

# Barriers to Mediation

## A LOOK AT THE IMPEDIMENTS AND BARRIERS TO VOLUNTARY MEDIATION PROGRAMS THAT EXIST WITHIN THE EEO

By Arup Varma and Lamont E. Stallworth

*Arup Varma is an associate professor at the Institute of Human Resources and Industrial Relations, Loyola University Chicago, and a senior research fellow with the Center for Employment Dispute Resolution.*

*Lamont Stallworth is a professor at the Institute of Human Resources and Industrial Relations, Loyola University Chicago, the chair of the Center for Employment Dispute Resolution, and a member of the National Academy of Arbitrators. He is a past president of the Society of Professionals in Dispute Resolution and currently co-chairs SPIDR's ADR in the Workplace Committee.*

Over the last two decades, there has been a substantial increase in the number of EEO lawsuits and charges relating to workplace disputes being filed. This has led to the search for alternative methods of resolving such disputes. Voluntary mediation is one such alternative—however, it is underutilized in EEO and other types of disputes. In this article, Arup Varma and Lamont Stallworth show the results of a survey they conducted in order to find out why voluntary mediation is not being used as much as it should. And they discuss how the barriers that exist might be overcome to increase the use of mediation in EEO disputes.

It has been said that “too few disputes settle, and too many that do settle drag on far too long.”<sup>1</sup> Although this statement was made within the broader context of bargaining impediments and settlement behavior, the concerns expressed by those researchers are also applicable to the impediments and barriers related to the utilization of agency-connected voluntary EEO mediation programs. The purpose and objective of this article is to examine empirically those factors which EEOC disputants believe are significant impediments or barriers which might explain the underutilization of EEO mediation programs offered at the administrative agency level.<sup>2</sup>

### Legislative and Public Policy Context

One of the most significant societal events and public policy changes which occurred during the last half of the 20th century was the racial and gender integration of the workplace.<sup>3</sup> The integration of the workplace, and indeed the general society was prompted, in large part, by the Supreme Court's decision in *Brown v. Board of Education*,<sup>4</sup> the civil rights movement of the 1960s<sup>5</sup> and the subsequent enactment of the Civil Rights Act of 1964, as amended.<sup>6</sup>

The cornerstone of Title VII was the principle that cases of discrimination were to be resolved by the use of “conciliation” prior to any court litigation.<sup>7</sup> Thus conciliation, as a matter of public policy, was foreseen by Congress as an effective method to resolve EEO disputes.

The period following the passage of Title VII brought with it the enactment of a number of other federal and state antidiscrimination and EEO statutes. These statutes included but were not limited to such legislation as the Age Discrimination in Employment Act (ADEA) of 1967,

the Americans With Disabilities Act (ADA) of 1990, and the Pregnancy Act of 1978, just to name a few.

From the perspective of the federal judiciary, such antidiscrimination statutes as Title VII were of the highest importance and order in protecting individual statutory workplace civil rights. The growth of these workplace civil rights statutes also greatly changed how employment disputes would be resolved within organizations and through our public justice system. As two scholars observed, the resort of employees to these EEO statutes forever changed the nature of litigation.<sup>8</sup> Specifically, these scholars found that in the last two decades the number of EEO lawsuits filed in federal district court had increased 2,166%.

This substantial number of EEO charges and lawsuits filed created a substantial backlog at both the administrative agency level, for example the EEOC, and the judicial level.<sup>9</sup> This backlog or what is sometimes called "case inventory" has worked and continues to work to the disadvantage of defendant employers and particularly complainant employees. As we embark on the next millennium, there are clear indicators that racial minorities and women believe that they continue to be victims of disparate treatment in the workplace.<sup>10</sup> There is also increasing empirical evidence that women and racial minorities are the subjects of disparate treatment in the broader society, for example in medical and health care matters.<sup>11</sup>

Consequently, from both an administration of justice perspective, cost-efficiency perspective, and in light of the economic and psychological costs caused by these disputes, the EEO administrative and court litigation processes have fallen under considerable criticism and attack.<sup>12</sup>

These concerns and attacks, particularly of the EEOC, have led Congress and subsequently the EEOC to recognize the potential utility and effectiveness of employing ADR, particularly voluntary mediation, to resolve employment discrimination charges and lawsuits.

In both the Americans With Disabilities Act of 1990 and the Civil Rights Act of 1991, Congress incorporated provisions which expressly encouraged the use of alternative dispute resolution processes such as voluntary mediation.<sup>13</sup>

With an ever-increasing caseload or case inventory, the EEOC subsequently adopted an ADR Public Policy Statement which further promoted the use of voluntary mediation and ultimately prompted the implementation of voluntary EEO mediation programs throughout the country.

In addition to these statutory provisions and public policy statements, Congress has attempted

to promote further the use of ADR by enacting the Administrative Dispute Resolution Act<sup>14</sup> and most recently the Alternative Dispute Resolution Act of 1998.<sup>15</sup> The former requires federal agencies to design and implement alternative dispute resolution programs, the latter requires federal courts to encourage the use of and establish alternative dispute resolution programs in civil actions.<sup>16</sup>

#### **ADR Underutilization**

Notwithstanding these legislative and public policy attempts and initiatives on the part of Congress and the EEOC, experience to date indicates that the use of ADR, specifically voluntary mediation, has been underutilized in resolving EEO and other types of employment disputes and charges.<sup>17</sup> This, in large part, may be attributed to the underfunding of such ADR initiatives. However, the phenomenon of underutilization of voluntary EEO mediation programs at both the EEO administrative agency level and at the judicial level persists.<sup>18</sup> This phenomenon is particularly intriguing, given the general displeasure of the disputants and litigants with the EEO administrative process and the litigation process.<sup>19</sup> The authors suggest here that logic would dictate that EEO disputants would readily and voluntarily seize upon the opportunity to resolve an EEO matter using a mediator of their choice and maintaining control of any settlement outcome rather than incurring the costs and inefficiencies related to litigation.

