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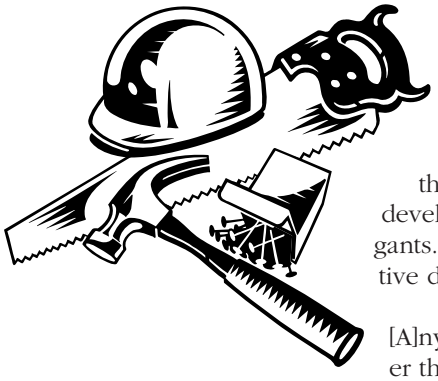
Two Trends in Alternative Dispute Resolution in the Federal Courts

In the past decade, federal litigators have witnessed numerous trends in alternative dispute resolution (ADR), two of which have a direct impact on litigation of labor and employment cases. The first trend is an increase in court-sponsored mediation. Since Congress passed the Alternative Dispute Resolution (ADR) Act of 1998, all federal district courts have been required to implement some form of an ADR program as a way to encourage litigants to explore alternatives to litigation.[1] In addition, in response to the 1994 amendments to Federal Rule of Appellate Procedure 33, all 13 federal circuit courts now employ a settlement or mediation program, which typically includes early case evaluation to determine if an appeal is eligible for reference to an ADR process.[2] The second trend in alternative dispute resolution is the recent inclusion of (and the federal courts' willingness to uphold) arbitration provisions in employment agreements.[3] In these agreements, employers mandate that an employee must arbitrate any and all claims arising during the employee's employment. Even though these new approaches aspire to streamline the nation's legal system, and often do so, they are not without their drawbacks.



Court-Implemented ADR Programs

While ADR programs have been in existence in the federal courts since as early as the 1970s,[4] the passage of the ADR Act mandated that every federal district court develop an ADR program for all litigants. The ADR Act defines alternative dispute resolution as:

> [A]ny process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration. …[5]

As such, the ADR Act provides district courts with wide latitude to determine the parameters of their programs. As a result, there are vast differences among the ADR programs found in the various federal district courts.[6] Some courts use voluntary mediation,[7] whereas others employ a mediated settlement/pretrial conference.[8] The Southern District of Ohio has established periodic settlement weeks during which mediations are conducted by volunteer lawyer-mediators who have been trained by the court. The court has also recently hired a full-time mediator, who holds settlement conferences in selected cases.[9] The Western District of Pennsylvania has recently amended its local rules to require nearly all civil cases to go through early neutral evaluation, mediation, or arbitration.[10] Despite the wide variety in approaches to ADR, all district courts have the same goal in mind when designing their own approach: to offer an efficient and cost-effective alternative to litigation.

In their programs, district courts will usually offer more than one form of ADR and permit the parties to choose the program that best suits their needs.[11] This approach provides greater flexibility by allowing participants to evaluate the expectations they have for filing a lawsuit and then choosing a program that will best meet these goals. For example, the Northern District of California has developed a program that offers multiple options, including mediation, nonbinding arbitration, early neutral evaluation, and settlement conferences.[12] According to the court, the purpose of offering a multitude of ADR alternatives is "to make available to litigants a broad range of court-sponsored ADR processes to provide quicker, less expensive and potentially more satisfying alternatives to continuing litigation without impairing the quality of justice or the right to trial."[13]

Similar statements are seen in the local rules of federal district courts across the country.[14]

In addition to ADR programs offered by district courts, since 2005 all federal circuit courts have been using some form of ADR to facilitate case settlement—usually through mediation or settlement conferences.[15] Each circuit court has formulated its own individualized approach in determining (1) which cases will be referred to mediation, (2) when the ADR proceeding will occur, and (3) what the effect of ADR on the disposition of appellate procedures will be.[16]

Despite the differences in the initial procedure, the mediation conferences themselves are fairly similar across the circuit courts. The courts generally use a mediation technique known as the "caucus model," which is aimed at facilitating solutions between the parties. First, a mediator meets with the opposing parties together to discuss settlement options. Sometimes, caucuses are conducted in person; however, depending on the location of counsel, these sessions are often held via telephone.[17] If conducted in person, the parties withdraw to separate rooms, and the mediator discusses the case individually with each party, moving back and forth between the rooms while attempting to encourage settlement.[18] The mediator informs the court if a settlement has been reached, in which case the appeal is dismissed. However, if there is no agreement, the appellate proceedings proceed as scheduled. To aid the parties in settlement, some circuit mediators are authorized to amend or suspend the briefing schedule while the parties continue their settlement discussions.

