CHAPTER 4

NAA MEMBERS AND THE EXPLODING ADR UNIVERSE

I. AN OVERVIEW OF EMPLOYMENT ADR IN CALIFORNIA

SARA ADLER *

Preliminarily, let us define as "labor disputes" those employment disputes covered by a collective bargaining agreement and "employment disputes" as all other disputes arising out of the employment relationship. Alternative Dispute Resolution (ADR) is fairly widely accepted in California for the prevention and resolution of all kinds of employment disputes. This is so even in light of *Duffield v. Robertson Stephens & Co.*[1], in which the Ninth Circuit, in an opinion by Judge Reinhardt, prohibited the use of predispute compulsory arbitration provisions to resolve Title VII claims and, by implication, similar state discrimination claims.

The most frequently used ADR technique is mediation, followed by arbitration, early neutral evaluation, and a host of less favored approaches such as minitrials. After the dispute has arisen, parties usually come to one or more of these ADR processes either voluntarily when offered by an agency or by one of the parties to a dispute or, possibly involuntarily, because they are a condition of employment or a court requires them to try some form of ADR prior to trial.

There is a sizable pool of potential arbitrators and mediators. A large number of retired judges, mostly from the state court system, are available through the American Arbitration Association, JAMS/Endispute, and a variety of other neutral providers. There is the traditional labor neutral community, most of whom are willing to serve in employment matters. In addition, a significant number of practicing attorneys from all sides are serving as arbitrators and mediators *pro bono*, for pay, or some combination of the two. For example, the Southern California Region of the Equal Employ-

---

*Member, National Academy of Arbitrators, Los Angeles, California.
[1]144 F.3d 1182, 76 FEP Cases 1450 (9th Cir. 1998).

ment Opportunity Commission (EEOC) has recently contracted with the Los Angeles Bar Association's Dispute Resolution Service (DRS) for mediation of its "B-Track" cases.

DRS recruited lawyers from the Labor and Employment Law Section and lawyers knowledgeable in employment law from the Litigation Section of the Los Angeles County Bar Association. The lawyers were required to have a minimum of 40 hours of workplace mediation training and orientation by the EEOC's staff. These lawyers have agreed to mediate for the first 3 hours for free and, if the matter has not settled in that time period, and the parties choose to do so, will continue to serve as mediator for pay until the matter settles or it is clear that further mediation efforts will not be fruitful.

The California judiciary has been exceedingly hospitable to arbitration in the 1990s. For example, in *Moncharsh v. Heily & Blase*[2] the California Supreme Court refused to vacate an arbitration award although its "manifest injustice" was plain from the face of the award. The California Supreme Court has left untouched most of the arbitration plans, programs, and outcomes that have come before it, with the notable exception of the mandated arbitration system of Kaiser Permanente, the health maintenance organization where, in *Engalla v. Permanente Medical Group*,[3] the court allowed the plaintiff to attempt to prove Kaiser's entire medical-arbitration system was a fraud. The Ninth Circuit has been somewhat less supportive of arbitration outside of the labor context.

The legislature has also taken an active role in ADR in recent years, laying out exhaustive requirements for potential arbitrators, including what is very probably the most extensive disclosure requirement in the nation, and setting many of the ground rules for what constitutes a mediation and an enforceable mediated settlement and the conditions for confidentiality.[4] At the moment there are multiple bills before the state legislature, each attempting to further refine the statutory framework of ADR processes—at least in their authors' views. Mediators in California appear to have full common law immunity as laid out in the only case I know of by an appellate court.[5] Arbitrators have had common law immunity for many years and, from time to time (but not presently), statutory immunity as well.

---

[2]3 Cal. 4th 1 (1992).
[3]15 Cal. 4th 951 (1997).
[4]Cal. Evid. Code §§1115–1128.
[5]*Howard v. Drapkin*, 222 Cal. App. 3d 843 (1990).

