Resolving Securities Industry Employment Disputes

by
Deborah Rothman

CHAPTER SUMMARY:

This chapter reviews the types of employment disputes likely to arise in the securities industry, the new NASD and NYSE arbitration rules, and the various dispute resolution methods available to resolve employment disputes—both statutory and common law—in the securities industry. The pro's and con's of litigation, SRO arbitration, and mediation are analyzed from the perspective of both brokers and firms. Pointers are given for selecting the appropriate mediator and ensuring success in the mediation process.

Introduction.

There is no question that employee-asserted employment claims are increasing in all industries, and are disruptive to business and to employee morale. It is instructive to consider that at the American Arbitration Association ("AAA"), the number of employment dispute filings has increased every year since 1996. In fact, between 1996 and 2000, the number of employment disputes filed under AAA's National Rules for the Resolution of Employment Disputes doubled. [1]

The types of employment disputes most often seen in the securities industry are primarily statutory claims—Title VII (discrimination based on age, sex—including harassment, race, national origin), ADA (disability discrimination, failure to accommodate), ADEA (older workers protection) as well as common-law claims (breach of contract, wrongful termination, breach of promissory note, lay-offs, compensation disputes, reductions in force, Form U-5 defamation and raiding claims)

There is an array of processes available as alternatives and/or adjuncts to litigation for the resolution of employment disputes between firms and brokers. [2] At one end is litigation, at the other is mediation, and in between is arbitration—both under the auspices of the Self-Regulatory Organizations ("SRO's"), and under the auspices of outside providers such as AAA and JAMS.

The SROs' Recent Rule Changes.

In an effort to address concerns about the fairness of certain of their arbitration procedures, the SRO's have recently made arbitration of certain employee-asserted claims a more consensual alternative to litigation, and a fairer process. The Form U-4 continues to require mandatory arbitration of all employment-related disputes between registered representatives and member organizations pursuant to the rules of the SRO's with which they are registered.

Effective January 1, 1999, however, both the NASD and NYSE have limited the arbitrability of employment discrimination disputes and simultaneously introduced procedures into the arbitration process to make it a more just procedure for the efficient resolution of such claims. Effective May 15, 2000, additional refinements to the NASD arbitration procedure of employment discrimination claims went into effect.

In 1999, the NASD the new Rule 10210 Series, which applies only to employment discrimination arbitration went into effect. Under the new rules, the NASD has removed the requirement that registered persons arbitrate statutory employment discrimination claims pursuant to the U-4 Registration Form. It will, however, enforce any private arbitration agreement made pre- or post-dispute other than the U-4, including an agreement to arbitrate contained in the firm's employment handbook or other employment-related document. And the NASD will continue to require arbitration of non-statutory employment-related claims pursuant to the Form U-4.

The NYSE has taken it a step further. Under amended Rule 347(b), any claim alleging statutory employment discrimination, including sexual harassment, is not eligible for arbitration pursuant to a Form U-4, nor any other pre-dispute arbitration agreement. This ineligibility extends to negotiated as well as form pre-dispute arbitration agreements. [3] The only statutory employment-related disputes for which the NYSE will provide an arbitration forum are those in which arbitration has been agreed to by the parties after the claim has been asserted. [4] In this respect, the Exchange's arbitration policy conforms with the EEOC's "Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment". [5]

Employment claims containing both statutory and non-statutory components have the potential to pose a significant burden on all parties where a SRO is identified as the arbitration forum; arbitration is the appropriate venue for common law contract and tort claims, but employees have the right to file statutory claims in court absent a separately negotiated agreement to arbitrate. Frequently the facts giving rise to both sets of claims are the same. Since failure to consolidate them would be financially oppressive and procedurally cumbersome, both the NASD and the New York Stock Exchange ("NYSE") have added a rule to deal with the consolidation of such hybrid disputes.

Under the NASD schema, if the employer agrees to have all claims heard in court, NASD will not stand in the way, and the employee need not go through the formality and expense of filing an arbitration demand for the common law claims. [6] If the employee files claims both in court (discrimination claims) and with the NASD (contract claims), the employer may remove the non-statutory claims to court. Under this schema, the employer has the ultimate power to agree to or withhold consent to judicial consolidation, and thus the power to impose the employee (and itself), the added costs and delays of litigating both in court and before the NASD.

Similarly, new NYSE Rule 347 makes provisions for bifurcation of hybrid cases, with the discrimination claims heard in a forum other than the Exchange [7] and the arbitrable claims

heard at the Exchange. Additionally, because the Rule provides for arbitration "at the instance" of either party, the employer can waive the arbitration requirement, so that the non-statutory claims can also be heard in court, or the employee can enter into a post-dispute agreement to consolidate all claims in arbitration.

One of the most controversial aspects of SRO arbitration has been the selection of the neutral(s). In an effort to reduce both the appearance and the acuality of pro-industry bias, both the NASD and NYSE have made recent changes to their arbitrator selection processes. The NYSE in September, 2000, initiated a two-year pilot project [8] that added a series of optional rules governing the selection of arbitrators. Under the Exchange's pilot program, the parties have greater participation in the selection of arbitrators than is provided in existing Rules 601 and 607, but only if both parties agree to utilize the optional Rules. If so, they may select any arbitrator, or select their arbitrator from a randomly generated list of fifteen arbitrators or from a list of nine arbitrators who have been pre-screened for conflicts, availability and employment law expertise.

The NASD, too, has improved the impartiality of its arbitrator selection process by assembling a sub-panel of employment dispute arbitrators with significant employment law expertise who are not aligned with either management or employees. These arbitrators comprise the pool available to hear employment discrimination claims. Further, statutory cases filed with the NASD after May 15, 2000 may be heard only by these public, non-industry arbitrators, unless the parties stipulate otherwise.

The NASD has made other changes to its arbitration procedure as well, designed to encourage the utilization of arbitration by ensuring its fairness and incorporating as many advantages of litigation as possible, without sacrificing the inherent benefits of the arbitration process. Thus the NASD rules permit the imposition of punitive damages. [9] To streamline the process, a single arbitrator now has the authority to hear claims seeking as much as $100,000, and the parties may stipulate to a single arbitrator for claims up to $200,000 as well. [10] Discovery has been liberalized, [11] and arbitrators now have the explicit authority to award attorney's fees. [12] Finally, NASD arbitration awards must contain supplementary information in place of an abbreviated award simply denominating the winner, the loser and the amount of money to be paid, if any. The provision of such information increases both the perception of fairness and the parties' satisfaction with the arbitration process.