This phenomenon of underutilization of agency-connected voluntary mediation programs, however, appears not to be unique to the EEO and employment ADR area.<sup>20</sup> The reluctance, or indeed, resistance of EEO disputants and their attorneys to use voluntary mediation have prompted a number of noted ADR scholars and practitioners to suggest some form of mandated participation in mediation. It has also been suggested that lawyers are one of the significant impediments and barriers to the use of mediation.<sup>21</sup>

#### **Impediments and Barriers to Voluntary Mediation**

The research in the ADR area has, thus far, focused on impediments or barriers to settlement.<sup>22</sup> There has been little empirical research into why EEO disputants and their attorneys do

***There are clear indicators that racial minorities and women believe that they continue to be victims of disparate treatment in the workplace.***

not use voluntary mediation to the degree or extent contemplated by Congress and other public policy makers. Similarly, there has been little empirical research to identify what the impediments and barriers related to the phenomenon of underutilization of voluntary mediation programs at the EEO administrative level. The identification of such barriers or factors would be helpful in assisting public policy makers in determining how to overcome these impediments and barriers in order to better design, implement, and more importantly, fund mediation programs so as to make them more acceptable and "user friendly."

In order to explore and examine empirically these public policy issues, the authors surveyed some 71 EEO disputants. These disputants had charges pending before the EEOC in St. Louis, Missouri and Kansas City, Kansas, and the Illinois Human Rights Commission, Chicago, Illinois, during the period of April 1994 to December 1997. The surveyed EEO disputants consisted of 52 charging parties; 10 charging party attorneys and 9 employer-respondent attorneys. There were a total of approximately 500 surveys mailed with a response rate of 14%.<sup>23</sup>

The questionnaire included 85 questions<sup>24</sup> related to the use or lack thereof of the EEO administrative agency-connected mediation program.<sup>25</sup>

Two of the questions in the survey were open ended and called for written open responses. These questions asked: "under what conditions, if any, would you support public policy or legislation requiring participation in mediation?" and "what are the key barriers to settlement and how can we overcome these barriers to arrive at mediated settlements more often?"

For the first question, a majority of the charging parties noted that they would support mandated mediation under certain conditions: (a) In cases where merit has been established, (b) in a clear case of discrimination, (c) only where strong financial gains for both parties existed, (d) in court-ordered cases, (e) only if internal procedures were not in place, (f) under situations of time and/or cost constraints, and (g) where only one party agrees to mediation. For the attorneys, a majority noted that they would support mandated mediation in all EEO cases, while some noted that they would support it only if there were no cost to the participants.

For the second question, many suggestions were given. The charging parties noted that (a) close-mindedness of the parties, (b) unskilled mediators, (c) lying on the part of either party, (d) lack of clarity in defining discrimination, and (e) lack of communication, were key barriers. Their suggestions on overcoming these barriers included (a) training, (b) having a competent mediator,

(c) mandating mediation, and (d) giving mediator more power to make settlement decision. On their part, the attorneys believed that the major barriers included (a) limited availability of EEOC case workers, (b) charges without merit being filed, (c) unreasonable expectations of parties, and (d) the cost of the process to the disputant. Their suggestions for removing these barriers included (a) moderating both parties from extreme positions, (b) instituting court ordered deadlines, and (c) starting the mediation process much earlier.

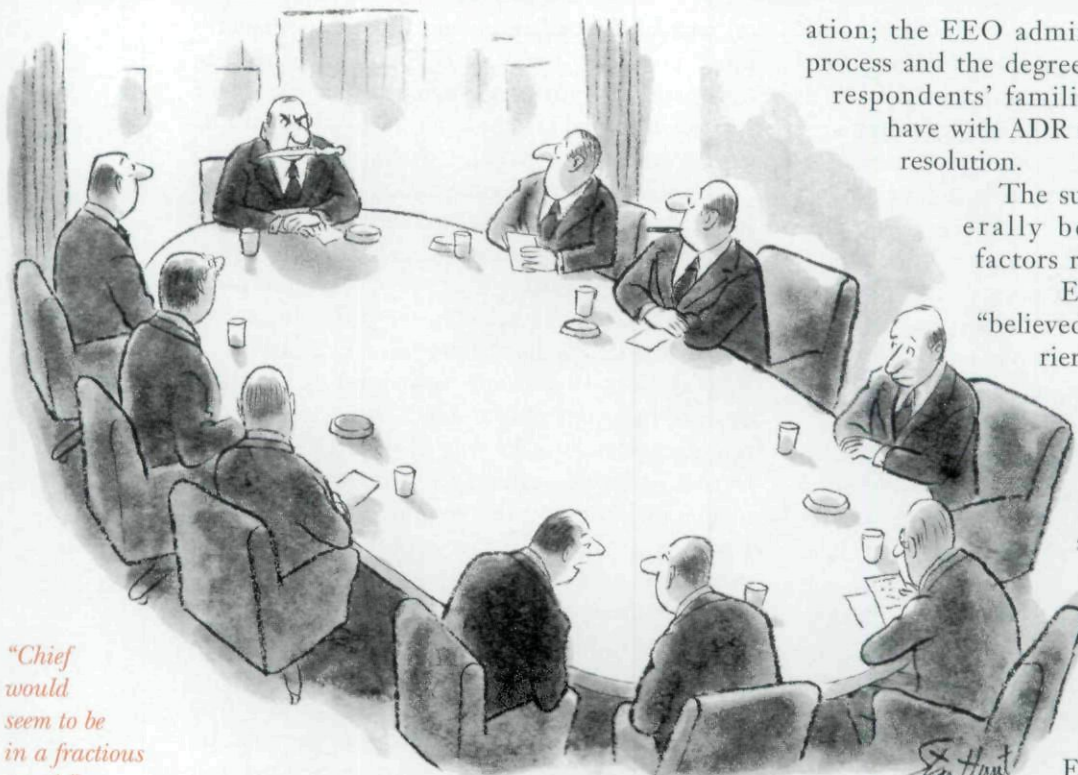
At the outset it would be helpful to note and discuss here the respondents' perspective and opinions related to the role of the EEO administrative agency in effectuating the related EEO mediation program; the respondents' familiarity, training, and actual prior experience related to mediation and conflict management resolution, and also their opinions related to how effective mediation is "believed" to be in bringing final closure to an EEO charge.