In addition to employer-generated plans that allow for grievances over the employer's own rules and regulations, and the statutory network of federal workplace rights and protections, California has a very extensive, wholly independent network of statutory workplace rights and protections. There are still more rights and protections, such as the potential right to be free of wrongful demotion outlined by the California Supreme Court in *Scott v. Pacific Gas & Electric Co.*,[6] which have been developed through case law. In the most recent development, *Cotran v. Rollins Hudig Hall International*,[7] the California Supreme Court ruled that an employee could be discharged under an implied-in-fact agreement not to discharge without "good cause" based on the employer's reasonable good-faith belief that the employee had engaged in misconduct that constituted good cause after an appropriate competent investigation and the opportunity for the employee to respond. The court found that it was not proper for judge or jury to inquire if the employee actually engaged in the alleged misconduct.

Needless to say, this case has caused substantial changes in approach for some cases and moved the inquiry very heavily into the nature, extent, and possible failures of the investigation and/or confrontation. It has also caused some advocates to argue that the *Cotran* standard, or some similar standard, rather than the traditional just cause standard, should be applied in the labor context. It seems likely that there will be some effect on the traditional labor just cause standard over time in California, especially where agreements use the terms "cause," "good cause," "proper cause," and the like instead of the phrase "just cause," which a concurring opinion by Justice Mosk recognizes requires that the employer meet the burden of proving the alleged misconduct occurred.

One area in which arbitration is frequently negotiated is the individual employment contract. In these matters, increasingly the issues involve stock options—a favored form of compensation at the moment in some industries and a growing driving force in discharge disputes. A California statute prohibits covenants not to compete, but the high technology industry especially has seen an attempted end run around this restriction where an employee arguably has trade secret information in his or her own head that is either subject to an agreement not to disclose or where transfer-

---

[6]11 Cal. 4th 454, 46 Cal. Rptr. 2d 427, 904 P.2d 834, 11 IER Cases 161 (1995).
[7]17 Cal. 4th 93, 69 Cal. Rptr. 2d 200, 948 P.2d 412, 423, 75 FEP Cases 1074 (1998).

ring the information from business A to business B, in the form of knowledge, is found to be a prohibited business practice. Employers losing employees to a competitor have had some success in arguing that, in his or her new position, the former employee will "inevitably disclose" the information and should be restricted from working for the competitor (or in certain jobs for the competitor—that likely was why the competitor hired the employee) for a period of time.

The one very disturbing recent development from the California Supreme Court came in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County*,[8] a nonemployment case, in which the court held that advising in preparation for or representing a client in arbitration is the practice of law. Due to the efforts of Dave Feller acting on behalf of the National Academy of Arbitrators (NAA) and others, the court added a paragraph specifically acknowledging that its ruling would not affect representation in collective bargaining cases subject to the National Labor Relations Act. However, it does have a profound effect on cases in employment law and the position of the NAA and others who negotiated the Due Process Protocol to include a provision that the parties could have any representation of their choosing. It is now clearly a misdemeanor—the unauthorized practice of law—for anyone (yes, human resources representative, business agent, friend, or relative) other than a lawyer to represent either party in California in an arbitration in the public sector or any employment law matter. It is not at all clear whether or not the court would reach the same conclusion regarding advice and representation in mediation, but, if it does, the chilling effect on ADR will be enormous.

II. SEXUAL HARASSMENT FACTFINDING AND INVESTIGATIONS: ISSUES AND DILEMMAS

MEI LIANG BICKNER*

In sexual harassment cases, it has been well established that a prompt, fair, and thorough investigation, coupled with appropri-

---

[8]17 Cal. 4th 119 (1998).

*Member, National Academy of Arbitrators; Professor of Industrial Relations, California State University, Fullerton.

I am indebted to Susan MacKenzie for her contributions and comments on the material presented in this paper. *See also Internal Investigations: The Perspective of an Outside Neutral*, 82 Employment L. Couns. 15 (1997).