In a move theoretically designed to ensure that registered representatives knowingly assent to arbitrate their common law claims, [13] effective May 15, 2000, the NASD added Rule 3080, entitled "Disclosure to Associated Persons When Signing a U-4." Modeled on the disclosure required to be given to customers under Rule 3110(f), the disclosure is the functional equivalent of a Miranda warning. It advises brokers that by accepting employment in the securities industry, they are waiving the right to a court trial (except for statutory discrimination claims), and that arbitration awards are final.

Judicial enforcement of mandatory arbitration agreements.

Nationally, the judicial trend, barring substantive and procedural due process concerns [14] , is to apply the Federal Arbitration Act, 9 U.S.C. §§1 et seq. ("FAA"), to enforce mandatory pre-dispute arbitration agreements of all employment disputes, including statutory claims. The U. S. Supreme Court, though strongly split, recently unequivocally reversed the stand-alone Ninth Circuit, holding that employment disputes are not exempt from mandatory pre-dispute arbitration agreements. Circuit City Stores v. Adams, 194 F.3d 1070 (9th Cir. 1999), rev'd in No. 99-1379, 2001 WL 273205 (U. S. Mar. 21, 2001). [15] In another recent decision, a district court granted a defense motion to compel arbitration of statutory discrimination claims, even though the arbitration agreement was not signed by the employee. Chanchani v. Salomon/Smith Barney, Inc., 99 Civ. 9219 (RCC), 2001 WL 204214 (S. D. N. Y. Mar. 1, 2001). [16] Likewise, a Form U-4 arbitration agreement, entered into prior to assertion of the claim, has been applied retroactively to compel a securities industry plaintiff to arbitrate his common law employment claims against his former employer. Marcus v. Masucci, 118 F. Supp.2d 453, (S. D. N. Y. 2000). In fact, only the Ninth Circuit still bars enforcement of mandatory arbitration agreements that pertain to discrimination claims, Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998), cert. denied, 121 S. Cot. 756 (2001). Though the Supreme Court declined to review Duffield, it is likely that this line of reasoning will be reviewed by the Supreme Court within the next few years, and that the Ninth Circuit will be reversed on this issue. At that point, assuming that the process is fair and mutual, mandatory pre-dispute arbitration agreements covering statutory claims should be liberally enforced.

Does SRO arbitration favor broker-dealers? Do brokers do better at trial? Or is it a toss-up? Pro's and con's of litigation and arbitration.

It is incontrovertible that arbitration is a faster, more informal process than trial that results in a binding award with less expense. [17] There is a price to be paid for these benefits. Every dispute is different. In certain disputes, the trade-offs are worth the cost for the broker and not for the firm, in certain disputes the reverse will hold, and there are disputes in which the interests of both sides will be aligned.

The Orrick study cited below reveals that in the Southern District of New York, the average time to judgment for a statutory employment claim was 28 months. In other jurisdictions where court congestion is greater, the waiting time for a judgment can be longer. Even arbitration, though faster, is not a speedy process. The NASD estimates that the time from filing of an arbitration claim to the rendering of an award [18] averages about twelve months.

To achieve this speed, one component of standard litigation practice that gets sacrificed to a greater or lesser extent is discovery. Securities arbitration at the SRO's does not routinely provide for depositions. As a rule, this trade-off disadvantages employees more than employers, who tend to be the repositories of relevant documents, and to have unfettered access to a greater number of potential witnesses. On the other hand, limited discovery is helps to keep the claimant's costs down and speed the claim to resolution and, ultimately, to compensation.

Another way in which arbitration differs from litigation is that arbitrators have substantial discretion to disregard rules of evidence and are vested with broad equitable powers, the exercise of which cannot be judicially corrected absent manifest disregard for the law, bias, and several other limited situations prescribed by the FAA and by state law. Some see this as an advantage over the precedent-clad, "blind" justice system. Others fear "social engineering". This characteristic of arbitration has the potential to negatively affect both brokers and securities firms, assuming unbiased arbitrators.

One disadvantage of arbitration for firms is that arbitrators are frequently less receptive than judges to such "technical" arguments as the statute of limitations defense. Along the same lines, arbitrators tend to sustain fewer evidentiary objections than judges, preferring to hear irrelevant and/or potentially prejudicial evidence as well as double and triple hearsay, taking the evidence "for what it's worth." Similarly, arbitrators do not generally entertain motions in limine, so that evidence of settlement negotiations and other prejudicial material cannot necessarily be kept out of arbitration. A corresponding disadvantage of jury trials, and this tends to hurt the broker-dealers more than the employees, is that juries are frequently mystified by the bewildering complexity of instructions they are charged with parsing. Juries, as arbitrators, are sometimes accused of rendering "frontier justice" when the facts are sufficiently compelling, rather than sticking to the exacting confines of the law.

While arbitration usually turns out to be less expensive than litigation, it is also true that the absence of motion practice in arbitration results in meritless claims going all the way to hearing. Consequently, litigation, where weak claims can be disposed of by motion, is more cost-effective for firms and less desirable than arbitration for employees. Precisely because the defense cannot dispose of these claims prior to a full-blown hearing, arbitration makes settlement of weaker claims more practical for firms than resisting them. Additionally, plaintiffs benefit from more relaxed rules of evidence in arbitration, since emotional issues, though of marginal legal relevance, have a better chance of reaching the arbitrators' ears. And since the claimant can appear in pro per at arbitration, the process is extremely accessible to employees wishing to assert even the most marginal statutory claims.

The accessibility of the arbitration forum to employees with threadbare discrimination claims may be taken into account by firms as they formulate their alternative dispute resolution policies in light of the Circuit City decision. Even if an employee cannot persuade an attorney to take his or her discrimination claim on a contingency fee basis, claimants may appear in pro per in arbitration, lowering considerably the bar to unmeritorious claims.

Arbitration's greatest strength, and arguably its greatest weakness, is that the arbitrator's award is final, binding and non-appealable, except in very limited circumstances. Trial court decisions and jury verdicts can, and often are, appealed. When all appeals have been exhausted, winning is frequently a pyrrhic victory for whichever side eventually prevails because of the passage of time and the economic and emotional depletion that accompany protracted litigation. Nonetheless, delay is a nominal advantage for employers, who are in a

better position to weather lengthy court battles, and for whom “justice delayed is money saved.”

