Mediation's On—Grab a Spoon

By Peter Petesch and Joshua Javits

A soothing cup of mediation can be good for what ails you. So why aren't more employers digging in?

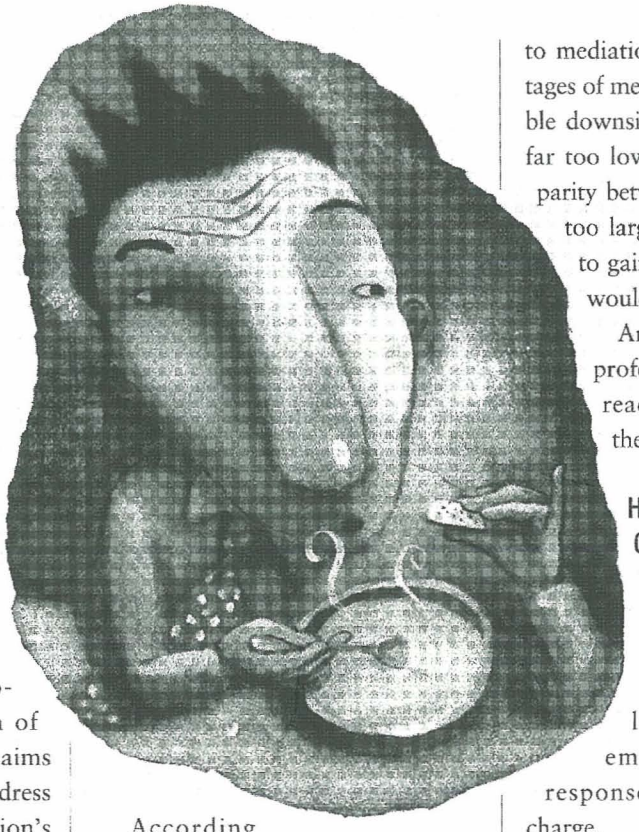
"Eat the chicken soup," she pleaded.

"I don't need the chicken soup," he replied, agitated.

"Eat the chicken soup," she implored.

"Madam, it couldn't help," he responded.

"It couldn't hurt."



STEPHANE DENIS

Voluntary mediation of employment disputes is a lot like chicken soup for employers: It might help. And, in most cases, it couldn't hurt.

The U.S. Equal Employment Opportunity Commission (EEOC) has been promoting voluntary mediation of employment discrimination claims since mid-1999. Yet, in an address to the American Bar Association's employment law conference, EEOC Chair Ida Castro decried the relatively low participation levels of employers in mediation and urged them to embrace the program.

According to Castro, only 36 percent of employers agree to voluntary mediation, while 81 percent of charging parties (employees, former employees or unsuccessful applicants) agree to mediation. Weighing the advantages of mediation against any possible downsides, both figures appear far too low. What's more, the disparity between the two numbers is too large. Employers have a lot to gain from mediation, if they would just give it a try.

And if they do, more HR professionals will need to be ready to get ankle-deep in the process.

How Mediation Of EEO Claims Works

The option to mediate is available early in the charging process. In fact, mediation usually takes place before employers submit their responses to a discrimination charge.

The big benefits of mediation are that it is non-binding, voluntary and confidential. EEOC mediators are supposed to play a neutral role; they have no power to decide who is

right or wrong, they cannot compel either side to settle and they do not conduct additional investigation of the case.

A mediator's job is to facilitate an agreement, if possible. The process usually begins with each side describing its side of the dispute (charging parties usually go first). The next step usually involves discussion and one-on-one, private meetings between the mediator and each side in the dispute. In these "shuttle diplomacy" meetings, the mediator sometimes reviews the strengths and weaknesses of each side's claim, with the goal of steering each side toward compromise. (Remember that, by its very nature, mediation involves convincing employers to do more—and employees to accept less—than they intended.)

Mediation resolutions often—but not always—entail paying money to the employee who filed the charges. (The EEOC attributes $58 million in settlement payments to its mediation program). But employers who are leery of opening their checkbooks still should consider mediation because non-monetary solutions also are possible. Examples of such low- or no-cost solutions include providing positive or neutral references for former employees and arriving at reasonable accommodations for current employees who file disability claims. Mediation is particularly useful for handling charges by current employees who allege failure to accommodate under the Americans with Disabilities Act (ADA).