Although there is some difference in the processes, procedures, and rules of the ADR programs offered by the district courts compared with those offered by the circuit courts, there is no doubt that court-implemented ADR programs have proven quite successful and are here to stay in both judicial forums.

Arbitration Agreements Found in Employment Contracts

In recent years, federal courts have also proven more willing to uphold arbitration provisions found in employment agreements, partly as a result of the Federal Arbitration Act.[19] Section 2 of the act states that, when parties have a contract or agreement to settle a controversy by arbitration, this agreement shall be "valid, irrevocable, and binding, save upon such grounds as exist at law or in equity for the revocation of any contract." Recently, in *Preston v. Ferrer*, the U.S. Supreme Court noted that there exists a national policy favoring arbitration when parties contract for that method of dispute resolution.[20]

Companies usually provide arbitration agreements to an employee upon commencement of employment, but courts frown on employers simply providing notice of the agreement included with stacks of papers for the new employee to sign.[21] Rather, courts are more inclined to uphold an arbitration agreement when the employer provides the employee with a separate notice regarding arbitration, and the employee signs a form acknowledging receipt of the arbitration agreement and consents to be bound by its terms.[22]

Despite the signed acknowledgment, employees frequently seek to void the arbitration agreement and pursue litigation against the employer.[23] Because federal courts apply state contract law when reviewing motions to compel arbitration,[24] employees who seek to void an arbitration agreement typically argue that the agreement is illusory, unconscionable, or lacking mutuality.[25] However, because of the policy that favors arbitration, courts are hesitant to recognize these arguments absent exigent circumstances.[26]

Benefits and Drawbacks to These Two ADR Methods

Both court-implemented ADR programs and arbitration provisions found in employment agreements have significant benefits. Employees and employers alike prefer to use ADR because it is less expensive than the costs associated with protracted litigation. For example, court-mandated ADR programs are often provided to litigants free of cost.[27] Alternatively, standard employment arbitration agreements may include a cost-splitting clause, in which the employer and employee agree to divide any arbitration costs between themselves.[28] However, most arbitration agreements also include a caveat that, if a litigant cannot afford to pay a proportionate share of the cost of arbitration, the employer will bear the full cost. If this provision is not included in the arbitration agreement, some courts allow an overly burdensome cost-splitting provision to be severed from the rest of the agreement, with the cost of arbitration assigned to the employer.

These ADR methods also provide a substantial degree of privacy and confidentiality to participants. Local rules in the district and circuit courts provide that the substance of what occurs during an ADR proceeding cannot be disclosed to the court if the case is not settled.[29] Courts do not always define "confidentiality"; however, they typically mandate that the ADR proceedings are not discoverable or admissible while the case is proceeding.[30] Similarly, arbitration hearings occurring as part of employer arbitration agreements are kept private, because the arbitrator typically prohibits those who are not parties to the case from witnessing the proceeding.[31] Private arbitration also allows the parties to agree on the extent of confidentiality and privacy to be maintained after the arbitration has occurred.

An ADR program can also save costly time for participants. Attorneys are well aware that time is money, and this aspect of an ADR program can be its primary advantage. ADR programs may require attorneys to spend less time conducting discovery, because the neutral parties will limit the discovery that is needed. Litigants and counsel also benefit from the quick finality and resolution that the ADR process provides. These proceedings can take only a few hours of meeting time before a matter is resolved (or a neutral party realizes that no resolution will occur) versus days spent in the courtroom presenting a case and then weeks (or longer) waiting for a decision in a trial to the court. In the end, even if ADR does not resolve the dispute, the process typically provides a well-informed building block if the parties elect to proceed with litigation.

However, despite the benefits that ADR offers—

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decreased costs of litigation and increased privacy—such procedures have certain drawbacks. First, litigants may be seeking to have their claims heard by a jury in a trial by their peers rather than simply being referred to a neutral ADR procedure. Another potential drawback is that the Federal Rules of Evidence and Civil Procedure may not apply with equal force in arbitration, thus allowing the arbitrator to possibly consider any information the parties provide, even if the evidence is potentially irrelevant but damaging. Similarly, while requiring less discovery may save time and money up front, certain cases may benefit from extensive discovery processes, which could eventually unveil a more appropriate outcome. In addition, with limited exceptions, the parties to arbitrations give up the right to appeal the arbitrator's decision.