The respondents indicated a general familiarity with voluntary mediation and also were of the opinion that the administrative agency made it clearly known that voluntary mediation was an option. However, when asked about their prior actual experience with voluntary EEO mediation and satisfaction with EEO mediation, the respondents indicated relatively limited experience with voluntary EEO mediation. They viewed, however, that voluntary EEO mediation was only relatively effective in bringing final closure to EEO disputes.

Also related to the respondents' perception and opinion of mediation is their actual formal

### ***The reluctance of EEO disputants to use voluntary mediation has prompted a number of ADR scholars and practitioners to suggest some form of mandated participation in mediation.***

training in negotiations; mediation advocacy and actual EEO mediation. On this score, the survey responses indicated that generally, most of the respondents lacked training in any of these areas. The authors propose that this general lack of training in alternative dispute resolution methods and processes might explain their opinion about voluntary EEO mediation and indeed help to explain the underutilization of agency-connected voluntary EEO mediation programs.



*"Chief would seem to be in a fractious mood."*

Notwithstanding the respondents' less-than-enthusiastic support for and training in ADR and conflict resolution management, it is noteworthy that the respondents indicated considerable interest in submitting a matter to voluntary EEO mediation where the charge could be resolved within 90 days using a trained professional third-party neutral.

Interestingly, the respondents maintained essentially the same degree of interest in submitting a charge to mediation even where the matter could be administratively investigated by the EEO administrative investigatory agency within 90 days. The consistent degree of interest may be attributed to two factors. First, the respondents viewed the administrative investigatory process as "taking longer to resolve the dispute than expected" and that the "administrative investigative process currently being used to resolve their case was somewhat unfair."

This might explain the respondents' expressed interest in submitting their EEO dispute to mediation—a process under which they would have greater control. Parenthetically, the parties' control over the mediation process and any outcome has always been viewed as a major benefit of mediation, generally.<sup>26</sup>

This conclusion is particularly interesting in light of the less-than-satisfactory prior experience of some of the respondents with voluntary mediation. Again, control over the mediation process might be the determining factor here.

The analysis of these particular survey responses provides the context within which the surveyed respondents view voluntary EEO medi-

ation; the EEO administrative investigatory process and the degree, or lack thereof, of the respondents' familiarity and training they have with ADR and conflict management resolution.

The survey covered eight generally believed impediments factors related to using voluntary EEO mediation. These "believed" impediments and barriers are listed here in order of importance, as rated by the respondents:

- A. the cost of litigation
- B. the clients financial situation
- C. avoiding verdict and/or favorable decision on motion for summary judgment
- D. avoid bad publicity
- E. the need to maintain confidentiality related to the

particular case

- F. strength and weakness of the particular case
- G. the likelihood that a particular judge would hear the case, and
- H. the likelihood that other damaging evidence would be unearthed

The surveyed respondents indicated that all of these items constituted, if not acted, as "some-what of a factor or barrier to mediation."

These responses were not surprising, except for the response related to the "strength and weakness of the case." Clearly, no employer welcomes being the subject of an EEO charge or lawsuit; however, most charges and lawsuits do not garner the attention of the general public. For many employers, being the subject of an EEO charge or lawsuit has become an inevitable part of doing business. The exceptions, however, would be whether the employer is found to have been in violation of federal or state EEO law and particularly in those high profile cases involving, for example, pattern and practice instances of sexual harassment and racial discrimination. The bad publicity attendant with *Texaco* and *Mitsubishi* cases are two examples where the employers obviously would have preferred to avoid the national and international bad publicity created by those disputes.<sup>27</sup>

In large part, the prosecution of the EEOC of these high profile cases is to signal to the general public, Congress, and other employers that the agency will vigorously pursue litigation in such matters as a public deterrent to other potential

violators. Consequently, the concern over bad publicity or the need for confidentiality is probably not an important factor or barrier particularly where the respondent employer believes that it will prevail in an EEO or employment matter.

It is surprising and noteworthy that the strength and weakness of a particular EEO case does not act as a more important or significant barrier to using mediation according to the respondents. Specifically, it is generally thought that the strength and weakness of a case would definitely determine whether a party to a dispute having, for example, a weak case, would be more inclined to resolve the matter either through direct negotiations or mediation.<sup>28</sup>

There are a number of possible explanations for the weakness and particularly strength of a case acting as an impediment or barrier to using EEO mediation. For example, it may be the general practice and philosophy of the advocate or attorney to exhaust the administrative and litigation process particularly by substantiating the case has no merit and the employer respondent will prevail. There are some attorneys who are "litigious lawyers" and not "early settlers" and find it to their best interest not to settle, notwithstanding that it might be more cost-effective to settle. Similarly, certain clients, both employers and charging parties, want to have their "day in court" and want the matter in dispute adjudicated at any cost rather than settle.

