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ALTERNATIVE DISPUTE RESOLUTION: PRIVATE JUSTICE?

This outline addresses some of the legal and procedural parameters of Alternative Dispute Resolution. The live session will focus on the advantages, disadvantages, and relative utility of various methods of Alternative Dispute Resolution and the trade-offs involved in selecting against court litigation.

I. GENERAL PRINCIPLES OF ADR

A. Overview of ADR

Alternative Dispute Resolution ("ADR") encompasses a variety of procedures whereby controversies that might otherwise go to court are resolved without involving the judicial system. ADR, broadly defined, includes all methods to address employment disputes other than litigation. However, the two most frequent modes of ADR in the employment law context are **arbitration** and **mediation**. Each involves the participation of a third party neutral.

Arbitration is by far the more formal process. In many respects, it resembles a private system of justice, paid for by the parties. The pre-eminent national organization facilitating arbitration is the American Arbitration Association ("AAA"). The AAA will, for a fee, administer an arbitration proceeding where the parties have agreed to conduct one. The AAA maintains a roster of qualified neutral arbitrators, from which the parties may select one or more arbitrators to hear their case. The AAA has specific rules that apply to arbitration of employment claims, and has promulgated a statement on Due Process safeguards that should be incorporated into employment agreements mandating arbitration. For example, the current AAA policy requires that, in most employment cases, the employee's liability for the AAA filing fee is limited, and the employer should be responsible for the costs of hiring the arbitrator. A number of other organizations also facilitate arbitration in employment law, depending on context, including the American Health Lawyers Association ("AHLA"), which maintains a roster of qualified neutrals who are familiar with the particular challenges of employment and partnership issues in the context of health care employers.

Mediation is less formal. Mediation involves a single neutral meeting with the parties to facilitate the parties' own agreement. Arbitration is binding; mediation is not. Arbitration often involves semi-judicial processes such as document discovery and even pre-hearing depositions; mediation often is conducted in a single meeting. We are fortunate that, in Virginia, there are a wide variety of private mediation firms with high-quality panels of neutrals. Many of these neutrals are retired judges with enormous experience.

A number of federal courts will also offer mediation services, under the rubric of a settlement conference, to litigants. Usually, the mediator will be a U.S. Magistrate Judge sitting in the Division in which the case is pending. The benefit to this process is that the service is provided to litigants free of charge; the downside is that it is available only after litigation has already begun in the court, often at substantial expense.

In sum, the difference is this: **a mediator facilitates the parties coming to a solution; an arbitrator imposes the arbitrator's decision on the parties, which is binding.**

B. <u>Judicial View of ADR</u>

For over a century, the courts looked unfavorably upon ADR, and were reluctant to enforce agreements to arbitrate. (Mediation, which is not enforced by a pre-existing contract and which is performed only when all parties agree to do so, has not often reached the court system.) This judicial hostility has not only dissipated; it has reversed itself. Courts now favor ADR in general and agreements to arbitrate in particular.

Speaking very generally (for there are some exceptions), agreements to arbitrate employment matters that arise in the context of interstate commerce are governed by the Federal Arbitration Act ("FAA"). Agreements to arbitrate employment matters that do not arise in the context of interstate commerce are governed by the Virginia Arbitration Act, which is an iteration of (although not a precise copy of) the Uniform Arbitration Act. The standards employed by both laws are similar but not identical. In cases where both the FAA and the Virginia act would apply, the FAA will be used for purposes of judicial review unless the parties contract states otherwise.

Specifically in the employment context, Congress has made express reference to favoring ADR as an alternative to the traditional judicial forum for vindicating employment rights. The Americans with Disabilities Act of 1990 contains a specific section encouraging ADR, as does the Civil Rights Act of 1991. (The Civil Rights Act of 1991, among other things, amended Title VII of the Civil Rights Act of 1964 to make compensatory and punitive damages available to successful employment claimants.)

The Supreme Court of the United States has addressed arbitration agreements a number of times in various contexts. An early leading case is *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991). That case involved a standard form agreement required of broker-dealers registered with the New York Stock Exchange, requiring arbitration of employment disputes with employers; the plaintiff tried to bring suit against his employer under the Age Discrimination in Employment Act ("ADEA"). Brokers are required to sign such an agreement to work as a securities dealer; the Supreme Court declined to invalidate the agreement on the basis that it was an unlawful contract of adhesion. The general applicability of the FAA to employment agreements (despite some language suggesting they may be exempt) was affirmed by the Supreme Court a decade later in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

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Three other Supreme Court decisions bear mention. In *Green Tree Fin. Corp. Alabama v. Randolph*, 531 U.S. 79 (2000), the Supreme Court held (in a non-employment case) that an arbitration agreement that does not mention who bears the costs and fees of arbitration is not *per se* unenforceable against the individual; a party who claims that an agreement to arbitrate is unenforceable because of the expense involved is required to show the costs incurred and that they are unreasonable. In *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279 (2002), the Supreme Court held that an agreement between an employer and employee to arbitrate their employment-law claims would not prevent the U.S. Equal Employment Opportunity Commission ("EEOC") from separately investigating and, if appropriate, going to court to litigate those claims. In practice, this almost never happens, but it does mean that most employee arbitration agreements will contain a carve-out permitting the employee to file a Charge with the EEOC (or the National Labor Relations Board, which takes the same position); an arbitration agreement may, nevertheless, waive an employee's right to obtain any relief from the federal agency or its litigation. Most recently, in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 11740 (2011), the Court held that employers may prevent individuals from pursuing their claims in arbitration on a class-action basis, even in the face of a state stature (there, California) that makes such an arbitration agreement illegal and unenforceable. The state law, the Court held, was preempted by the FAA and the broad federal policy favoring arbitration.