Overall, alternative dispute resolution offers a positive alternative to protracted and costly litigation; however, the ADR procedure must be a proper fit for the needs and expectations of both parties. It will be interesting to observe how the federal trial courts and appellate courts view court-sponsored mediation and arbitration agreements in future labor and employment disputes. **TFL**

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Endnotes

[1]28 U.S.C. §§ 651, *et seq.* (1998). This article provides a brief overview of the federal ADR process. It should be noted, however, that ADR programs are constantly changing and counsel should consult each court's own ADR rules and procedures before proceeding.

[2]Fed. R. Civ. P. 33.

[3]*See* L.R. 33 in all circuit courts.

[4]*See* Jerry Goldman, *The Civil Appeals Management Plan: An Experiment in Appellate Procedural Reform*, 78 Colum. L. Rev. 1209 (1978).

[5]28 U.S.C. § 651 (a) (1998).

[6]For a detailed overview of the various ADR programs offered by the federal district courts, *see* Robert Niemic, Donna Stienstra, and Randall Ravitz, Guide to Judicial Management of Cases in ADR, 2001, available at www.fjc.gov.

[7]*See*, for example, M.D. Ala. L.R. 16.2; W.D. Mich. L.R. 16.3.

[8]*See*, for example, W.D. N.C. L.R. 16.2; Kansas L.R. 16.2.

[9]*See* U.S. District Court for the Southern District of Ohio, *Mediation*, at www.ohsd.uscourts.gov/mediation.html (last visited June 2, 2008).

[10]W.D. Pa. L.R. 16.2.

[11]*See*, for example, S.D. Ohio L.R. 16.3(a)(1); W.D. Texas CV-88(a); N.D. Ga. L.R. 16.7(B)(1).

[12]N.D. Cal. L.R. ADR Rule 1-1 *et seq.*

[13]N.D. Cal. L.R. ADR Rule 1-2.

[14]*See*, for example, C.D. Ill. 16.4(A); M.D. Fla. 9.01(a).

[15]For simplicity, the term "mediation" will be used to include both mediation and settlement conferences, which are used interchangeably by the circuit courts.

[16]For a detailed overview of the various ADR programs offered by the federal circuit courts, *see* Robert Niemic, Mediation and Conference Programs in the Federal Court of Appeals: A Sourcebook for Judges and Lawyers (2d ed. 2006), available at www.fjc.gov.

[17]*See*, for example, 3d Cir. R. 33.5(b).

[18]*See* Niemic, *supra* note 18 (overview of mediation procedures in all 13 circuit courts).

[19]9 U.S.C. §§ 1, et seq.

[20]*See*, for example, *Preston v. Ferrer*, 128 S. Ct. 978, 983 (2008).

[21]*See*, for example, *Walker v. Ryan's Family Steak Houses Inc.*, 400 F.3d 370, 381–382 (6th Cir. 2005).

[22]*See*, for example, *Pennington v. Frisch's Rest. Inc.*, No. 04-4541, 147 Fed. Appx. 463, 467 (6th Cir. 2005).

[23]*See*, for example, *Walker*, 400 F.3d at 373.

[24]*Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265 (1995).

[25]*See* Richard Bales, *Contract Formation Issues in Employment Arbitration*, 44 Brandeis L.J. 415 (2006).

[26]*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (stating that arbitration agreements shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

[27]However, this provision varies by court; therefore, counsel must check with the local clerk of court for specifics on what costs may not be included.

[28]*See*, for example, *Morrison v. Circuit City Stores Inc.*, 317 F.3d 646, 657–658 (6th Cir. 2003).

[29]28 U.S.C. § 652(d); *see*, for example, Maine L.R. 83.11(d); 10th Cir. R. 33.1(D).

[30]*See*, for example, S.D. Ga. L.R. 16.7.8; D.C. Minn. L.R. 16.5(c)(2).

[31]*See* American Arbitration Association, National Rules for Resolution of Employment Disputes, Rule 22.