In addition, mediation allows employees to express themselves in a different and more equal way, which can open the channels of communication and help employers more clearly explain the reasons for their actions. As a result of this improved communication, employees sometimes simply drop their charges.

Mediation sessions usually last about four hours and require the

presence of an individual with settlement authority—not necessarily a lawyer. The mediator has discretion in determining the level of involvement of either side's attorney. An effective counsel can make occasional comments to guide and focus the discussions, as long as this privilege is not abused.

However, attorneys often are urged to act merely as observers and advisors—to "show up and shut up." This means the employer's representative, who is often an HR professional, becomes the main—and sometimes the only—company spokesperson. As a result, HR professionals must be adequately prepared.

The primary benefits of an attorney's presence are to evaluate new facts to determine if they change the liability stakes and to draft the settlement agreement. While both functions may be performed after the mediation, it may be useful to do these quickly, while the iron is hot.

Either, both or none of the parties may bring counsel. If the charging party brings an attorney, the employer should strongly consider bringing counsel. Also, if the charging party brings a lawyer, the chances are far greater that he or she is not interested in a nominal or non-monetary settlement, that more posturing will take place and that the charging party may see the mediation as a way to ferret out the strengths and weaknesses of the employer's position. On the other hand, mediation may allow the charging party's lawyer to evaluate the case in a more objective light than simply relying on the client's side of the story.

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If the mediation does not result in resolution, the case simply goes on to investigation—as it would have if the mediation had never taken place.

Pros and Cons of Mediation

Mediation provides significant benefits, says the EEOC's Castro. She claims that 65 percent of voluntary mediations result in resolution of the claims. These cases are ordinarily resolved within 90 days, as opposed to nine months or more under conventional procedures.

Bear in mind that the EEOC has a vested interest in promoting mediation; after all, the program can help the agency reduce its backlog of cases and its average processing time. But mediation can benefit employers as well, by providing the following:

- A structured opportunity to resolve EEO claims at a relatively low cost, before spending significant time or money litigating the case or furnishing position statements and records to the EEOC.
- A chance to open lines of communication with aggrieved employees without appearing to be the

"weak" side that called the meeting.

- A greater opportunity to resolve a dispute quietly, without the public fanfare and gossip of litigation.
- A less structured way to get at the heart of the problem without pigeonholing the dispute in a strict legal theory or relief scheme.
- A means of potentially settling a case while avoiding unpredictable juries and public exposure.
- An opportunity to obtain "free discovery."
- A chance to better understand the employee's position (and the strengths and weaknesses of that position), as well as to size up the employee's potential as an effective witness in court.
- Another free tote bag. (Just kidding.)

The potential downsides of mediation include:

- Possible heated exchanges that heighten each side's resolve and prolong the dispute.
- Encouraging the charging party to think that you are on the defensive and want to settle.
- Coming across as a bad witness and therefore inflating the charging party's confidence.
- Additional cost of preparing for mediation (which may be outweighed by the advantages of obtaining a quick resolution or learning more about the case).
- Revealing key elements of your case and helping the charging party prepare for litigation if no settlement is reached.
- Wasting everyone's time if both parties are not committed to an honest dialogue.
- The possibility of paying a higher settlement in response to pressures from the mediator—especially if you don't understand the limits of the mediator's power.

No One Expects The Spanish Inquisition!

A skilled mediator can mitigate some of the disadvantages of mediation; by contrast, a bad mediator

can poison the experience. Most mediators understand and embrace their roles as credible neutrals. On occasion, however, some mediators assume the mantle as advocate for the aggrieved employee. In these instances, the mediation transforms quickly into the Spanish Inquisition.

The danger of such a wayward mediator is that the employee who brought the charge may be emboldened to leave with grossly inflated expectations. Unlike the Spanish Inquisition, however, you can walk out and make it clear to the employee who brought the charge that mediation with another facilitator is still acceptable.

Reporting the rare, poor mediator helps keep the process effective for everyone involved. To avoid such situations, conduct some research on your mediator ahead of time. Start by asking colleagues and other HR professionals if they have had any experience with the assigned mediator. If your mediator is part of the American Arbitration Association, you may be able to find background information from that organization.

Mediators who are hired contractors (as opposed to EEOC employees) usually reveal this when they call to set up a meeting. If your mediator is in an organization that provides mediation services, you may be able to find information on the company or your specific mediator that can help you prepare for what's ahead. (For more information on the EEOC's use of contractor mediators, see the April issue of SHRM's monthly newspaper, *HR News*.)