Because of the limited possibility of appeal of erroneous arbitration awards, arbitrators simply are not as accountable as judges. There is presently no counterpart to a judicial commission to which parties can turn when they believe an arbitrator has transgressed in ways other than those that form the basis for an appeal. [19] The absence of a right of appeal in arbitration weighs more heavily on individual claimants than on broker-dealers. Firms take comfort in the knowledge that, over time, they win some and they lose some. Claimants, who do not ordinarily file more than one, or possibly two claims in their lifetime, take no consolation if, in their only arbitration, the arbitrator makes a prejudicial error of law and that award is final.

The plaintiffs’ employment bar firmly believes that panels of three arbitrators are less likely than single arbitrators to assess punitive damages. There is a concern, as well, that panels tend to be more conservative and to seek consensus by “regressing toward the mean”. Single arbitrators theoretically act more boldly. So unless a firm stipulates to have a single arbitrator hear a claim in which the amount sought is between $100,000 and $200,000, brokers asserting statutory claims for more than $100,000 will have their cases heard by panels of three arbitrators, resulting in more conservative awards rendered in a less timely manner because of the difficulty inherent in scheduling so many people.

A disadvantage of both litigation and arbitration is the absence of confidentiality in these proceedings. While arbitration hearings are not open to the public, as trials are, court records are infrequently sealed from public view, and arbitration awards are available through a variety of publications. [20] Thus the identities of the parties, the allegations made, and the disposition of the claims, are all publicly available.

It is impossible to predict how any given claim would have fared in arbitration as opposed to litigation. The plaintiffs’ employment bar maintains that the awards rendered by NASD arbitrators in the past were substantially smaller than court judgments. The General Accounting Office and the Securities Industry Association have conducted studies, on the other hand, that indicate that securities employees can expect equal if not better outcomes in arbitration than in court.

Powerhouse San Francisco-based employment defense firm Orrick, Herrington & Sutcliffe in May, 2000 released an ambitious retrospective study comparing litigation and arbitration results in employment discrimination cases. [21] The Orrick firm reviewed over 2000 court and jury verdicts for employment discrimination cases filed in the Southern District of New York between April 1, 1997 and November 30, 1999. It also reviewed nearly 500 securities arbitration awards involving claims of discrimination or wrongful termination reported between January, 1989 and March, 2000. The study found that in arbitration, claimants prevailed in 43% of cases, while in litigation, that number was only 38%. Further, the average arbitration claimant was awarded $410,025, while the average recovery for prevailing plaintiffs was only $361,161. The study therefore suggested that “case outcomes are not substantially different in

arbitration versus court litigation." When the time frames are held constant, the statistics do not support the conclusion that statutory employment claims fare as well in arbitration as in litigation, although employees' frequency of recovery remains consistently higher in arbitration. [22]

Predicting the effects of the SROs' rule changes and of Circuit City on the acceptability to broker-dealers and to registered persons of arbitration of employment disputes.

The effects of the 1999 and 2000 rule changes are still being sorted out. The New York Stock Exchange's refusal to enforce pre-dispute arbitration provisions has essentially shuttered its employment discrimination arbitration business. In the meantime, there is less predictability than ever before. It is predictable that the rule changes will eventually go a long way toward enticing plaintiffs into the arbitration forum.

The most far-reaching change applauded by brokers' counsel is the new make-up of the SROs' panel of arbitrators. The prerequisite of employment law expertise on the part of the single arbitrator, or the panel chair, should result in awards more consistent with the body of law already established judicially in the area of employment discrimination. This should be so notwithstanding that there is no requirement that all the public arbitrators have legal expertise. The fact that arbitrators do not have to follow the law as strictly as judges, however, will always leave unpredictability in the process. On the other hand, some claims, and some defenses, benefit from a clear-eyed, non-legalistic, common sense analysis.

Further reducing the predictability of arbitration outcomes is the fact that, for statutory discrimination claims filed with the NASD after May 15, 2000, [23] none of the arbitrators may come from within the securities industry. Further, NASD rotates the arbitrator list, so that arbitrators can expect to get an equivalent number of cases without currying favor with the broker-dealers or with the plaintiffs' bar. The uncertainty of the characteristics of the members of the new roster of public arbitrators, coupled with their lack of a track record, creates more risk for both sides. So in the short-term, practitioners will not have reliable statistics on the new pool of arbitrators for the purpose of handicapping the names offered.

It is no secret that some arbitration critics contend that the NASD arbitration panels had a demonstrable pro-management bias. A decade ago there may have been something of an "old boys' network" within which certain discriminatory practices were tolerated by industry insiders. In point of fact, industry insiders have always been something of a double-edged sword as arbitrators—their insider's perspective on how things work did not necessarily cut in favor of the firm when the firm's actions had the potential to embarrass the industry.

Now with the absence of insiders on the employment discrimination panel, if there ever was built-in pro-management sentiment, it has disappeared. Additionally, public arbitrators who are less industry-dependent and who grew up in the post-Title VII era will be less complacent about discrimination. The shift to large panels comprised of public arbitrators who are selected

on a rotational basis should go a long way toward quelling plaintiffs' concerns about industry bias in the arbitration of statutory claims.

Arbitration is known for its speed, finality, relative informality and lower cost. The NASD's recent rule changes--the option of having a single arbitrator hear claims as high as $200,000 more truly neutral arbitrators, more liberal discovery, the ability to obtain an award of punitive damages, and explicit administrative authority for attorney's fees--may in the long run persuade the plaintiffs' bar, in particular those working on a contingency fee basis, that arbitration of statutory employment claims is a more plaintiff-friendly process than before.

Since the recent promulgation of the rules changes, have brokers voluntarily brought their discrimination claims to the SRO's for arbitration? On the contrary, employment arbitration filings have decreased at the NASD since the implementation of its new rules, as employees take advantage of their newfound ability to avoid the Form U-4 arbitration provision and take their statutory claims to court. Docket congestion, discovery battles, aggressive motion practice resulting in the early death of weaker claims and other unpleasant aspects of trial practice may dampen the plaintiffs' bar's predilection for litigation.

Are the broker-dealers changing their arbitration policies? Until the Supreme Court decisively addressed the enforceability of mandatory pre-dispute arbitration agreements governing discrimination claims, it would have been premature for securities firms to address possible revisions to their alternative dispute resolution policies. With the SROs' rule changes and the Supreme Court's unequivocal holding that pre-dispute arbitration provisions governing all manner of employment claims are enforceable under the Federal Arbitration Act, firms can now assess whether they wish to promulgate private mandatory arbitration policies. During the period of flux preceding Circuit City, many securities firms have created such effective internal dispute resolution procedures, including the option of external mediation, that many employment disputes are resolved internally.

