ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT CONTEXT

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A. Alternative Dispute Resolution Defined

Alternative dispute resolution, or ADR, is a generic term describing any form of dispute resolution which does not involve a matter being decided by a judge, jury or governmental entity. As the term is commonly used, it normally, but not necessarily, includes involvement of a person or entity (usually, but not always a “neutral”) that is not a party to the dispute who helps the parties reach a resolution.

B. Types of ADR

1. Arbitration
   Arbitration is the form of dispute resolution most traditionally associated with the term ADR. It involves one or more neutrals who assume the role typically fulfilled by the court and make the decision for the parties.

2. Mediation
   Mediation is the form of dispute resolution more commonly associated with the term ADR in recent times. It involves one or more people (usually neutrals) who assume the role of helping the parties reach a settlement.

3. Anything Else
While most attorneys think of arbitration or mediation, ADR encompasses just about any form of dispute resolution other than decision by a court or governmental entity. It includes parties and attorneys negotiating and reaching a settlement on their own, as well as mini-trials, internal company grievance or dispute resolution procedures, coin flips, and self-help.

C. **Dispute Resolution – A Continuum or A Circle**

1. **Avoidance** actually is a method, and perhaps the most common method, of ADR. One party or the other simply chooses to walk away from the dispute or potential dispute.

2. **Negotiation** between the participants, or their counsel, is the most common method of dispute resolution when avoidance is not practiced. The
participants or their counsel deal directly with one another to reach a mutually acceptable resolution.

3. **Mediation** is increasingly becoming the preferred method of ADR by attorneys and courts. This is because mediation enjoys a high level of success, especially when qualified mediators are used. A trend in the legal profession is to resort to mediation early, sometimes even without any direct negotiation between the parties or their counsel. Mediation simply is a form of negotiation that involves a third party neutral, usually selected by the parties but sometimes appointed by the court. Like negotiation, the parties retain ultimate control, and the mediator has no power to decide the case.

4. **Arbitration** is similar to mediation in that it involves intervention of a third party to resolve the dispute. It differs from mediation and is closer to litigation in that the parties surrender control of the outcome by giving the arbitrator the power to decide the case.

5. **Litigation** is using the legal system for resolution of disputes that the parties are unable to resolve on their own. The parties delegate control and power to the court or governmental entity and are bound by the results. Litigation provides a final resolution of the dispute, which may or may not be fair or just. Next to self-help, it is the most adversarial and aggressive form of dispute resolution.

6. **Self-help** involves unilaterally acting outside of the legal system to achieve the desired ends, sometimes illegally. While it is on the extreme opposite end of the continuum, self-help shares two key attributes with avoidance. First, it involves one party unilaterally deciding what to do and acting accordingly. Second, it exists independent of any legal system or agreed to method for dispute resolution.
D. **Timing of ADR**

Most forms of ADR can take place at any point from the time that a dispute develops until after it is finally resolved and the judgment or settlement has been fully implemented. When the term is defined broadly, usually more than one form of ADR is consciously or unconsciously employed during the life of a prolonged dispute. Pre-litigation mediation and other forms of ADR before the filing of a lawsuit are becoming increasingly advantageous, especially in employment disputes. Reasons for this include:

1. Litigation is increasingly expensive, is unpredictable, and doesn’t always result in justice.
2. Court filings become public records accessible by anyone with internet access.
3. The danger of adverse publicity or internet/social media exposure is higher than ever.
4. 90% of cases ultimately eventually are resolved by settlement anyway.

E. **Arbitration**

1. **Common Characteristics of Arbitration**
   a. Arbitration is usually agreed to prior to the dispute.
      i. It is sometimes agreed to after the dispute arises.
      ii. Arbitration is sometimes imposed by court.
   b. An agreement to arbitrate normally is enforceable under both the Federal Arbitration Act, 9 U.S.C. §1 et. seq., and Ohio law, Ohio Revised Code §2711.01 et seq.
      i. There are few exceptions.
      ii. The agreement must be in writing to be enforceable.
   c. There are various methods for selecting the arbitrator.
      i. The arbitrator is usually selected by agreement.
ii. The court may appoint an arbitrator in absence of agreement.

d. There is usually one arbitrator.
   i. Sometimes an arbitration panel is used (usually three arbitrators).

e. There are no universally established qualifications for arbitrators.

f. Once appointed, arbitrators have powers over a case similar to a judge.

g. There is limited pre-arbitration exchange of information.
   i. Arbitrators can order exchange of information.

h. Arbitration decisions are normally final and binding with a participant having an extremely limited ability to contest the result.
   i. The Federal Arbitration Act sets the normal standard for vacating an arbitration award in 9 U.S.C. §10:

   “(1) where the award was procured by corruption, fraud, or undue means;

   (2) where there was evident partiality or corruption in the arbitrators, or either of them;

   (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

   (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”

ii. The Federal Arbitration Act also provides the normal standard for modifying an arbitration award “so as to effect the intent thereof and promote justice between the parties” at 9 U.S.C. §11:

   (1) “Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.”
“Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.”
(3) “Where the award is imperfect in matter of form not affecting the merits of the controversy.”

iii. In very limited situations, sometimes arbitration is not binding.