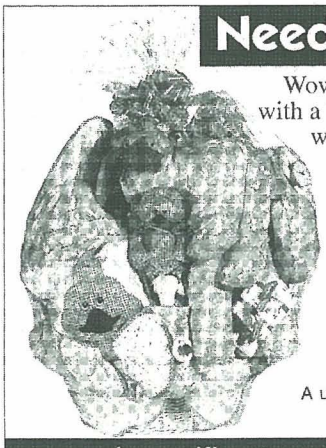
Why the Low Participation Rates?

One reason participation rates among employers are so low may be that many people either don't understand the advantages of mediation or opt to "go to the mat" because they are afraid of appearing weak. In addition, some employers may opt out of the process because they are afraid to confront a disgruntled former employee.

Employers who don't know enough about mediation, and especially those who don't know how to behave in mediation (proper mediation etiquette is explained later in this article), probably shouldn't mediate. Finally, even rational parties who know they are miles apart or who know that the other party is not truly interested in a realistic settlement should sometimes skip mediation. In other words, a 100 percent participation rate in mediation isn't realistic or desirable.

One large employer participating in the EEOC's mediation program reports generally positive results. Deborah Lilly, vice president of corporate diversity for Giant Food, Inc., a grocery story chain based in Landover, Md., says that there's "no great downside." She sees mediation as "a means to establish credibility with the charging party and their counsel, and an opportunity to get the dispute behind you in a manner acceptable to all parties."

Lilly cautions, however, that in mediation, "Nobody is *completely* satisfied. However, it's a very positive means to resolve EEO complaints." She adds that unresolved mediations should not necessarily be considered



failures. "Even if you walk away without a settlement, you know what the issues and concerns are."

As more employers become aware of the relative advantages of mediation, and how to approach mediation, employer participation figures should rise. Employers that fear the "wimp" label should realize that mediation isn't just for "wimps" or companies too nervous to fight and win EEO claims. Many disputes can be resolved with little or no financial commitment. For the others, at least there are advantages to listening and trying to learn more about the other side's view of the case and sense of resolve.

The only group that could conceivably benefit from wholesale rejection of mediation is lawyers—who usually do not top employers' corporate philanthropy lists.

Finally, refusing to mediate may not help you in the long run. A stubborn employer that is unwilling to try mediation may not engender much subjective sympathy from the EEOC. (The same holds true for employees.)

Although effective EEOC investigators try to be objective and professional, they are also human. On an informal basis, many EEOC investigators admit that they share information on which employers (and employment lawyers) are reasonable and cooperative and which aren't. Good faith participation in mediation by employers certainly couldn't hurt in this regard.

The Joys (and Dangers) of Venting

Mediation often is seen as an opportunity for the charging party to "vent." Some believe that if the charging party has a chance to vent, he or she will just walk away. That seldom happens.

Merely allowing the charging party to vent usually does not foster resolution. It can even compound the problem and rekindle the charging party's anger.

Psychiatrist Marcia Scott, vice president of Medical Services in Group Insurance for Prudential in Parsippany, N.J., and a frequent speaker on psychiatry in business, explains that charging parties are angry and upset and feel distress over their individual—and sometimes idiosyncratic—construction of events.

Similarly, venting probably won't do you any good, either. If you vent, you may incite the charging party. The problem is that most employers will want to vent. Unless you have become a complete cynic, you also are harboring some anger about the situation. Admit it: Being unjustly accused of or associated with bigotry builds resentment. Or, if the charge has merit, it may make you angry at managers who you suspect have acted wrongfully. In any event, you probably are not happy to be addressing the charge. That doesn't matter. Curb your anger.

To diffuse the anger, a skilled mediation participant must build a "working relationship" in the mediation and should keep the discussions focused on the employer's perspective and relevant facts. In some cases, when charging parties are presented with the more complete picture, their anger—which is sometimes their motivation in bringing the charge—is diffused. Scott explains that when employees see someone from their employer listening, being reasonable and presenting their point of view as an equal, it helps them feel respected and equal. "A constructive dialogue makes the person feel less helpless."

But, she adds, don't "overwhelm the person with too much information. Otherwise, they may feel beat over the head." Similarly, your "venting" or allowing the other party to simply "vent" is regressive and dooms the mediation to failure. "Your agenda," Scott explains, "has to be to enlarge the picture from both sides, so that it almost clarifies itself."