Two of the other factors appeared to be more influential barriers to mediation. These were: the client's financial situation; and the related cost of litigation. The cost of litigation is of particular importance to both defendant attorneys and charging party attorneys.

Thus, it appears that there is some understandable rationale to explain why EEO disputants may or may not elect to use voluntary mediation. The potentially troublesome or problematic aspect of this essentially economic equation is that in many, if not most instances, the charging party is not as well financially situated as the employer-respondent; and thus, may not be able to pursue a matter in court, absent the EEO agency representing the charging party. Consequently, it is suggested here that charging parties would be more inclined to seek voluntary mediation, primarily because of the proximate employer-employee relationships and the concomitant economics related to that relationship. Generally speaking, most employers can "out litigate" most employees.

#### **Pre-Charge and Post-Charge Impediments and Barriers**

The believed impediments or barriers to mediation might vary or change depending upon

whether the voluntary mediation option were made available at the pre-charge filing stage versus the post-charge filing stage. The authors did not make a similar comparative inquiry related to post-lawsuit matters and relevant "believed" or perceived barriers or impediments. There is, however, a need to conduct a similar empirical investigation at the federal district court level, particularly in light of the Alternative Dispute Resolution Act of 1998.<sup>29</sup>

The respondents were asked to respond to the following questions using a "Likert-type" scale, e.g., "strongly disagree to strongly agree." Within this parameter, the respondents were asked to respond to some 16 items which were believed or not believed to be a barrier to settlement prior to the dispute becoming a charge.

The authors initially contemplated that there would be a considerable, if not substantial, variance in responses related to believed pre-charge and post-charge impediments and barriers to settlement and mediation. This, however, was not the case. Generally, the responses of the respondents were consistent or similar to believed pre- and post-charge impediments and barriers to voluntary mediation.

The items posed to the respondents concerning believed impediments and barriers to mediation were taken from the major research in the area related to settlement and negotiation.<sup>30</sup> Of these items, the factors which appeared to be believed and viewed as having the least or little effect were: (1) the number of parties present at

### ***The dynamics of negotiations between the client and their principal appear to be a factor related to believed impediments to settlement and mediation.***

the negotiation table; (2) concerns or needs related to privacy and confidentiality; and (3) party's preference for formal adjudication. The factors that were believed and viewed as having the most effect were: (1) misrepresentation of facts by the other party; (2) the other party's refusal to moderate their extreme position; (3) the other party's refusal to negotiate in good faith; and (4) the other party misinterpreting motivation and intent.

As such, the items or factors that, in the respondents' opinion, are believed to act as significant barriers to settlement, and mediation may be grouped as follows:

- A. Trust and motive factors, including distrust of motives related to why certain proposals are made.
- B. Bad-faith negotiations, and inter-personal and personality issues.

The authors cannot present here as thorough a discussion and analysis as they would like. However, there are several factors which are par-

### ***The respondents expressed a high degree of support for the certification and licensing of EEO mediators.***

ticularly noteworthy and warrant some discussion, primarily because of their believed negative impact on settlement and the use of mediation.

The first factor relates to bargaining behavior and perhaps professional conduct. Specifically, the respondents generally believed that refusal to negotiate in good faith and refusal of the opposing party to moderate extreme positions was an important impediment and barrier. This position or belief is further compounded by the fact that the respondents felt that the opposing party "inherently misrepresented" the facts in negotiation. It is not suggested here that, as a general rule, all EEO and employment lawyer mediation advocates or representatives engage in such conduct with "ill will." However, this finding may merely reflect the lawyers' negotiation styles.<sup>31</sup>

This type of negotiation style, however, does not appear to enhance the probability of settlement or the use of mediation where the same parties have been unsuccessful in resolving prior cases involving the same EEO disputants and where there is an absence of a decision maker with settlement authority present at the negotiation table.

The dynamics of negotiations between the client and their principal also appear to be a factor related to believed impediments to settlement and mediation. These types of interpersonal or intra-organization bargaining behavior was explored by asking two related questions: The first question asked was to what degree the respondents believed that "the differing interests of lawyers and their clients" may be a barrier to a settlement or mediation prior to the dispute becoming a charge; the second was a similar question asked within the context of "after the dispute becoming a charge." The respondents generally agreed that this created "somewhat" of an impediment or barrier to settlement and mediation.

The respondents were subsequently asked "the degree to which you believe that your interests are different than your clients' interest in negotiation or mediation sessions?" It was particularly interesting to find that such a conflicting bargaining dynamic exists and, of course, that where such a dynamic exists, it is believed to create an impediment to settlement or the use of mediation, particularly where the client has a preference for formal adjudication and where the representatives or attorneys would prefer to settle. Although the EEO mediator may not be able to control the occurrence of such a situation, it is critical for the EEO mediator to be aware of such interpersonal or intra-organization conflicts and decide how they might best be handled.

### **Employing the Law to Increase the Use of Mediation**

The study of negotiations, mediation, and conflict resolution is, in large part, an interdisciplinary endeavor drawing upon the fields of economics, the law, and the behavioral and social sciences.<sup>32</sup> The responses of the EEO disputants who participated in this study underscore this point. Indeed, one of the more interesting findings of this study was the role which conflicting personalities play in resolving disputes and the advocates' previous success or lack of success in resolving EEO cases involving the same parties has on the parties' future settlement behavior, including submitting matters to voluntary mediation.

One of the major challenges related to the use of voluntary ADR programs, particularly mediation, is how to effectively encourage the early negotiation and/or mediation of disputes, specifically EEO and employment disputes. It has been suggested that the law might be needed to encourage the early negotiation of disputes and the increased use of mediation.<sup>33</sup> Indeed, as stated earlier, the developing public policy in the EEO and employment area is to encourage the use of ADR, particularly mediation, to resolve the many thousands of EEO charges and lawsuits filed annually. Thus, the critical public policy question is whether to mandate or not to mandate participation in mediation—and how?