(1) A court can order non-binding arbitration.
(2) The parties can agree to non-binding arbitration.

iv. Fees and expenses of the arbitrator are normally split between parties.

2. Arbitration Agreements and Employment Claims

a. Until the 1990’s, arbitration of employment claims was largely limited to arbitration provisions contained in union contracts. As the law developed, depending on how the union agreements were worded, these arbitration agreements could apply to statutory claims and other claims outside of the union agreement itself. While the law on enforcement of such arbitration awards for the most part has developed independently of the Federal Arbitration Act, the awards are given a high degree of deference by the courts.

b. An arbitration agreement can be used to require an employee to arbitrate individual employment claims, including statutory employment discrimination claims. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). *Gilmer* opened the floodgates for incorporating arbitration agreements into employment agreements with non-union employees. While the Supreme Court has not directly decided the issue, its subsequent decisions have been interpreted by most courts to permit mandatory arbitration of individual wage-hour claims as well.

c. An arbitration agreement can be used to require most employees to arbitrate individual breach of contract claims, with the exception of certain

d. An arbitration agreement cannot preclude an employee from filing a discrimination charge with the EEOC, or preclude the EEOC from investigating or pursuing a claim based upon that charge. The arbitration agreement, however, still binds the employee to arbitrate, and limits the remedies which the EEOC may recover on the employee’s behalf. *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

e. The law on use of arbitration agreements to preclude or limit class action litigation is still developing. It appears settled that an arbitration agreement will only apply to class action claims if the court concludes that the parties agreed to arbitrate class claims as well. *Stolt-Nielsen v. Animal Feeds Int’l. Corp.*, 130 S.Ct. 1758 (2010). In recent years, the National Labor Relations Board has taken the position that class action waivers interfere with an employee’s rights to protected concerted activity and therefore are not enforceable. The courts are split on this issue. The issue is now before the Supreme Court for decision.

f. Employees also can challenge arbitration agreements based upon “unconscionability” or unfairness as to their terms under various theories.

For that reason, employers desiring to require arbitration of employment claims should engage qualified legal counsel for drafting such agreements.

3. Arbitration – Pros and/or Cons Compared to Litigation

a. Arbitration is usually easier to pursue.

b. The parties and attorneys usually have a say in who is picked as arbitrator.

c. There are usually less attorney’s fees. Savings in attorney’s fees are partially offset by arbitrator associated fees and costs.

d. There usually is less sharing of information. This means both less opportunity and less obligation to share information.

e. Relaxed evidentiary rules generally are followed in arbitration.
f. There is usually a quicker result with arbitration.
g. Arbitration is not a public proceeding, but not necessarily confidential.
h. With arbitration, there is no jury. This normally means less chance of an excessive award to the plaintiff.
i. Arbitrators are unpredictable. Arbitrators tend to focus more on reaching a result that they consider “fair.” In doing so, they are prone to “baby splitting” by giving something to each side. They tend to be pro-employee, and often have little if any real world business experience. They have little accountability because their decisions are given so much deference. All of these factors can lead to odd results.

j. Arbitration has stronger finality. There is less chance of appeal.

F. **Mediation**

1. **Common Characteristics of Mediation**

   a. Ohio law – Ohio has adopted the Uniform Mediation Act at Ohio Revised Code Chapter 2710. The provisions are very limited. There are only ten sections. The Act expressly does not apply if mediation is conducted by a judge or magistrate who “might” make a ruling in the case. The Act may not apply to “settlement conferences” that are not labeled as mediation. Nonetheless, all settlement discussions normally are inadmissible under Evidence Rule 408.

   b. Mediation is usually agreed to after a dispute arises. It is sometimes agreed to before a dispute arises, and is sometimes ordered by the court after suit is filed.

   c. An agreement to mediate may or may not be enforceable. A written agreement to mediate as a pre-requisite to suit normally is enforceable.
d. There are various methods of selection of the mediator. A mediator is usually selected by agreement. The court may appoint a mediator in the absence of agreement.

e. There is almost always one mediator. Co-mediators are sometimes used in complex disputes.

f. There are no established qualifications for mediators. No education or training is required. No licensing or certification is required. Anyone can call themselves a mediator. Ohio Revised Code §2710.08 expressly provides that the provisions of Chapter 2710 “do not require that a mediator have a special qualification by background or profession.”

g. Mediators exercise authority over the process but have no real power except as granted by the parties. There is a possible exception if the mediator is court appointed.

h. Pre-mediation exchange of information is limited. The exchange of information is requested by the mediator or arranged by the parties.

i. The mediator attempts to broker a settlement. A mediator normally has no power to make a decision or to issue an order.

j. With very limited exceptions, the mediation process is confidential. Under Ohio Revised Code §2710.03, a mediator or party may refuse to disclose and prevent another from disclosing a mediation communication that is made at any time during the mediation process. Under Ohio Revised Code §2710.06, mediators are restricted in what they may disclose to the court or to any governmental entity empowered to make ruling. Mediators may disclose that (1) the mediation occurred, (2) the mediation terminated, (3) who attended the mediation and (4) whether a settlement was reached. In practice, mediators frequently also communicate if the parties made a good faith effort to settle. There is some skepticism whether these restrictions are always honored,
particularly when the mediator is an employee of the court or required to report to the court.

