed their reliance on their own choice of the individual to be their arbitrator. While they might not repose such faith in their imposed assignment of judges, even if they had access to judges as mediators, they enter this scene with awareness that neutrals who generally serve as arbitrators are likely to have extensive experience in mediation as well. Thus, it is easier for the parties, or their chosen arbitrator to suggest mediation as a prelude to arbitration, than it would be in a litigation setting. And indeed what might be perceived as a prelude to arbitration to “narrow the issues” or discuss depositions or discovery options, may itself become the main ring, with many disputes not even getting to the litigation phase. That has been the experience in the Massachusetts Commission Against Discrimination[8] where the majority of the cases are in fact resolved through mediation, even though initially signed up for arbitration.[9]

With the advent of the Due Process Protocol, the designating agencies assumed a more responsible posture, committing themselves to administer cases only where the employers procedures lived up to the standards of the Protocol. By writing the components of the Protocol into their rules, the designating agencies sent word to employers that they could no longer proclaim to their employees that their draconian mandatory system was fair just because it was being administered by the employers’ choice of designating neutral organization. Now, employers with unfair systems were forced to abandon their claim that their system was fair merely because it was administered by a respected neutral agency which was itself fair. With heightened standards of due process adopted by the agencies the unscrupulous employers were forced to thus self-administer their systems without the protective hue of the neutral agency. Alternatively, they could revamp their procedures to meet the new Due Process thresholds now adopted by and demanded by the agencies. Most did the latter, making the administration of the arbitration systems far fairer than they were before the due Process Protocol. When one considers the number of employer systems now being administered by neutral agencies, or by agencies such as NASD which have adopted the Protocol, it is likely that its protections now run to as many private sector employees as are currently represented by AFL-CIO unions.

Training the Neutrals

The requirements of the Due Process Protocol also required adjustment in the pre-existing system of designating mediators and arbitrators. The neutrals had to be trained in the statutes and the panels had to be demographically diverse. Those standards were met in the case of the arbitrators, who were selected from advocates and professional arbitrators from the union management field familiar with employment law. But in both instances, the skills of the employment law advocates and the skills of the collective bargaining arbitrators were readily adaptable from their prior experience with advocacy

to the adjudicative format of employment arbitration. The arbitrators may have faced new problems in working in an environment where they no longer had the comfort two experienced advocates or representatives representing union and management, since plaintiffs would be tending to appear pro se. They might also face problems with demand for more complete disclosure of potential conflicts of interest compared to the labor management field where the arbitrator sector is small, and every one tends to know one another and the advocates were likely to be frequently reusers. For those coming from employment advocacy, adjustment was also necessary; they were clearly familiar with the statutes and with handling witnesses, although their responsibilities to conduct a fair and smooth hearing and their decision making and decision writing skills might need development. Thus, for the arbitration component, the prior roles of the new employment arbitrators required minimal adjustment. But the problem of providing a qualified cadre of employment mediators proved more difficult. Certainly, there were mediators available, some serving as employer in-house ombudspersons. But, neither they, nor the traditional labor management mediators, let alone mediators of other types of disputes, had the requisite familiarity with the employment statutes at issue.

In the case of the mediators, as distinguished from arbitrators, there was less effort made by designating agencies to recruit let alone to train employment mediators. Unlike the employment arbitration field, where the lawyers and labor arbitrators could readily adapt to the adjudicative model, there were no pre-existing cadres of individuals identifiable as recognized employment mediators. The FMCS traditionally focused on mediation of interest disputes in the collective bargaining field, where they worked with employers and unions representing the bargaining unit of enterprise employees. Labor arbitrators often did some mediation, but were seldom required to invoke or apply statutes since their jurisdiction was usually confined to the four corners of the parties' agreement. Thus, it was left to those arbitrators, comfortable with labor management mediation, who had gained experience in the employment field serving as employment arbitrators, to fill the void for employment mediators. There were no credible training institutions to bring potential employment mediators the process and substantive skills necessary to make them acceptable to disputing parties. The evidence soon showed that the parties instead of looking for experienced employment mediators often requested their employment arbitrators to mediate the matters in dispute. The designating agencies declined to undertake meaningful training programs for mediators. They often relied instead on small cadres of mediators experienced in other realms of conflict to create mediation rosters without making a determined effort to undertake the statutory and/or process training expected by the Due Process Protocol.

The Appeal of Employment Mediation

There is no way of measuring the present, let alone the future demand for mediators of employment disputes. The evidence shows that those selected as employment arbitrators are usually called upon to mediate. The evidence of clogged judicial dockets, of the high cost of litigation with threatened delays and appeals, and of pricey retainers for lawyers undertaking contingency cases, shows that the present adversarial system is not meeting the needs of claimants seeking to resolve disputes over employment statute violations. The problem is compounded by the expansion in recent decades of legislation affording employees expanded individual rights. Unfortunately, the promise of court victory in such cases of claimed violations as in the case of the Family and Medical Leave Act too often involved minimal financial reward designed not to encourage litigation let alone win over the

support of costly attorneys. To this mix must be added the intensified pressure of the courts on any disputing parties to resolve their dispute prior to litigation.