The fact is, some members of the plaintiffs' employment bar still do not view NASD arbitration as fair to claimants. [24] What changes would need to take place for employees to forego their right to pursue their statutory claims in court and instead litigate them in an arbitration proceeding? The plaintiffs' employment bar has asserted that the following would be high on its wish list:

Arbitration would be voluntary, not industry-mandated. If arbitration is really advantageous to both parties, they reason, why not permit the parties to come to that conclusion themselves, once the dispute has arisen? This stance is consistent with the EEOC's position that mandatory arbitration of discrimination claims as a condition of employment violates the federal anti-discrimination laws, and with the newly-established NYSE arbitration policy.

Selection and training of arbitrators would take place outside the purview of the industry-dominated SRO's.

Discovery rules would take into account that the broker and the firm are not on an equal footing in terms of pre-arbitration access to relevant documents and witnesses. [25]

Except where agreed to by the employee, all arbitrations would be heard before a single arbitrator.

Arbitrators would be required to issue written, reasoned awards stating the basis for their decisions. [26]

Still there is, from the plaintiffs' perspective, a structural problem with arbitration—the "repeat player" phenomenon. Firms are a source of ongoing business for arbitrators, while each employee participates in no more than one or two arbitrations in a lifetime. Thus the plaintiffs' bar fears that arbitrators will, if only unconsciously, shade their decisions so as not to alienate the broker-dealers. The vast majority of arbitrators value their integrity and reputations too much to make such a compromise. Nonetheless, to a certain extent, perception is reality. As the plaintiffs' employment bar creates mechanisms, such as national databases and list-serves, whereby information can be rapidly exchanged concerning proposed arbitrators, arbitrators can be expected to regard the plaintiffs' bar as a whole as another "repeat player" with the same power to blackball a biased arbitrator as the institutions. At that point, the "repeat player" phenomenon should cease to be a barrier to arbitration.

In the meantime, one way the plaintiffs' bar tries to avoid arbitration when they believe their clients' claims would fare better in court is by capitalizing on NASD Code of Arbitration Procedure §12(d)(1). Since that rule explicitly excludes class actions from the arbitration process, these attorneys avoid SRO arbitration by consolidating individual employees' claims and filing them as class actions. [27]

Mediation: introduction.

Mediation is a fast, private, flexible, confidential, non-binding process whereby a neutral professional facilitates a dialogue that usually results in a settlement of the dispute. The dialogue centers on the parties' legal positions, their individual interests, and the options they, their counsel and the mediator are able to generate to resolve the dispute. Ordinarily, the settlement is documented before the parties leave the mediation.

The mediation process is increasing in popularity in resolving employment disputes in all industries and is encouraged by the SEC, NASD, [28] NYSE and EEOC. Because many firms and employees prefer to resolve sensitive employment issues privately, mediation of employment disputes is growing in favor within the securities industry.

Mediation's popularity within the securities industry.

The securities industry is relatively small, and is heavily regulated and highly visible. The media seems fascinated by its goings-on. Employment turnover is at times rapid, and reputations

precede the arrival of brokers and managers. When brokers depart, they want to have problems at their old firms quickly resolved—even faster than arbitration can provide--so that they and their clients can easily transition to the new firm. Managers, too, prefer not to have clouds hanging over their heads as they embark on leadership at a new firm.

Employment relationships sour while intra-branch disputes are pending. Sometimes factions form within an office, and the business of buying and selling securities is disrupted, especially if the claim is an emotionally-charged one such as sexual harassment or racial discrimination. Mediation is the process of choice when a paramount goal is to safeguard employment relationships and defuse, rather than exacerbate, existing tensions in a branch.

The benefits of mediation include confidentiality and speed at a fraction of the expense of arbitration and litigation. In contrast to those processes, mediation can be scheduled and completed even before the claim has been filed. Mediation is a fast process, too, in the rapidity with which disputes resolve; many employment mediations take less than eight hours from opening statement to settlement agreement.

In upwards of 80% of employment cases, mediation results in a mutually acceptable resolution and dismissal of the claims. The collaborative quality of the process can even open up avenues of communication that were not strictly the province of the mediation, but which prove to be enormously helpful at heading off potential future problems.

One reason the process is so successful is because of the parties' participation in a positive, win-win procedure. Mediation is a relatively satisfying process in that it encourages the crafting, by the people who have the problem, of mutually acceptable resolutions flowing from both interest-based as well as legal analyses. In mediation, the parties—who know the most about the dispute and about what each is willing to give up to get it resolved--cooperatively tailor a solution they both can live with. In contrast, the binding processes—arbitration and litigation--promote a position-based, win-lose mindset, and result in determinations that are longer in the making, more expensive and are imposed by people not nearly as familiar with the parties' true interests. [29]

Before launching into protracted, costly, risky and disruptive litigation or arbitration around sensitive employment issues, employees and management frequently attempt a mediated resolution. Mediation is an attractive alternative, or at least prelude, to binding processes, and provides a measure of risk control not available in binding processes.

Determining whether a dispute should go to mediation.

Mediation is especially well-suited to the satisfactory resolution of statutory claims because of the creativity that can be brought to bear on crafting a win/win resolution. It is not uncommon for the parties (and their counsel, if they are represented) to sit together at a conference table and discuss non-monetary alternatives that might have significant value to the claimant and be relative inexpensive to the firm. Apologies, letters of reference, adjustment of promissory note

obligations, adjusted participation in the firm's incentive programs, lower LOS (length of service) designations, increased payout, additional ability to obtain shares in new issues, participation in a mentoring program, enhanced distribution of departing brokers' accounts, improved promotion prospects for the class of employees of which the claimant is a member, and increased marketing resources are all examples of monetary substitutes that cannot be obtained—even by a successful claimant—from an arbitrator, a judge or a jury.

Mediation of employment disputes is especially valuable in the securities industry because the NASD rules do not routinely provide for depositions. Even if the case does not settle, mediation permits each side to preview the other's case, as well as the credibility and charisma of the other side's principal witness(es). At mediation each side presents its analysis and weaves its facts into a compelling tale—information which is invaluable to the other side's analysis in the event the matter does not settle.

Some people fear that highly emotional parties can exacerbate what would otherwise remain a purely legal dispute. [30] While this is a legitimate concern, it actually militates in favor of mediation because emotional people seldom make sound business judgments, either with regard to the conduct of the arbitration or litigation, or in considering settlement. A mediator skilled in dealing with people's emotions can help them transcend the emotional obstacles to rational decision-making.