This public-policy question was posed to the surveyed respondents by presenting a series of legislative or public policy proposals.

There were 12 questions related to employing the law to increase the use of mediation. These questions can be grouped or collapsed into four areas of inquiry: (1) legislation requiring training and certification of EEO mediators; (2) government funding of the cost of mediation, *i.e.*, the mediator's fees and related expenses; (3) mandat-

ed participation in EEO mediation; and (4) whether attorneys should be legally required to advise their clients about EEO mediation.

The issue and debate to the job-related qualification and possible certification of mediators has existed for a considerable period of time is particularly critical given the potential exclusionary and disparate impact which qualification, such as being a lawyer, may have on certain members of protected classes.<sup>34</sup> Notwithstanding this and other related important concerns, the respondents clearly supported legislation or public policy which would establish qualification and training standards for EEO mediators. They also expressed a similarly high degree of support for the certification and licensing of EEO mediators. The respondents further expressed considerable support for legislation which would require that non-lawyer EEO mediators be familiar with EEO and employment law. Interestingly, they only moderately supported the use of training third-year law students serving as "sole" EEO mediators as long as they were supervised; however, the respondents indicated that they would not use EEO mediation if trained "non-lawyers" were presumably the only option.

Another recognized barrier or impediment was the cost related to retaining an EEO mediator and the payment of the mediator's fees and expenses. This cost is often cited as being particularly burdensome for the charging party, particularly in cases where the charging party is discharged and remains unemployed and is a racial minority<sup>35</sup> or a single parent.

Given this fact, the respondents were asked "to what degree would you agree with legislation or an EEO agency public policy which would provide 100% government financial support for mediation?" The EEO disputants' response to this public policy question was supportive, which is not surprising. Common sense dictates that most parties would prefer to shift as much as possible the economic burden for most services to the federal or state government. Furthermore, there are those, particularly plaintiff attorneys, who strongly believe that the cost of mediation should be borne entirely by the federal government. Without debating this philosophy, it should be noted that since this study was completed, the EEOC's mediation program has been sufficiently funded to subsidize the fees of EEO mediators. Early returns under the most recent mediation initiative of the EEOC indicate a greater percentage of disputants electing to use voluntary mediation.<sup>36</sup>

It should be further noted that in those situations where mediation programs and fees have been subsidized by the employers or the govern-

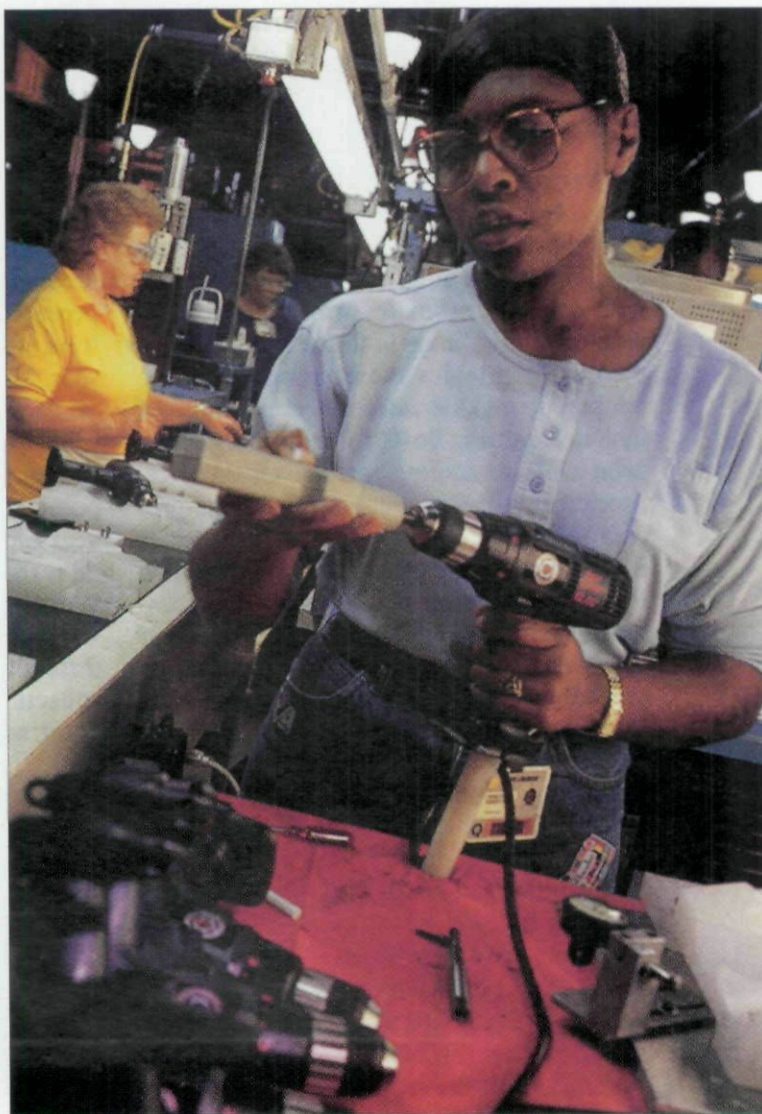
ment the utilization of voluntary EEO mediation has increased. The recent mediation programs and initiatives of the U.S. Postal Service and the earlier programs of the U.S. Forest Service and Farm Service Agency of the Department of Agriculture and currently the Department of Navy support this proposition.<sup>37</sup>

