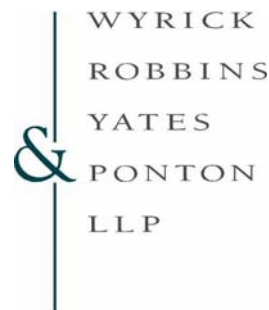
THE RESOURCE



A Legal Newsletter for Employers & Human Resource Professionals

By: L. Diane Tindall & Mary M. Williams
Attorneys-at-Law

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Pick Your Battle: An Introduction to Alternative Dispute Resolution

As costs and delays of formal litigation continue increasing, more and more states require parties to engage in some form of alternative dispute resolution ("ADR") before trial. The term ADR generally refers to any process that litigants use to resolve their dispute privately, but commonly refers to the most popular forms: arbitration or mediation. Many litigants realize that ADR is a viable alternative to litigation, but may not be aware of the variety of methods available. Some litigants unwisely refuse to participate in ADR out of a concern they will appear "weak" by agreeing to discuss settlement. This volume of The Resource will provide a basic description of ADR methods and will discuss the costs and benefits of participating in private dispute resolution.

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This newsletter is meant to provide basic, general legal information only, and should not be relied upon in lieu of advice from an attorney. Please consult your company's counsel for specific advice concerning your company's legal obligations.

1. Types of ADR—

a. Arbitration

Arbitration is a simplified version of a trial involving little to no discovery, simplified rules of evidence, an arbitrator or panel of arbitrators, and no jury. Typically the parties will have agreed in advance of any dispute, often in a contract, to submit any controversy to binding arbitration. In most cases, the parties' agreement will specify whether they will select a single arbitrator or a panel of three arbitrators to hear the dispute. Arbitration hearings can last anywhere from several hours to several weeks. After the arbitration hearing, the arbitrator or panel of arbitrators will issue a decision that is binding upon the parties and typically can be enforced in court, if necessary. However, unlike traditional litigation, the arbitrator's rulings are not a matter of public record.

b. Mediation

Mediation is a non-binding negotiation between adversaries conducted by a neutral mediator, who typically is an experienced judge or attorney. Unlike arbitration, mediation is consensual

and both parties must agree to the final resolution of the dispute. In addition to court-ordered mediation, pre-lawsuit mediation is often used when attorneys realize that direct negotiations between the parties will not resolve the dispute efficiently.

North Carolina law now provides that civil cases pending in superior court (disputes where the amount in controversy is over $10,000), may be ordered to mediation by the senior resident superior court judge. In practice, nearly all civil lawsuits filed in superior court go through mediation; only cases seeking an extraordinary writ or appealing a driver's license revocation are exempt from court-ordered mediation. To participate in court-ordered mediation, mediators in North Carolina must be certified by completing mediation training and observation.

Although mediator styles vary, mediators commonly employ the following format at mediation. First, the mediator explains his or her role in the process and emphasizes that mediation is voluntary. Second, the parties may be permitted to make a statement explaining their version of the facts and applicable law. These presentations generally occur without direct or cross examination of any witnesses and without regard to the rules of evidence that would apply in court. After the parties' initial presentations, the mediator often separates the parties for "caucusing" or individual discussions. During these caucuses, the mediator often explores with each side the strengths and weaknesses of their case, suggests compromises, and communicates offers and counter-offers between the parties. Although parties are often more candid with a mediator in caucusing sessions, an added benefit is that separate sessions also diffuses tension among the litigants.