Giant's Lilly has experienced mediations where the charging party has simply walked away after such open exchanges. "For an aggrieved staffer, it's sometimes an issue of image," she explains, and talking the matter through is enough. Lilly adds that, in mediation, "You can dispel their assumptions that someone was treated better—such as in cases claiming differences in available overtime."

Oh, Behave!

Mediation is only effective when you follow certain ground rules, some of which involve simple "people skills" and others that may be less intuitive:

1. Treat the other party respectfully. Show confidence and respect, not anger, arrogance or paternalism. Even though you don't have to agree with their point of view, belittling other parties—through hostility or condescension—is counterpro-

ductive and usually heightens their resolve to pursue their claim and vindicate their perceived wrongs. Although it may be tempting to be sarcastic, laugh or take the "cheap shot," hold off. Resentment fuels battles, not closure.

2. Do your homework on the facts of the case, your position and goals and, to the extent possible, the likely position of the charging party. If the charging party is represented, check the background and reputation of the opposing counsel.

3. Pay attention to your presentation style, so that you come across as a credible, unflappable witness should the case proceed to court. If you don't settle, you're that much more prepared for the next stage of the case.

4. Recent behavioral studies suggest that chimpanzees are not capable of empathy. Good mediation participants are. Used appropriately, without being condescending or leading the charging party to believe they are right, being empathetic or identifying areas of common interest can be effective. Sometimes, it's all the charging party really wants.

5. Give some, but take a little more. Listen respectfully and very carefully to the other side and feel free to ask follow-up questions (without interrupting). When appropriate, give your explanation of events and describe *generally* why you do not believe the other side has a viable claim and why you, as an employer, acted as you

No Soup for You!

Not every case presents the option for mediation. The Equal Employment Opportunity Commission (EEOC) does not pursue mediation in extremely complex cases or in cases that have no potential merit on their face (although it does allow a lot of weak cases to go to mediation). Supervisors from some EEOC district offices say they do not extend mediation invitations for high priority or "Category A" cases—cases that the EEOC believes (based only on the charging party's input) are clear violations of Title VII, the Americans with Disabilities Act or the Age Discrimination in Employment Act.

In other districts, the EEOC does not offer mediation in the cases that it decides to litigate (cases that, ironically, might be excellent candidates for resolution through mediation).

Therefore, employers that do not receive a mediation invitation in a controversial matter should take special care when responding to the charge at hand and should ensure that a thorough and fair investigation is performed. This may be the only way to overcome the EEOC's initial negative perception. In this sense, the mediation invitation (or its absence) provides some indication on where the case stands with the EEOC.

did. But don't volunteer too much information, and don't show or furnish many new documents. You risk overwhelming the other side and sending them away without understanding the bigger picture or a word you have said.

Explaining too much also risks over-educating the other side, at an early stage, on your theories of the case and on your specific witnesses and evidence. It can also alert them to weaknesses in your case that they had never imagined. This gives them more time to change their story or to try to refute your factual and legal theories. Don't play all your cards at once.

6. Be careful what you say and how you say it. Even though everything the parties say in mediation is "off the record," the facts revealed in the discussions are discoverable later by other means. In other words, saying too much teaches the other side what questions to ask later and who to ask. You are also being sized up (just like the charging party) as a potential witness.

7. Whatever you say to the mediator—even in private—might still be conveyed to the other side. Mediators tend to accentuate the "shuttle" part of their "shuttle diplomacy" function. By the same measure, use the mediator effectively to convey your message or to reach a settlement. To test the waters, you might even make "out of school" offers through the mediator—or "mediator's proposals"—so that you do not necessarily appear "weak" or committed to the settlement proposal.

8. Don't be afraid to say "no" to inflated demands. Not resolving the case in mediation doesn't mean you failed.

9. If you're showing up for mediation only because your lawyer is forcing you to, your time is probably better spent reading all those *HR Magazine* articles collecting in your in box.

Mark Twain said, "If the only tool you have is a hammer, then every problem looks like a nail." Employers looking for an alternative to the expense, frustration and uncertainties of litigation should give mediation and the EEOC's initiative a chance. But mediation isn't always beneficial for everyone in every case, and certainly does not guarantee an acceptable resolution. Its advantages, however, justify a much higher rate of participation among employers.

Barring unusual circumstances that would render a mediation session either hopeless or even harmful, employers should consider "trying the chicken soup." It couldn't hurt. HR

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