### The Question of Mandatory Participation

Mandated participation in mediation in which any outcome is strictly voluntary was presented as a central aspect of a series of possible legislative and public-policy options. These legislative and public-policy mandates were posed within the following frameworks:

1. as a pre-condition to an administrative EEO investigation where both parties would be required to participate in mediation;
2. as a pre-condition to court trial where both parties would be required to participate in mediation;

*Racial minorities and women believe that they continue to be victims of workplace discrimination.*



3. as a pre-condition to an administrative EEO investigation but where at least one of the EEO disputants expressed a desire to submit the matter to mediation. For the purposes of this study this is referred to as "modified mandated or directed" participation in EEO mediation;
4. as a pre-condition to a court-trial where at least one of the EEO litigants have expressed a desire to submit the matter to mediation. This form of mediation is also referred to as "modified mandated or directed" participation in EEO mediation. This option is similar to the Employment Dispute Resolution Act sponsored by former U.S. Senator John Danforth.<sup>38</sup>

In general, there was little support for mandated participation as a pre-condition to an administrative EEO investigation. This was also the case

### ***The potential cost of litigation was indicated as a significant factor in deciding to settle or to submit the matter to EEO mediation.***

at the EEOC conciliation stage or post-probable cause-finding stage. The respondents support was even less for "mandated" mediation at the administrative investigatory stage.

The respondents appear to express the greatest degree of support for mandated participation in EEO mediation as a pre-condition to a trial court proceeding where "both" litigants must participate in mediation. However, the respondents expressed less support for "modified mandated or directed" participation in mediation as a pre-condition to a trial court proceeding.

#### **The Obligation of Lawyers to Advise their Clients about Mediation**

From a historical perspective, it has taken a considerable amount of time to change a "litigation culture" to an "ADR culture" in which the use of ADR, particularly mediation, is the early, if not immediately contemplated means to be used to resolve a dispute.<sup>39</sup>

It has been suggested that ADR works where it is advocated and strongly supported from the "top down."<sup>40</sup> Within the context of the litigation of EEO and employment disputes, the attorney in many ways effectively takes upon the role of the "top down" person in advising his or her client about the existence of the EEO mediation alternative; the pros and cons of EEO mediation and, in fact, the appropriateness and effectiveness of using mediation generally for the resolution of

specific EEO cases. Furthermore, with the enactment of the Administrative Dispute Resolution Act, the Alternative Dispute Resolution Act, and other various federal statutory ADR provisions and public policies, a legitimate argument can be made that now, more than ever, a lawyer has or should have a professional, ethical, and legal obligation to advise his or her client about the pros and cons of voluntary mediation and other ADR processes such as fact-finding and arbitration. Regretfully, the evidence suggests that this is not always the case. The absence of an attorney, or an attorney who is not an advocate of mediation and/or one who does not advise his or her client of the mediation alternative, acts as a major barrier or impediment to using EEO mediation. It appears that the surveyed EEO disputants agree with this statement and proposition.

The surveyed EEO disputants were queried as follows: "To what degree would you agree with legislation or an EEO agency public policy requiring attorneys to advise their clients of the availability of voluntary mediation in EEO disputes?"

The response yielded an unequivocal indication of strong support for legislation and agency public policy requiring attorneys to advise their clients of the availability and the pros and cons of EEO mediation. This is a significant finding, particularly if the attorney either has considerable "top down" influence with clients or actually has the authority to submit a matter to EEO mediation. Consequently, legislation or public policy requiring such client advisement is one generally recognized way, according to the surveyed respondents, by which employing the law may increase the use of mediation.

#### **Conclusion**

Several conclusions and recommendations can be made based on the responses provided by the surveyed EEO disputants.

Of all the "believed" or "expressed" factors related to the decision to use EEO mediation, the potential cost of litigation was indicated as a significant factor in deciding to settle or to submit the matter to EEO mediation. This was seen as a more important or controlling factor than the strength or weakness of a case. The other factor or barrier which was believed to influence the decision to use EEO mediation to settle a case was the high level of distrust between the advocates. This distrust, according to the respondents, stems from the assertion that advocates "misrepresent the facts in negotiations" and bargain based on extreme positions. Also related to this distrust issue was the apparent personality conflicts which exist between the advocates. According to the respondents, these personality

conflicts create a significant barrier to settlement and, presumably, the successful use of mediation. In sum, the respondents were of the belief that "bad faith" negotiation was at the root of the failure to settle and to use mediation.

The purpose for posing public-policy questions was to attempt to find out how some of these barriers might be overcome by the increased use of the law and public policy. In order to enhance the acceptability of EEO mediation, the respondents expressed strong support for the proposition that EEO mediators be either certified or licensed. The respondents generally rejected the use of non-attorney EEO mediators.

The respondents also expressed strong support for federal and state governments to totally subsidize the cost of the mediator's fees and expenses. They rejected, however, the "modified or directed" mandating of EEO mediation at the agency stage. Interestingly, they supported the mandated participation of both parties at the trial-court stage. Lastly, there was substantial support for legislation or public policy which would require the attorneys to advise their clients of the pros and cons of EEO mediation and the availability of mediation.

A number of the above-detailed factors or barriers are not subject to change by the increased use of the law or public policy. However, the issue of bad faith negotiations, posing extreme negotiation positions, and misrepresentation of facts and con-

tentious personalities, may be addressed by the use of an EEO mediator. This is one of the "value-added" of a mediator, *i.e.*, to assist and guide the disputants through such dynamics, using such techniques as "reality testing."