If mediation is successful, the parties may leave the mediation session with a signed settlement agreement (that the parties will usually agree is binding and enforceable) or memorandum of settlement outlining the terms of their proposed settlement. However, in some cases, parties cannot reach a resolution and the litigation may commence or continue.

c. Med-Arb

Med-Arb is a third type of ADR that combines mediation and arbitration processes. In the first stage of a med-arb proceeding, a neutral third party mediates the dispute until the parties reach an impasse. If the parties reach an impasse, the third party issues a binding or non-binding arbitration award on the cause of the impasse or any unresolved issues. Parties using med-arb must agree in advance whether the same or different neutral third party conducts both the mediation and arbitration processes. Using two neutrals in a med-arb proceeding can be more expensive than using one individual for both parts of the process. However, using the same neutral party for both mediation and arbitration can be challenging where the parties are concerned that information shared in mediation may hurt them in arbitration.

d. Conciliation

Conciliation is a process in which a neutral third party (conciliator) attempts to bring the parties together, communicating each party's position, clarifying perceptions and pointing out misperceptions. The conciliator may also advise the parties about discovery and other litigation procedures. Government agencies such as the EEOC and Department of Labor often use conciliation to negotiate private settlement between two private parties to a dispute, subject to the agency's jurisdiction. Conciliation is appropriate where parties are unwilling, unable or

unprepared to come to the table to negotiate their differences.

e. Early Neutral Evaluation

Early neutral evaluation (sometimes referred to as "ENE") is a less commonly used form of ADR. In an ENE proceeding, the evaluator, typically an experienced attorney, hosts an informal meeting of clients and counsel. During this meeting, as in mediation, the parties each present their version of the facts and applicable law. The evaluator then identifies areas where the parties agree, clarifies and focuses the issues and encourages the parties to enter procedural and substantive stipulations.

Following the parties' presentations, the evaluator then privately drafts an evaluation of the case, which normally includes an analysis of the strengths and weaknesses of each party's case, whether the defending party is likely to be found liable, a potential range of damages, and the reasoning that supports the evaluator's analysis. After the evaluation is drafted, the evaluator offers to present the evaluation to the parties, who may then ask either to: hear the evaluation (which must be presented if any party requests it); postpone hearing the evaluation until the parties have further settlement discussions facilitated by the evaluator; or continue engaging in discovery. If no settlement is reached, the case goes to or remains in litigation.

2. ADR in Employment Disputes—

a. Enforceable Arbitration Agreements

In the employment context, an issue that frequently arises is whether an employer can require an employee to arbitrate employment-related claims. Because arbitration involves giving up important jury trial rights, courts carefully scrutinize arbitration agreements in the employment context, especially if the employer has greater bargaining power than the employee. Although federal and state laws generally favor arbitration, courts will not enforce arbitration agreements that heavily favor the employer over the employee.

At a minimum, arbitration agreements with an employee should clearly specify (1) that the employee is waiving his or her jury trial rights; (2) the types of disputes that will be arbitrated; (3) which organization the parties will use to conduct the arbitration (often the American Arbitration Association or "AAA" or the Judicial Arbitration and Mediation Services known as "JAMS"; (4) the rules that the parties will use to conduct the arbitration; and (5) whenever possible, the city or county where the parties will hold the arbitration. Courts have invalidated arbitration agreements that (a) shortened the applicable statute of limitations; (b) required the employee to pay costs or attorneys' fees for which he or she would not be responsible under an employment-related statute, such as Title VII; or (c) allowed the employer more flexibility than the employee to modify the terms of the arbitration agreement (such as in an employee handbook).

b. ADR with the EEOC

The EEOC and other administrative agencies encourage ADR to resolve employment disputes. The EEOC particularly encourages ADR in cases where early resolution is possible because settlement of those disputes frees up their resources to identify, conciliate and/or litigate other,

more serious disputes. Although employers are sometimes hesitant to engage in ADR with the EEOC, the EEOC and other administrative agencies have had significant success with ADR. Employers should consider engaging in ADR with the EEOC because doing so offers an opportunity to resolve disputes quickly and confidentially. In some cases, employers are surprised to learn that the employee simply wants the employer to hear his or her side of the story, or to receive an apology for what happened. Such a resolution can save the employer significant time and expense in litigation.