Promissory note cases, on the other hand, are not textbook examples of disputes that cry out for mediation. These cases are relatively straightforward: the departed broker received a sign-on bonus and signed a note or series of promissory notes for the amount of the bonus, to be forgiven in intervals as a function of the broker's longevity with the firm. Since the broker has departed before the entire amount of indebtedness had been forgiven, the firm seeks to enforce its rights under the remaining promissory notes for the unearned balance. It is rare that there are strong defenses to such a claim.

Firms' conventional wisdom is that promissory note cases and other straightforward, easily-proven cases should not be mediated. These cases do not involve an ongoing employment relationship to preserve, and emotions ordinarily play little if any role in the decision-making process of either side. Liability is usually clear-cut, so there is little room for compromise. Passing up mediation avoids giving the employee a preview of the firm's documentation, or otherwise educating the opposition, and saves attorney time and mediation costs. With so little room for compromise, broker-dealers believe the parties can explore equally fruitfully the few avenues for concession without an intermediary.

Yet given the high success rate of mediation—some employment mediators boast an 85% or even 90% success rate—firms sometimes choose to "show their hand" on "slam-dunk" cases simply because of the likelihood of persuading the broker to agree to pay the balance owing. In other words, precisely because the defense case is so straightforward, a dispassionate neutral can, in caucus, review the evidence with the broker, predict the likelihood of a defense award, and persuade the broker to settle to avoid the inevitable outcome and expense of a binding

procedure. Areas that the mediator can explore to make settlement more palatable to the broker include fashioning a payment plan, a reduction of the accrued interest on the debt, write-off of fractionate years, favorable tax treatment, a reduced interest rate, and/or a cash discount. Mediation of clear-cut liability cases is all the more appropriate where the departed broker asserts offsetting claims, or where there is a new branch manager who is not personally upset with the departed broker and simply wants to achieve a prompt resolution.

When is the best time to mediate?

The earlier mediation is undertaken, the less entrenched the parties are. Early in the process, too, neither side has burned through its litigation budget, and thus more defense funds are available to satisfy the claimant. In fact, firms frequently propose mediation upon receipt of the Statement of Claim.

The defense generally spends the bulk of its litigation budget well before the arbitration date. Claimants' counsel who work on a contingency basis tend to pace their preparation differently, and may not be prepared to engage in serious settlement negotiations until closer to the date set for arbitration or trial. This timing mis-match can complicate settlement negotiations not just because there is less of the pie available, but also because parties become increasingly entrenched in their legal positions as the trial or arbitration date approaches.

Ordinarily a certain amount of discovery must take place to assure both sides that they have sufficient information upon which to compromise their positions. In anticipation of a scheduled early mediation, though, counsel can agree to an informal exchange of key documents. Early mediation is akin to a high-stakes poker game where no one knows what cards the other holds, but does know its own strengths and weaknesses. Certainly a party who is aware of a weakness in its own case would be well-advised to try to convene an early mediation. Plaintiff's counsel on a contingency fee arrangement stands to make a much higher hourly rate by settling earlier rather than later.

If mediation is not desirable at the outset, the defense sometimes proposes it while a demurrer or motion to dismiss is pending. To put maximum pressure on the plaintiff, the defense will sometimes suggest mediation while its motion for summary judgment is pending, but before a busy plaintiff's attorney has invested the time and energy in assembling an opposition. A mediation scheduled for a date close to the hearing on the summary judgment motion forces the plaintiff to confront the realities of his or her case; in that situation, if the settlement prospects look dim, the mediator will stress the risk of declining the last and best offer, having the case dismissed soon thereafter, and walking away with nothing. If the defense wants to signal that it intends to aggressively resist the claims, it may suggest mediation following the claimant's deposition, especially if the deposition went well for the defense and the plaintiff is unnerved or disheartened.

Even if the dispute is not sufficiently developed to settle at the mediation, there are collateral benefits to early mediation such as more collegial relations between counsel, more focused

discovery, better understanding by the individuals involved of the other side's perspective, greater likelihood of an agreed-upon informal discovery schedule and open lines of communication regarding future settlement discussions and litigation courtesies. A secondary benefit is that the tensions between the employee and the broker-dealer are reduced, resulting in a more pleasant working environment. An employment dispute that was mediated prematurely can be the subject of a second—often successful—mediation session.

Increasing the likelihood of success in employment mediations: Selection of mediator--a critically important decision.

What makes a good mediator? The most important criteria for maximizing mediation success are familiarity with the industry, extensive knowledge of employment law, ability to quickly master complex fact patterns and, perhaps most important, expertise in the people aspect of the mediation process. According to an American Arbitration Association publication, the best mediator is "an active listener who can, without endangering one side's perception of the mediator's impartiality by appearing to take a position, assist the parties to better understand each other's views and offer creative solutions to move them off what might otherwise be entrenched positions. Successful mediators . . . attempt to suggest, clarify, interpret, reason, persuade, and inform the parties of the pros and cons of each side's case and of alternative solutions to their disputes." [31]

Should a judge or an attorney-mediator serve as mediator? There is a place for each style. Retired judges bring a prestige, status, mantle of authority and presumed expertise to the mediation, which is especially helpful, for example, when an attorney recognizes that his or her client will be more amenable to settlement if a judge recommends the settlement. Retired judges tend, and this is a generalization with many exceptions, to be evaluative in their approach. In other words, what judges do best is judge—they efficiently identify the strengths and weaknesses of each side's case, place a range of value on the claim, and then try to persuade both sides to settle within that range. This technique, when carried to extremes, is referred to as "bashing," which is characterized by belittling both sides' positions and settlement offers in order to get them to settle for a compromise figure. The evaluative approach is best suited to non-emotional cases the resolution of which hinges on an accurate and credible prediction of how the case would be decided if it did not settle. However, because it is so straight-forward, the evaluative approach lacks the nuance and creativity that are sometimes necessary in difficult cases. This type of approach is generally favored by firms precisely because it is straightforward and efficient. Claimant's counsel, on the other hand, generally favor a more facilitative mediation approach unless they believe their client is not likely to be swayed by reasoning and. believe that nothing short of a "hammer" will produce a settlement.

Selecting a retired judge as a mediator is not necessarily in either party's economic interest. As a general rule, retired judges may be less apt—by training, experience, or inclination—to explore creative solutions involving indirect or non-monetary benefits which can be traded off

against a large cash demand. A retired judge may be too evaluative or too authoritarian to encourage the parties to brainstorm on a collaboratively developed "win-win" solution.