II. VIRGINIA STATUTORY PROVISIONS GOVERNING ADR

A. Arbitration

In Virginia, agreements to arbitrate employment disputes that are contained in a written contract are generally irrevocable. Virginia Code Section 8.01-577(B) provides, "Neither party shall have the right to revoke an agreement to arbitrate except on a ground which would be good for revoking or annulling other agreements."

Overturning – vacating – an arbitration award is almost impossible. The grounds for vacating an award issued by an arbitrator are contained in Va. Code § 8.01-581.010.

> Upon application of a party, the court shall vacate an award where:
>
> 1. The award was procured by **corruption, fraud** or other undue means;
>
> 2. There was **evident partiality** by an arbitrator appointed as a neutral, corruption in any of the arbitrators, or misconduct prejudicing the rights of any party;
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> 3. The arbitrators exceeded their powers;
>
> 4. The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 8.01-581.04, in such a way as to substantially prejudice the rights of a party; or

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> 5. There was no arbitration agreement and the issue was not adversely determined in proceedings under § 8.01-581.02 and the party did not participate in the arbitration hearing without raising the objection.
>
> The fact that the relief was such that it could not or would not be granted by a court of law or equity is not grounds for vacating or refusing to confirm the award.
>
> An application under this section shall be made within ninety days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety days after such grounds are known or reasonably should have been known.

Under both the FAA and the Virginia Arbitration Act, it is not possible to vacate an arbitrator's award because the arbitrator "got the facts wrong" or "got the law wrong" – even where the arbitrator's opinion explains what the law is and then expressly says that the opinion will not follow the law.

B. <u>Mediation</u>

For many years, Virginia law did not seek to regulate mediation. The increase in use of mediators in recent years has led to the imposition of some minimal oversight – most particularly, providing for the certification of mediators, and making certified mediators immune to suit by the parties.

Virginia law, Virginia Code § 8.01-581.21, defines mediation:

> "Mediation" means a process in which a mediator facilitates communication between the parties and, **without deciding the issues or imposing a solution on the parties**, enables them to understand and to reach a mutually agreeable resolution to their dispute.

Section 8.01-581.24 provides:

> A mediator selected to conduct a mediation under this chapter may **encourage and assist** the parties in reaching a resolution of their dispute, but **may not compel or coerce** the parties into entering into a settlement agreement. A mediator has an obligation to remain **impartial** and free from conflicts of interest in each case,

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> and to decline to participate further in a case should such partiality or conflict arise.
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> Unless expressly authorized by the disclosing party, the mediator may not disclose to either party information relating to the subject matter of the mediation provided to him in confidence by the other. A mediator shall not disclose information exchanged or observations regarding the conduct and demeanor of the parties and their counsel during the mediation, unless the parties otherwise agree.

Section 8.01-581.23 provides immunity from civil liability for a certified mediator – but only for a **certified** mediator. Most mediators made available by mediation firms are certified; most individual attorneys who "do mediation" are not.

> When a mediation is provided by a mediator who is certified pursuant to guidelines promulgated by the Judicial Council of Virginia, or who is trained and serves as a mediator through the statewide mediation program established pursuant to § 2.2-1202.1, then that mediator, mediation programs for which that mediator is providing services, and a mediator co-mediating with that mediator shall be immune from civil liability for, or resulting from, any act or omission done or made while engaged in efforts to assist or conduct a mediation, unless the act or omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another. This language is not intended to abrogate any other immunity that may be applicable to a mediator.

Finally, the standards for overturning a mediated agreement is essentially as strict as the standard for overturning an arbitrated decision. Virginia Code § 8.01-581.26 provides:

> Upon the filing of an independent action by a party, the court shall vacate a mediated agreement reached in a mediation pursuant to this chapter, or vacate an order incorporating or resulting from such agreement, where:
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> 1. The agreement was procured by fraud or duress, or is unconscionable;
>
> 2. If property or financial matters in domestic relations cases involving divorce, property, support or the welfare of a child are in dispute, the parties failed to provide substantial full disclosure of all relevant property and financial information; or

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3. There was evident partiality or misconduct by the mediator, prejudicing the rights of any party.

For purposes of this section, "misconduct" includes failure of the mediator to inform the parties at the commencement of the mediation process that: (i) the mediator does not provide legal advice, (ii) any mediated agreement may affect the legal rights of the parties, (iii) each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so, and (iv) each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement.

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