Mediation as the preferred forum for resolution of such statutory disputes has not been accorded its rightful recognition. Certainly it is less expensive, and less time consuming than litigation or even arbitration. And it does not require the services of an attorney either in the mediator seat or as representatives of the parties. The prospect of resolving a dispute in mediation with a minimal role for lawyers may also contribute to undoing the appeal of mediation particularly when it may be an attorney who is in the role of choosing among mediation, arbitration or litigation for processing a dispute. Litigation with prospects of discovery, depositions, jury selection, and multiple appeals holds the promise of greatest financial returns for the advocate. Arbitration, with surrender of right of appeal may be somewhat less rewarding for the practitioner, but without doubt; mediation is the least remunerative prospect. Indeed, there are those who proclaim it is best done without lawyers at all.

Yet, what is so appealing about mediation as a dispute resolution tool? Two elements readily come to mind. The first is the opportunity for the claimant to directly partake in the proceedings. Mediation is not a forum where the lawyers or the law or procedures control. In court, the claimant, bearing the burden of being the victim of the wrongdoing may never even get to the stand to articulate his or her emotions or feelings. On the other hand, mediation is participatory, and has a cathartic value, which may, in many cases, constitute the prime relief the claimant is seeking. The other, and stronger argument in support of mediation is that it is participant, not outsider, controlled. The mediation continues only as long as both parties wish it to, and at the end any agreement is of the parties own making and not a decision imposed by some outside third party, arbitrator or judge. The parties retain control throughout including the form and content of the resolution they deem satisfactory, and can walk away from the process at any time, even opting for arbitration or litigation if they deem those for a more likely of an acceptable decision.

Clearly, the ability to bring disputing parties together to agreement through mediation requires unique skills. That is particularly true where there is a desire to have the claimant feel the procedure has resolved some personal need. It is of course easy for the mediator to serve as an evaluator to proclaim an anticipated outcome if that case went to litigation, or to pressure the parties into what the evaluating mediator believes to be a reasonable settlement. A far more effective and more demanding use of mediation is to meet the deep felt needs of the two parties and to endeavor to shape a future relationship rather than penalize or pay off a prior wrongdoing. That role takes a great deal of sensitivity and higher skills than does mere advocacy. That role is made all the more difficult in employment mediation where the mediator must also have sufficient knowledge of the pertinent statutes to assure the playing field remains level, and to protect the unrepresented claimant from inaccurate and perhaps even misleading conduct and statements from the employer or its representative. And all this with the sensitivity to assure that the mediator is not being perceived by either party as advisor or advocate for the weaker participant.

Genesis of the Alliance

Despite the treatment of mediation as the stepchild of litigation, and despite the lack of focus on it by designating agencies it is unquestionably the preferred procedure for resolving many employment disputes. Yet there must be recognition that mediation of employment disputes requires competent

trained mediators with sensitivity, and statutory knowledge as well as all the other attributes traditionally ascribed to mediators. Early in 1998, I met with David Lipsky, former Dean of the New York State School of Industrial and Labor Relations at Cornell to develop a program of research and education to help fill the need for qualified mediators for employment disputes. With the assistance of a grant from the Hewlett Foundation, and with the administrative support from Cornell, we assembled a group of schools, organizations and institutions sharing the goals of research and education in the field of ADR. They also shared an interest in helping to train mediators with competence in the process of mediation as well as knowledge of the substantive area of statutory employment law. Inherent in our joint effort was the goal of developing a mutually acceptable standard of what should go into mediation training. We also sought to protect against those commercial exploiters of the demand for mediators who might hold out the prospect of a two or three day course culminating in the award of a Qualified Mediator Certificate as the easy ticket to qualify “walk ins” as employment mediators. Adapting the 40-hour training model, which had been used to secure certification for mediators in several states, we opted for a five-day 40-hour course composed of training in process and in substantive law, with emphasis on those two elements varying with the prior experience of the participants. Those who completed our training were to be then listed with their biographies and experience on a web-based roster where parties could select them directly and without administrative cost for mediation service. This approach we also felt the most effective way of showcasing minority mediators who might have greater prospects of selection by pro se or self represented claimants through a web listing instead of following the more traditional route of being selected by lawyers or party representatives. Our goal has been to bring together under the umbrella of the Alliance all those institutions, which subscribe to our goals and are willing to assist in using the Alliance to achieve them. Hopefully, by increasing the size and coverage of the umbrella we will develop a consortium of all the main players in mediation training and mediator designation. We are also planning conferences among the diverse training organizations on core competencies to be taught in mediation as well as ethical standards to be followed by mediators of statutory disputes. At the time of writing, the Alliance members are Cornell University, Georgia State University, MIT, Ohio State University, Pepperdine, University of California at Los Angeles, University of Illinois, University of Missouri, Willamette University, the Labor and Employment Law Section of the American Bar Association, the Federal Mediation and Conciliation Service, Federal Society of Labor Relations Professionals, Industrial Relations Research Association, National Academy of Arbitrators, National Bar Association, and the Society of Professionals in Dispute Resolution. The day to day activities of the Alliance are conducted under the direction of the Alliance Executive Director, Rocco Scanza, a former Senior Vice President of the American Arbitration Association with responsibility for neutral development. He is advised by an Executive Committee of the Alliance which at this writing is composed of Sara Adler representing the ABA, Richard Barnes representing the FMCS, Leslie Hough representing the Usery Center of Georgia State University, David Lipsky representing Cornell, and me representing the National Academy of Arbitrators, currently serving as Chair.