Attorney mediators, occasionally referred to as "recovering litigators", are generally believed to have more training in and expertise with the facilitative approach. This method initially focuses less on the merits of each side's case, and instead early on gives the aggrieved party an opportunity to vent. Venting is a process whereby a person who feels unfairly treated relates his or her story, irrespective of legal relevance, in a supportive environment. The mediator, in the venting phase, serves as an active, empathic, neutral listener who acknowledges the underlying emotional content of the narrative, an aspect of mediation that is often helpful in allowing the claimant to close the book on that chapter of his or her life: the opportunity to communicate the full gamut of feelings and positions to an empathic neutral is, for many claimants, the functional equivalent of his or her "day in court". The process of venting also helps the mediator separate the claimant's legal position from his or her interests which can be addressed in the mediation and resolved with an apology or more appropriate recognition of the employee's strengths and contributions.

In a facilitative mediation, the defense is encouraged to present in a non-combative manner what it perceives to be the strengths of its case and the weaknesses of the claimant's case, all the while signaling that it hopes that the matter can be successfully resolved at mediation, and reaffirming its commitment to a collaborative approach to settlement. Rather than declare impasse if the parties cannot agree on a dollar figure, a facilitative mediator is likely to help the parties collaborate on a settlement that involves a combination of non-monetary recognition/status benefits and indirect financial remuneration, in addition to direct financial compensation. Conducting this type of mediation requires patience, [32] diplomacy, compassion and intuition on the part of the mediator. The last quality is especially important because there are no classes, and no textbooks, to teach the mediator when to limit the claimant's venting, and when to encourage it, nor when to break the parties into caucus, and when, if ever, to bring the individuals together without their counsel (assuming counsel have so agreed).

The facilitative approach of many attorney mediators can serve to defuse the fears of a firm that is concerned about setting a negative precedent by settling a dispute with an immediate, large cash payment that impliedly admits employer error, discrimination or poor judgment. Instead, a resolution comprised of some cash compensation, but which leads to immediately improved work conditions for all similarly situated employees, can be characterized as an employee dispute that resulted in a "win-win" resolution by acknowledging the claimant's role in sensitizing management.

When counsel cannot agree on a mediator, how do they break the deadlock? Unfortunately, sometimes they don't—counsel would have needed a mediator just to mediate the question of who should mediate! Frequently, when firms believe they have a strong case, even if the claimant rejects everyone on their proposed list of acceptable mediators, they will permit the employee to select the mediator [33] , subject to their right of veto. Once they demonstrate

the strength of their case, they want the mediator to have credibility with the employee to persuade him or her of the problems with the employee's case. Where the employee is a woman and her case lacks merit in the firm's eyes, the firm is likely to want the mediator to be female, as well. Mediators who have the ability to express empathy with the individuals involved in the controversy can be most effective with disputes in which emotions run high, such as statutory claims.

How do the parties find competent mediators? Most full-time mediators have resumes and online sites that convey a sense of the age, interests, life experiences, community affiliations and personality of the mediator. The NASD, American Arbitration Association, JAMS and other major private arbitration providers maintain rosters of mediators with both employment law and securities industry expertise, and have administrators who can help guide parties in the selection process. The best source of mediators is by referral; there is no substitute for first-hand experience of a mediator's performance under the pressure of a heated conflict.

Sometimes inexperienced parties are reluctant to retain a mediator with whom the other side has worked successfully, for fear that the mediator may be biased. Bias on the part of the neutral should not be of major concern to the parties. First of all, since mediation is a non-binding process [34] , bias would not create as major an obstacle to the success of the process as it does in arbitration—the mediator does not make any orders or decisions, or render an award. Second, when a neutral has gained a reputation for effectively mediating cases in a particular field of law or industry, it is inevitable that the mediator will have worked with some or even the majority of the attorneys in that field. It would be counter-intuitive and counter-productive to disqualify a mediator merely because the other side, based on first-hand experience, thinks highly of him or her. Third, a successful and effective mediator who has worked successfully with one or more of the parties before has an immediate advantage, [35] and is far preferable to a mediator that neither side has ever used. And fourth, the only way a mediator develops a reputation for effectiveness and gets repeat business is by helping both sides negotiate a resolution that is mutually acceptable.

After narrowing the choice of mediators to two or three, the attorney and client might perhaps interview each by phone. This process is akin to selecting a surgeon, attorney, investment advisor or any other specialist. The interview enables counsel and client to experience the neutral's demeanor and approach to their concerns. It is also appropriate to request the mediator's references before retaining the mediator.

Increasing the likelihood of success in employment mediations: Preparing for mediation.

Counsel should prepare for mediation almost as thoroughly as they prepare for trial insofar as mastery of documents, witnesses and timelines is concerned. It is important to analyze the costs—financial, personal, and organizational, including foregone opportunities--of proceeding with the case to trial or arbitration—as well as the realistic likelihood of success given the strengths and weaknesses of the client's case. Success should be defined from the perspective of the client, who may not consider legal victory at all costs to be a success. Finally, the same

analysis should be done from the perspective of the opposing party. This helps the client view his or her own case more realistically, as well as generating possible avenues for compromise.

Deciding who should be in attendance at the mediation is essential; the mediator can lend guidance on this issue. If the dispute involves an alleged "perpetrator", should that person be present? Most plaintiffs' counsel opt to protect the client from the unpleasantness of spending additional time with the person whose actions generated so much pain, reasoning that it would add insult to injury and would be counter-productive to the spirit of mediation. On the other hand, some plaintiffs' attorneys believe the claimant should be exposed to the alleged perpetrator since, if the claim does not settle at mediation, there will be no choice about whether to face the perpetrator at arbitration or trial.

Ordinarily, the parties do not bring their witnesses to mediation. The substance of what a witness is expected to say at trial is a sufficient offer of proof, and settlement can, if necessary, be made contingent on the provision of a sworn statement from the witness regarding the proferred testimony. On the other hand, documents supporting a party's position are persuasive and should be brought to the mediation.

Technically, only parties and their counsel may attend a mediation. Realistically, the defense should not object if an emotional claimant wishes to bring a support person—spouse, friend, sister, etc.—who can be in the caucus room to help the claimant evaluate various settlement proposals, to help calm jittery nerves and perhaps to generate additional ideas. This is especially helpful where the defense will have more representatives on its side of the table.

It is imperative that a decision-maker with sufficient authority be present at the mediation on behalf of the securities firm. It is nearly impossible to convey telephonically the gist of the mediation and the basis for a representative's recommendation that the firm increase its settlement figure. After the parties have gone through an emotional day and have finally gotten down to serious negotiations, it is disheartening and can be counter-productive to cut short the negotiations until the firm's representative has had an opportunity to meet with management and attempt to obtain more settlement authority. In an important case, the better practice is to send a highly-placed representative to the mediation. Plaintiff's counsel is well-advised to confirm with the defense that the firm will send a representative with sufficient authority, and to define the level of authority expected.