3. Pros and Cons of ADR Methods—

Because arbitration and mediation are the most commonly-used forms of ADR, the following table weighs the pros and cons of both methods as compared to traditional litigation:

Factors to Consider	Arbitration	Mediation	Litigation
Expense.	Filing fees and costs of the arbitration hearing can run in the tens of thousands.	Mediation itself is inexpensive; unless otherwise agreed, the parties will split mediator fees (usually $150-300 per hour).	Filing fees are inexpensive; however, the costs of continued litigation are high. Trial costs often exceed $50,000.
Length of time to reach resolution or final judgment.	Most cases are resolved within a year; many are resolved within six months or less.	Mediation is scheduled per the parties' agreement. Court-ordered mediation may be required within several months to a year of the lawsuit being filed.	From the time suit is filed until judgment typically will be eighteen months to two years. Appeals, if taken, could prolong resolution for years.
Flexibility for creative settlement.	Not flexible because an arbitrator will decide the outcome.	Highly flexible because the parties create their own settlement.	Not flexible because the judge or jury will decide the outcome.
Extensive discovery?	Not in most cases.	No, unless suit has been filed.	Yes.
Confidential proceedings?	Yes.	Yes.	No.
Works best for:	Routine cases where not much discovery is needed or where confidentiality is a primary concern.	Cases where the parties are rational, have non-monetary concerns and/or are already close to settlement.	Complex cases or complicated legal issues (e.g., class actions, intellectual property).
Not recommended for:	"All or nothing" cases, because arbitrators often try to "split the baby" and give everyone something.	Cases with inflexible, emotional parties unwilling to consider compromise.	Cases where the facts or applicable law are relatively simple.

Employer Alert: *Taxation of Attorney Fees in Employment Discrimination Cases*

On October 22, 2004, President Bush signed the American Jobs Creation Act of 2004 into law. Included in the law is a provision that allows plaintiffs to deduct amounts paid for attorney's fees from their adjusted gross income ("AGI"), if the case involved an unlawful discrimination claim. Because this deduction is to the employee's AGI (often called an "above the line" deduction), such payments are not subject to the alternative minimum tax or the two percent floor on miscellaneous deductions. The deduction is permitted regardless of whether the attorneys' fees and court costs were paid by the plaintiff or by the defendant; however, the amount of the deduction cannot exceed the amount included in the taxpayer's gross income for the taxable year on account of a judgment or settlement resulting from the unlawful discrimination claim.

The new law applies to fees and costs paid *after* the date of enactment, October 22, 2004, with respect to any judgment or settlement occurring *after* October 22, 2004. These changes will apply to suits filed under the following laws:

- Title VII of the Civil Rights Act of 1964;
- The Age Discrimination in Employment Act (ADEA);
- 42 U.S.C. § 1981 (equal rights in contracting);
- The Americans with Disabilities Act (ADA);
- The National Labor Relations Act (NLRA);
- The Fair Labor Standards Act (FLSA);
- The Employee Retirement Income Security Act (ERISA);
- The Employee Polygraph Protection Act;
- The Worker Adjustment and Retraining Notification Act (WARN);
- The Family and Medical Leave Act (FMLA);
- 38 U.S.C. 4301 *et seq*. (veterans employment and reemployment rights);
- Any provision of federal law providing "whistleblower protection;" and
- Any provision of federal, state, or local law, or common law claims providing for the enforcement of civil rights, or regulating any aspect of the employment relationship, including claims for wages, compensation, or benefits.

Although it is too soon know the ultimate effects of this change, the new law is expected to benefit both employees and employers. Employers in particular will benefit because plaintiffs can no longer seek to have a settlement "grossed up" to include taxes on attorneys' fees.

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Wyrick Robbins Yates & Ponton LLP
4101 Lake Boone Trail, Suite 300, Raleigh, NC 27607-7506
(919) 781-4000
www.wyrick.com