2. **Mediation – Pros and/or Cons**
   a. Mediation has an extremely high success rate especially with a qualified mediator and parties and attorneys motivated to reach settlement.
   b. Mediation can be done at any stage in the process from the time that a dispute first arises until a final judgment is reached (and even beyond). In employment disputes, mediations can be arranged by the parties or their counsel before a claim is filed. The Equal Employment Opportunity Commission, the Ohio Civil Rights Commission, and other agencies have their own mediation programs to attempt to mediate employment claims at an early stage. A growing trend is for employers to retain mediators to mediate claims with active employees when other resolution methods have failed.
   c. Mediation is much more cost effective than either arbitration or continued litigation. This is especially valuable in statutory employment law claims that involve fee shifting statutes that expose the employer to liability for the employee’s growing fees and expenses. This is especially true for class and collective action employment law claims such as wage-hour claims.
   d. Mediation permits the parties to maintain control over deciding the outcome of their case rather than handing it to someone else, thereby trading an unpredictable outcome for a certain outcome.
   e. The parties also normally control the selection of the mediator. Nonetheless, because anyone can be a mediator and there are no set standards, greater care must be taken in selecting a mediator with the appropriate training and experience.
   f. A qualified mediator serves as a neutral third party that can share an objective and candid view of the dispute. Likewise, employees can share
information with the mediator that they may not feel comfortable sharing with their employer.

g. In litigation, there is sometimes an advantage to not disclosing certain information until the appropriate time. Because successful mediation may involve the disclosure of such information with the party’s consent, there may be strategy considerations against mediation, or at least early mediation.

h. There are multiple mediation options.
   i. Many courts have mediation programs at low cost or no cost. Some courts have staff mediators employed by the court, while others have “mediation panels” of private attorneys who agree to serve as mediators on cases for a fee set by the court.
   ii. Private mediation options include various organizations and individuals with varying qualifications, varying approaches and varying fee structures. Common alternatives include:
       (1) Former or retired judges
       (2) Active or retired attorneys
       (3) Other active or retired professionals
       (4) Community based mediation organizations
       (5) Anyone that wants to call themselves a mediator

3. Primary Mediation Styles
   a. Facilitative Mediation Style – As a facilitator, a mediator helps parties understand and explore interests, proposals and options for resolution. The facilitative mediator does not take an active role in the mediation process itself other than communicating the proposals of the parties, and does not become actively involved in developing proposals or evaluating the positions of the parties. Community based mediation organizations normally engage in facilitative mediation only.
b. Evaluative Mediation Style – On the other end of the spectrum, evaluative mediators take a more active role in the mediation process. They can assist parties in making proposals and develop proposals of their own. They may evaluate and express their opinion as to the merits and value of a case. Former or retired judges tend to reside at this end of the spectrum. Attorneys or other professionals that are retained as mediators because of their subject matter expertise normally engage in evaluative mediation.

c. Hybrid Mediation Style – Most experienced mediators are not purely facilitative or evaluative, but instead use varying styles during the course of a mediation.

4. Selecting The Right Mediator

a. Does the mediator have education or training as a mediator? As discussed above, anyone can call themselves a mediator. There are no certification or licensure requirements. There are various organizations that provide training or certification for mediators, but they are of varying quality and there is no generally accepted standard. Furthermore, qualifications in another profession do not necessarily translate into qualifications to be a mediator.

b. Does the mediator have experience as a mediator? Anyone can hold themselves out as a mediator without any experience acting as a neutral in the mediation process.

c. Does the mediator have the necessary expertise in the subject matter? Unless the parties desire a mediator that will limit their role to facilitative mediation, it often is preferable to have a mediator who has a degree of expertise in the field that is involved in the case, such as employment law. Likewise, the mediator may also have specialized education or training in employment law, or experience with mediating similar cases.
d. Does the mediator have **set procedures/requirements**? Ideally, a mediator will have flexibility in the mediation process to adapt to the needs and preferences of the parties and their counsel.

e. What is the mediator’s **availability/flexibility**? Frequently, the parties and their counsel have limited availability, or need to schedule the mediation on short notice due to court deadlines or other time constraints.

f. What are the mediator’s **fee arrangements**? Fee arrangements for mediators can vary significantly, and some mediators may offer different fee options.

g. Have you **interviewed** the mediator before hiring them? Any mediator should be willing to be interviewed by the parties’ legal counsel without cost or obligation to see if the mediator is the right fit for the case.

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