Within the past year, the Alliance has undertaken four training programs. The first with the cooperation of the National Academy of Arbitrators in October 1999, focused on statutory training for participants who were largely experienced in mediation. The second in April 2000, at Georgia State University was evenly divided between process and statute, components, and emphasized minority participants, one of whom attended as a William Usery fellow. The third program was held in Washington, DC in September 2000, with sponsorship of the American Bar Association focused on process training, since most of the participants were experienced in employment law as advocates.

The fourth training program scheduled in NYC in November 2000 and under the direction of Cornell focuses jointly on process and statutory training. For forthcoming programs we expect to have specialized minority training sponsored by minority bar organizations. Each course has been operating with about 20 participants, and we hope to keep attendance at that level for future programs. In addition to these programs, which are open to members of the participating organizations, we are about to conduct an advanced training program for individuals with knowledge of mediation process and statutory law who have mediated at least 10 employment mediation cases. Those experienced individuals will also be added to the Alliance Roster. In addition to the foregoing, we are committed to providing annual refresher training and statutory updates utilizing teleconferencing and advanced Internet training tools such as videostreaming.

It is our expectation that employers providing mediation within their employer-mandated dispute settlement machinery will permit their employees to select their choice of mediator from the Alliance roster. Additionally, we hope that neutral designating agencies such as the American Arbitration Association, CPR, JAMS, and NASD will enlist some of our trained participants for inclusion in their rosters of mediators for employment disputes.

The need for mediators trained in process and substance such as employment law we believe is manifest as the most expeditious and most hopeful prospect for resolving statutory disputes in the work place. The desirability of that goal was highlighted by the recent decision of the U.S. Department of Labor to approach the Alliance with the offer of a non-competitive grant of \$1,100,000 to establish and operate a two-year research project on mediation of disputes arising out of statutes enforced by the Solicitors Office of the DoL. That grant, announced in September 2000, was offered to the Alliance as the umbrella organization representing all the main players in the employment law field. Under that grant, the Alliance is to develop a DoL roster of employment mediators to be administered by the FMCS from applicants selected from the Alliance roster and the FMCS/ADR roster. Cases to be mediated will be selected by the Office of the Solicitor of the DoL whose staff has been given an extensive training by the FMCS on the use of mediation in employment disputes and have been trained in mediation advocacy for those cases to be submitted to the mediation process. Once the Solicitors Office has secured the agreement of the participants to utilize mediation, the Alliance will be contacted and a panel of three mediators selected at random from the New DoL/Alliance roster for the parties to alternately strike names to reach agreement on their designated mediator. It is expected that the cases to be mediated will involve ERISA, the several whistle-blower statutes administered by the Dept., Family and Medical Leave, OFCCP and Wage and Hours issues that would otherwise be subjected to litigation by the Solicitors Office. Professor Thomas Kochan of MIT who evaluated the ADR initiative of the Massachusetts Office of Dispute Resolution, and who has done considerable evaluation and research work for the FMCS, SPIDR, and IRRA, is expected to conduct the evaluation of the DoL program. If the two-year program deemed successful, it is the expectation of the DoL that the program will become a regular part of its claim settlement efforts.

Prospects for the Future

Even if mediation were not the wave of the future, it has an important role to play in reducing the heavy reliance of our society on litigation, particularly of statutory disputes. The foresight of the DoL in awarding us the grant recognizes that mediation is a valuable tool for resolving statutory

enforcement issues and should be considered as an essential means of helping other government agencies to bring speedy, sensitive resolution to a wide range of individual complaints against employers and other enterprises which would otherwise be abandoned because of the cost and delay of litigation, or which could, if litigated, be lost in the quagmire of our administrative and judicial enforcement and appeal machinery. That need for expanding the opportunity for early statutory claim resolution, is also apparent in state governments where recent Supreme Court Decisions have closed the door to reliance on federal courts to enforce federal employment statutes against state employees. Through offering programs of statutory mediation, state governments could demonstrate their compliance with federal protective employment legislation, either through making mediation available on a state by state basis or through developing mediation machinery as an element of their collective bargaining agreements with their unionized employees.

The Alliance approach is not a panacea for societal statutory ills. But it does point out the desirability and marketability of mediation as an effective procedure for resolving statutory disputes, and as a vehicle for bringing more minorities into the corps of mediators. It also underscores the valuable role that mediation can serve in bringing acceptable resolution to many of those societal issues for which cost and delay of litigation results in deprivation of equal protection of the law.

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