Counsel and client alike should be thoroughly familiar with the mediation process—joint session, caucuses and long periods of boredom between meetings with the mediator. Generally the caucus sessions take less and less time as the day goes on. The party that insists on "cutting to the chase" earlier in the process can expect to lose bargaining leverage.

To optimize the chances for a successful mediation, the parties should, in a pre-mediation phone call if time permits, review with the mediator factors such as how emotional the claimant is, whether the broker is still employed by the firm, whether the manager is upset, whether the "perpetrator" continues to work with the claimant, the circumstances under which

the claimant departed, whether and to what extent the settlement amount comes out of the branch's budget and the extent to which the facts and the law are contested.

Cases are likely to settle faster when claimant's counsel does not open with an unwarranted seven- or eight-figure demand, and when defense counsel does not steadfastly maintain that the company intends to aggressively defend the claim all the way to the Supreme Court if necessary. Mediation trainers teach participants to "attack the problem, not the people." Where a party cannot persuade the other on an important point, the best practice is to agree to disagree, and move on. Mediation can succeed even if the parties still disagree on the facts and the law. "Brainstorming" rather than "storming out" is what saves the day.

In other words, effective mediation advocacy requires that counsel employ a different skill set than trial advocacy--assertive but conciliatory, cooperative, sympathetic and collegial. Hard-line positions in mediation frequently harden the other party's resolve. Refusal to be bullied into an unfair settlement can be communicated in a soft-spoken but persuasive manner. It is important, too, that the client understand that his or her otherwise pugnacious attorney's failure to argue every point, and private encouragement of settlement, do not signify that the attorney has lost faith in the client or the case.

In preparation for the mediation, the parties should find out whether the mediator wants mediation briefs submitted, and of what length. Some mediators prefer them, while some will not read them. In a dispute that is factually intensive, it is a good idea to prepare a timeline showing when the critical events occurred in relation to one another, so that the mediator can quickly grasp the causality that is being asserted or the basis for the defense's denial thereof.

Mediation: conclusion.

Counsel must keep clearly in mind that professional mediators never bully, coerce or pressure the parties to settle. The mediation process, if conducted expertly, results in settlements of cases that should settle, and impasse in cases that are not ready to settle, or should be tried. The role of the mediator is to effectively ensure that each side understands the strengths of the other side's case, the weaknesses of its own, the risks inherent in proceeding to a binding process, and the costs associated with doing so, as well as to continually participate in the generation of alternatives to litigation. If the mediator has privately explored these issues thoroughly with each side and the parties still choose not to settle, pressuring them would be disrespectful and counter-productive. [36] Paradoxically, sometimes the parties become more fully committed to serious negotiation when the mediator steps out of the middle.

Assuming the case does settle at mediation, it is the better practice to document the settlement as fully as possible, regardless of the hour. Analyzing the details that must be documented, and working through any unanticipated glitches, can be accomplished with the mediator's assistance while the parties are still enchanted with the fact that they have finally put an end to their dispute. [37]

If the case does not settle, the mediator will summarize the progress the parties made, leaving the door open for future negotiations or a second mediation session. Additionally, the mediator can smoothe the litigation process by identifying the roadblocks to settlement and suggesting the parties informally exchange information and documentation in the following week.

From a time, cost and effectiveness perspective, mediation is quickly becoming the method of choice in the securities industry for resolving employment disputes if internal procedures fail. Given the high settlement rate, the speed with which disputes can be resolved, the relatively low cost relative to full-scale litigation and arbitration, the confidentiality of the process, the creative settlements that can be crafted that actually "expand the pie" by incorporating highly-valued non-monetary items into the settlement package, and the higher level of participant satisfaction, it is not surprising that brokers and firms embrace mediation so wholeheartedly.

This article will be published as a chapter in the PLI 2001 Securities Arbitration Handbook.

FOOTNOTES:

[1] Of the 4,022 employment cases filed with the AAA in 1999 and 2000 combined, only 300 eventually resulted in decisions by arbitrators.

[2] In this article, the terms "broker", "employee", "claimant" and "plaintiff" are used fairly interchangeably except where another usage is explicitly or contextually obvious. Likewise, the terms "firm", "defendant", "respondent" and "broker-dealer" are used interchangeably.

[3] The NYSE's rules should not be interpreted to prohibit arbitration of employment discrimination claims in the absence of a post-dispute arbitration agreement. See, SEC Release No. 34-40858, 1998 WL 907943 (Dec. 29, 1998) where the SEC noted that the new NYSE rules "neither invalidate. . .pre-dispute…arbitration agreements nor force. . .parties to litigate statutory employment discrimination claims—[they] merely remove. . .the Exchange as an arbitration forum for such claims."

[4] NYSE Rule 600(f), dealing with non-registered employees, was also amended to make ineligible for arbitration before the Exchange, statutory employment claims unless the parties have entered into a post-dispute arbitration agreement.

[5] EEOC Notice No. 915.002, July 10, 1997. The EEOC has taken the position that arbitration is a fair, effective means of resolving discrimination claims where the parties choose, post-dispute, to arbitrate.

[6] Where the respondent declines to have all claims heard in court, NASD Rule 10216 provides methods for coordination of the court action and the arbitration proceeding.

[7] In Chanchani v. Salomon/Smith Barney, Inc., 99 Civ. 9219 (RCC), 2001 WL 204214 (S. D. N. Y. Mar. 1, 2001), the court upheld Salomon/Smith Barney's arbitration procedure, which called for the arbitration of all employment disputes, including statutory discrimination claims, before the American Arbitration Association.

[8] NYSE No. 00-22.

[9] See, e.g., Acciardo v.Millennium Secs. Corp., No. 99 Civ. 3371, 2000 WL 177793 (S. D. N. Y. Feb. 1, 2000), upholding an arbitration award of $5000 in compensatory and $100,000 in punitive damages for Form U-5 defamation.

[10] In February, 2000, the SEC approved a voluntary two-year "Single Arbitrator Pilot Program." NASD Code of Arbitration Procedure 10336.

[11] NASD Rule 10213, effective May 15, 2000, requires that arbitrators consider the relevance of the information sought in light of the time and expense in ruling on the need for depositions.

[12] Pursuant to NASD Rule 10215, in accordance with Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e-5(k), which authorizes an award of attorney's fees to the prevailing party, the arbitrator has authority to award reasonable attorney's fees if applicable law permits such an award.