The issues related to EEO mediator certification and licensing are issues which can be determined through the increased use of the law and public policy. The cautionary word here is that any such required qualifications should be "job related" and "validated" so as not to have a disproportionate effect on any protected class. The issue related to the funding of EEO mediation programs is critical, particularly given the financial constraints of many complainants and charging parties. Accordingly, it is recommended that Congress and state legislatures substantially increase the financial support for EEO mediation. It is also recommended that as a matter of public policy and law, attorneys be required to advise their clients of the availability of voluntary EEO mediation and the related advantages and disadvantages. Attorneys should be required that they certify such client advisement. Among other things, it is hoped that short of mandating the participation in EEO mediation, that this "client advisement" requirement would serve to make attorneys more knowledgeable about ADR. This may be the first step to increase the utilization of EEO mediation and to start changing the EEO litigation culture to an EEO/ADR culture. ■

## ENDNOTES

<sup>1</sup> See, Samuel Issacharoff, Charles Silver and Kent D. Syverud, "Bargaining Impediments and Settlement Behavior," in *Dispute Resolution: Bridging the Settlement Gap* (Greenwich, Conn., JAI Press, Inc., 1996).

<sup>2</sup> This study was conducted in connection with a voluntary EEO mediation program administered by the Center for Employment Dispute Resolution, a not-for-profit organization, initially funded by the William and Flora Hewlett Foundation, Menlo Park, California. See, "Illinois Human Rights Commission and CEDR Offer ADR for Job Bias Cases," *World Arbitration and Mediation Report*, Vol. 5, No. 4 (April 1994, 75-78).

<sup>3</sup> See, for example, John A. Davis, "How Management Can Integrate Negroes in War Industries," published by New York State War Council Committee on Discrimination in Employment (1942).

<sup>4</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954). Also see, Herbert Hill and James E. Jones, Jr. (Eds.) *Race In America: The Struggle For Equality* (Madison, Wisconsin: The University of Wisconsin Press, 1993) for a discussion of the impact of Brown and for a history

of earlier struggles for racial equality.

<sup>5</sup> See, for example, John Lewis, *Walking with the Wind: A Memoir of the Movement* (New York, New York, Simon & Schuster, 1998) and see Philip A. Klinkover, *The Unsteady March: The Rise and Decline of Racial Equality in America* (Chicago, Illinois, The University of Chicago Press, 1999).

<sup>6</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §2000e, and see The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1081 (1991).

<sup>7</sup> Pursuant to Title VII of the Civil Rights Act of 1964, the EEOC is to participate in conciliation where there has been an agency finding of probable cause.

<sup>8</sup> John J. Donohue, III, and Peter Siegelman, "The Changing Nature of Employment Discrimination Litigation," *Stanford Law Review*, Vol 43 (1991) (hereinafter cited as Donohue III and Siegelman).

<sup>9</sup> "EEOC Chief Voices Frustration Over Case Backlog, Budget Cuts," *Washington Post*, (February 11, 1996), and see "Backlog of Cases Is Overwhelming Job-Bias Agency," *New York Times* (November 26, 1994).

<sup>10</sup> See, for example, Philip A.

Klinkover, *The Unsteady March: The Rise and Decline of Racial Equality in America* (Chicago and London: University of Chicago Press, 1999).

<sup>11</sup> See, for example, Chester Pierce, "Offensive Mechanisms" in Floyd B. Barbour (Editor), *The Black Seventies* (Boston, Mass: Porter Sargent Publisher, 1970), at pp. 265-282. And see, Gavin DeBecker, *The Gift of Fear: Survival Signals That Protect Us From Violence* (Boston: Little, Brown and Company, 1997).

<sup>12</sup> For examples of research critical of government enforcement agencies, see, Alfred W. Blumrosen, *Modern Law: The Law Transmission System and Equal Employment Opportunity* (Univ. Wisc. Press, 1993); James A. Gross, *Broken Promise: The Subversion of U.S. Labor Relations Policy, 1947-1994* (Temple Univ. Press, 1995).

<sup>13</sup> Americans with Disabilities Act: Sec.513 Alternative Means of Dispute Resolution:

"Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and

arbitration, is encouraged to resolve disputes arising under this Act;"

Civil Rights Act of 1991: Alternative Means of Dispute Resolution:

"Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts of provisions of Federal law amended by this title."

<sup>14</sup> Administrative Dispute Resolution Act and Negotiated Rulemaking Procedure Act, both at 5 U.S.C., §581.

<sup>15</sup> Alternative Dispute Resolution Act of 1998, Pub.L. 105-315, 12(b)(1) 112 Stat. 2898.

<sup>16</sup> For an article discussing the provisions of the Alternative Dispute Resolution Act, see John Bickerman, "Great Potential: The New Federal Law Provides Vehicle if Local Courts Want To Move on ADR," *Dispute Resolution Magazine* (Fall 1999) at pp. 3-6.

<sup>17</sup> See Craig A. McEwen, *An Evaluation of the Equal Employment Opportunity Commission's Pilot Mediation Program: Center for Dispute Settlement*, Washington, DC (Contract no. 2/0011/0168). Under the EEOC Pilot Mediation approximately 58% of cases submitted to mediation were successfully resolved. It should be noted that a number of state EEO enforcement agencies implemented formal mediation programs prior to the EEOC's pursuit of its mediation programs. And see Lamont E. Stallworth and Linda K. Stroh, "Who Is Seeking To Use ADR? Why Do They Choose To Do So?" *Dispute Resolution Journal* (January-March, 1996).

<sup>18</sup> *Supra*, note at XXX. See also for example, Leslie Christovich and Lamont E. Stallworth, "The Equal Opportunity Act and Its Administration: The Claimant's Perspective," *Proceedings, Annual Meeting of Industrial Relations Research Association* (1983).

