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Sitting At The Head Off The Table: How To Be An Effective Labor And Employment Mediator And Arbitrator

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How To Be An Effective Labor And Employment Mediator And Arbitrator

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To be effective, the labor and employment mediator or arbitrator needs both dispute resolution skill and a thorough knowledge of labor law issues.

MEDIATION AND ARBITRATION remain favored ways of dealing with employment cases. As the need for qualified mediators and arbitrators continues to grow, many practitioners have expressed interest in becoming labor mediators or arbitrators. This article discusses what mediators and arbitrators should know, the role of the mediator, negotiation tactics and strategies, settlement, resolving class and complex cases, and a few views on the use and selection of mediators from the plaintiff’s perspective.

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WHAT CHARACTERISTICS SHOULD A LABOR MEDIATOR OR ARBITRATOR POSSESS? • Among the most important characteristics that a mediator must have to be persuasive and effective are knowledge and experience in the subject matter of the litigation. An experienced and knowledgeable mediator may be able to facilitate the settlement process by assessing the possibilities of success or failure in court. For a mediator to make such a judgment call and be persuasive, knowledge of the relevant law is necessary.

Crucial Issues
In the employment litigation area, it is virtually impossible to serve effectively as a mediator without understanding not only the basic substantive and procedural issues surrounding class action litigation, but also some of the more subtle issues. For example, employment class actions often require in-depth understanding of the importance of:

• The now-famous footnote 15 in Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 159 n. 15 (1982);
• The interrelationship between Rule 23(a) requirements of commonality, typicality, and adequacy of representation as reflected in the Supreme Court’s decision in East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977);
• The distinction between certification under Rule 23(b) (2) and (b) (3);
• The effect of decentralized operations on class certification. Compare Hively v. Northlake Foods, Inc., 191 F.R.D. 661 (M.D. Fla. 2000) (decentralized nature of employer decision-making negated satisfaction of commonality and typicality requirements for class certification) and EEOC v. McDonnell Douglas Corp., 17 F. Supp. 2d 1048 (E.D. Mo. 1998), aff’d, 191 F.3d 948 (8th Cir. 1999) (the decentralized and subjective nature of the RIF process undermined the EEOC’s claim that age discrimination was “standard operating procedure”) with Faulk v. Home Oil Co., 184 F.R.D. 645, 660 (M.D. Ala. 1999) (showing that vice-president controlled challenged subjective hiring process satisfied commonality and typicality requirements for class certification);
• The renewed importance of the predominance requirement in class certification. See, e.g., Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228 (11th Cir. 2000), cert. denied, 532 U.S. 919 (2001) (Eleventh Circuit affirmed a district court decision holding that a purported class of Jewish customers of Avis Rent-A-Car who allegedly were discriminated against in the terms of their rental contracts based upon their religious status, in violation of 42 U.S.C. §1981, failed to meet the predominance requirement of Rule 23, given the highly individualized analysis applicable to such generalized claims of discrimination in contracting);
• The employer’s burden in proving its affirmative defense to sexual harassment claims under Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998);
• The validity and effect of releases. See, e.g., Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998);
• The importance of statistics in establishing or rebutting a prima facie case of adverse impact discrimination or class-wide intentional discrimination. See, e.g., Int’l Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) and Anderson v. Zubieta, 180 F.3d 329 (D.C. Cir. 1999). See also Caridad v. Metro-North Commuter R.R., 191 F.3d 283 (2d Cir. 1999), cert. denied, 529 U.S. 1107 (2000) (statistical evidence supported finding of commonality of claims);
• The effect of the Civil Rights Act of 1991 on various certification and liability issues. See, e.g., Bickerstaff v. Vassar College, 196 F.3d 435 (2d Cir.