[13] The existence of this disclosure really does not change the "take it or leave it" adhesive nature of the mandatory arbitration provision of the Form U-4. It is unlikely that people who have prepared for and passed the Series 7 exam and are otherwise intent on becoming brokers will decline to become registered by virtue of the disclosure that their contractual claims, if any should arise, will be subject to mandatory arbitration.

[14] See, e.g., Hooters of America, Inc. v. Phillips, 39 F. Supp. 2d 582 (D.S.C. 1998).

[15] Adams had brought a statutory discrimination claim in federal court.

[16] In Chanchani, the district court granted the employer's motion to compel arbitration of plaintiffs' employment discrimination claims. The court based its decision on the fact that the plaintiffs continued to work for Salomon/Smith Barney after receipt of Interim Handbooks containing the arbitration agreement.

[17] Michael Delikat, an employment defense lawyer whose firm handles substantial numbers of discrimination claims before the SRO's, estimates that the legal fees charged his clients to resist these claims in arbitration are less than one-quarter of those incurred in a federal court jury trial (excluding appeals) on similar claims. Delikat, "Employment Arbitration: A Defense Practitioner's View", Securities Arbitration Commentator, Vol. IX, No. 2, pp. 1 et seq. (September, 1997).

[18] The NASD does not break out employment cases from customer cases for statistical purposes.

[19] In April, 2001, the College of Commercial Arbitrators, a national group of experienced arbitrators and academics, was formed to address issues of arbitrator qualification and performance among its members.

[20] Arbitration awards are published in Westlaw and digested in the Securities Arbitration Commentator ("SAC"), for example. Starting June 1, 2001, the NASD, in conjunction with the SAC, will maintain a free online library of arbitration awards, catalogued by award number, parties, arbitrator and award date. AAA had already made its labor and employment awards available for a fee online, although the names of the parties and the witnesses are not available.

[21] The study was published in the Orrick Employment Law Ticker, Volume No. 00-01, May 2000. The firm acknowledged that the study was not scientific, in that, among other things, (1) The Southern District of NY is a jurisdiction where "runaway" jury verdicts in employment matters are virtually non-existent; (2) the court sample was not limited to discrimination cases filed in the securities industry; (3) given the relatively private nature of arbitration, some awards may not have been reported; and (4) the vast majority of claims in both fora settled; one cannot know to what extent the selection of forum influenced the settlement amounts.

[22] Ninety-four percent of the sampled litigation cases that went to judgment were tried to juries. In spite of the paucity of "runaway" jury verdicts in the sample, the median arbitration award—in some ways a more reliable measure than the average award because it is less likely to be skewed by extraordinarily high recoveries--was only $71,965, compared to $125,000 for the median litigation plaintiff. Had the study compared arbitration results with trial outcomes in a jurisdiction with more "runaway" juries, the discrepancy would have been even greater.

The inference that arbitration claimants did as well as plaintiffs is further undermined when the time frames are held constant. Limiting the analysis to the 1997 – 1999 period for which district court data are available, employees still prevailed more frequently in arbitration—43-49% compared to 38% in litigation—but litigants' average and median recoveries far exceeded arbitration awards during this time frame--average court damages were $361,161, while arbitration awards averaged only $220,366; median court damages were $125,000, while median arbitration awards were only $81,167.

[23] NASD Rule 10211(a).

[24] Ironically, the SRO's have accomplished administratively what the plaintiffs' employment bar is more unlikely than ever to achieve judicially: a requirement of more evidence of an employee's willingness to arbitrate discrimination claims than a mere signature on a binding agreement (the Form U-4).

[25] Compare new NASD Rule 10213 with the more liberal Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, adopted by AAA and JAMS. This protocol was developed by representatives of management, labor, civil rights organizations, governmental bodies, as well as the American Arbitration Association. AAA's implementation of the discovery portion of the Protocol is embodied in its Employment Rule 7, which grants the arbitrator the authority to "order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issue in dispute, consistent with the expedited nature of arbitration." The AAA even reserves the right to decline to administer cases submitted pursuant to employment arbitration plans that materially deviate from the Due Process Protocol, and has exercised that right on more than one occasion.

[26] NASD Rule 10330(e) permits parties to request that arbitrators provide the reasons for their decision, but the arbitrators have the discretion to grant or deny the request. Contrast AAA Employment Rule 34c, which requires that the arbitrator(s) provide written reasons for the award unless the parties agree otherwise.

[27] There is nothing in the AAA rules preventing its arbitrators from hearing class actions, although an arbitrator does not have the power to certify a class.

[28] See NASD Notice to Members 00-64, announcing rule changes lowering its mediation fee structure.

[29] Sometimes the parties themselves don't realize what their priorities are until they are offered substitute items as part of a settlement package. For example, while a claimant may believe that she is interested in nothing less than a high six-figure settlement to compensate her for her firm's alleged discrimination, she may find herself impelled to accept a lower settlement amount when it is coupled with other, non-monetary items that she values highly: an apology, a letter of reference and/or the firm's demonstrated commitment to improved professional opportunities for its female employees.

[30] As noted below, the choice of mediator is critically important in such a case, not just because of his or her skill in working with emotional parties, but also in assessing the extent of contact the parties ought to have at the mediation.

[31] Mediation and Arbitration: A Handbook for Attorneys and Their Clients, American Arbitration Association, p. II-8 (1991).

[32] According to a recent article in one of California's daily legal publications, in a 1990 survey done by the Florida Supreme Court's Florida Dispute Resolution Center, most responding neutrals who utilized the bashing technique were retired judges. "Judging Judges," Los Angeles Daily Journal, Verdicts & Settlements, p. 8 (May 23, 2001).

[33] With the caveat that the mediator must of course be skillful, impartial and forceful.

[34] Absent unabashed arm-twisting, which is the antithesis of mediation, a biased mediator could not persuade a party that a proposed settlement is acceptable if it were not.

[35] In every mediation, there is an inevitable “circling” that precedes fruitful negotiations, during which each party to the mediation attempts to “feel out” the other parties in an effort to establish a comfort level. The mediator who is familiar with one or more of the participants can shorten that process because of the insight he or she will have gained into that participant’s style and sensibilities.

[36] Counsel can expect to have less argument over their fee bills, too, when their clients are made fully aware by a neutral third party of the weaknesses in their case, and the risks and costs of proceeding to trial, and the client chooses to go forward with a binding process rather than settle.

[37] In some jurisdictions, such as California, statutory mediation confidentiality provisions render virtually unenforceable oral settlement agreements.