<sup>19</sup> For articles on the benefit of EEO mediation, see for example, Donald B. Reder, "Mediation as a Settlement Tool for Employment Disputes," *Labor Law Journal* (September 1992); Carol A. Wittenberg, Susan T. MacKenzie and Margaret Shaw, Chapter 15, "Employment Disputes" in Dwight Golann, ed., *Mediating Legal Disputes: Effective Strategies for Lawyers and Mediators* (Little Brown, 1996). ; Lamont E. Stallworth and Carolyn Hernandez, "Labor Arbitration and Alternative Methods of Resolving Employment Discrimination Disputes," *Workplace Topics* (July 1992).

<sup>20</sup> Nancy H. Rogers and Craig A. McEwen, "Employing the Law To

Increase the Use of Mediation and To Encourage Direct and Early Negotiations," *Ohio State Journal on Dispute Resolution*, Vol 13 (1998) at pp. 831-864.

<sup>21</sup> *Supra*, note 1.

<sup>22</sup> *Supra*, note 1. "Concerns Raised About Trend Toward Using Alternative Dispute Resolution Process for Bias Claims," quoting Professor Lamont E. Stallworth, *Daily Labor Report* (BNA), October 31, 1994. And see Lamont E. Stallworth "Contract with the American Worker: Workplace Civil Rights and the Potential Role of Alternative Dispute Resolution," Frank Sander Lecturer, Annual Meeting of American Bar Association (Chicago, Illinois), August 5, 1995.

<sup>23</sup> It should be noted that since the number of attorneys participating in this study was fairly small, the authors have used overall attorney responses in most cases. However, where necessary, the authors have provided attorney ratings broken up by charging party attorneys and respondent attorneys. It should also be noted that since this study was conducted, the EEOC has received funding to subsidize the cost of mediation which has permitted an increase in the number of cases submitted and resolved through mediation. See, "New EEOC Mediation Program" *Wall Street Journal* (December 28, 1999).

<sup>24</sup> It might seem that this study has a relatively small sample size, given that the total number of respondents was only 71 (52 disputants and 19 attorneys). However, it should be noted that the survey instrument contained 85 questions (including two open-ended questions). Such in-depth surveys, no doubt, lead to a decrease in the return rate—at the same time, such surveys allow the researchers to examine the questions of interest in depth and make the findings, inferences and recommendations more robust and meaningful.

<sup>25</sup> For the purpose of this article, the authors focused upon and analyzed the data related what factors were viewed and believed by EEO disputants as being the more, if not the most significant impediments or barriers to using voluntary EEO mediation at the EEO administrative agency level.

<sup>26</sup> Judith P. Meyer, "The Pros and Cons of Mediation," *Dispute Resolution Journal* (Summer 1997): 9-14.

<sup>27</sup> The settlement involving Mitsubishi Motor Manufacturing and the EEOC pursuant to a court consent decree resulted in a \$34 million settlement and adoption of sexual harassment and diversity training. See, for example, Mitsubishi Will Pay \$34 Million, *Chi Trib.*, June 12, 1998).

<sup>28</sup> Cheryl Niro, "The Decision Tree: A Systematic Approach to Settlement Decisions," *Illinois Bar Journal*, 82 (March 1994).

<sup>29</sup> The authors plan to do an evaluation of an EEO mediation program which makes EEO mediators available to EEO litigants in the Federal District Court (N.D.I.L). This program is being administered by the Center for Employment Dispute Resolution (CEDR).

<sup>30</sup> See, for example, Mnookin, *Barriers to Conflict Resolution*.

<sup>31</sup> See Dwight Golann, *Mediating Legal Disputes: Effective Strategies for Lawyers and Mediators* (Canada: Little, Brown & Co. Ltd. 1996).

<sup>32</sup> See, generally David Anderson (Ed.), *Dispute Resolution: Bridging the Settlement Gap* (Greenwich, Conn. JAI Press, Inc. 1996).

<sup>33</sup> See Nancy H. Rogers and Craig A. McEwen, "Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations," *Ohio State Journal on Dispute Resolution* (Vol. 13:3) (1998) at pp. 831 to 864.

<sup>34</sup> Given the decreasing number of minority law students, there will inevitably be a decrease in the number of licensed attorneys. This will lead to a decrease in the number of minority state and federal judges and also mediators and arbitrators, if being a lawyer is made to be a requirement. It should be noted that at the 1999 Annual Meeting of the ADR Section of the American Bar Association (Boston), a resolution was passed stating that being a lawyer in order to be a mediator or arbitrator is not required; "other professionals" may also be mediators and arbitrators.

<sup>35</sup> *Supra*, note \*

<sup>36</sup> See, "New EEOC Mediation Program" *Wall Street Journal* (December 28, 1999) where it is reported that in the agency's year-end report for fiscal 1999, EEO mediation helped the agency cut its backlog by 23%.

<sup>37</sup> The EEO mediation initiatives sponsored and subsidized by the Forest Service and the Farm Services Agency of the Department of Agriculture in 1998, resulted in some 80% of the complainants electing to use EEO mediation. Seventy-eight percent of the cases were resolved. The Center for Employment Dispute Resolution administered these EEO mediation initiatives.

<sup>38</sup> Former Senator John Danforth proposed S.B. 2327, the "Employment Dispute Resolution Act of 1994," in the 103rd Congress. S.B. 2327 mandated participation in EEO mediation as a condition precedent to a court trial where at least one of the disputants have expressed an interest in mediation.

<sup>39</sup> *Supra*, note \*.

<sup>40</sup> Todd B. Carver and Albert A. Vondra, "Alternative Dispute Resolution: Why ADR Works and Why It Does Not," *Harvard Business Review* (May-June 1994).

Copyright of Dispute Resolution Journal is the property of American Arbitration Association Inc.. The copyright in an individual article may be maintained by the author in certain cases. Content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.