

# THE UNGUIDED USE OF INTERNAL ADR PROGRAMS TO RESOLVE SEXUAL HARASSMENT CONTROVERSIES IN THE WORKPLACE

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## I. INTRODUCTION

Corporate use of internal dispute resolution (IDR) mechanisms, such as mediation, arbitration, and peer review, in companies across America has increased dramatically over the past decade. There are several reasons to explain this increase, including the desire to resolve disputes efficiently<sup>1</sup> and cost effectively,<sup>2</sup> the need to reduce the caseload of our over-burdened public legal system,<sup>3</sup> the desire to shield internal disputes from external scrutiny,<sup>4</sup> the need to maintain a working relationship between disput-

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<sup>1</sup> See Cindy Cole Ettingoff & Gregory Powell, *Use of Alternative Dispute Resolution in Employment Related Disputes*, 26 U. MEM. L. REV. 1131, 1141 (1996). Employment disputes resolved through ADR, as opposed to litigation, are often resolved more quickly because of the backlog of cases in the federal court system. Most ADR procedures can be effectuated very quickly and take less time to be resolved than do cases that go to court. One exception is mediation, which can last for a long time, depending on the speed of the negotiations. However, as mediation is party-determined, the mediation will only continue if the parties wish to continue. This is unlike a court case, where the process can take a very long time when the parties both desire a speedy resolution.

<sup>2</sup> Litigation is a costly process that requires a company to expend money and manpower in order to defend itself against a sexual harassment claim. Many companies turn to ADR as a means of saving the costs involved in litigation. For example, Chevron reported that mediating one in-house employee dispute cost the company \$25,000, whereas litigating the case would have cost an estimated \$2.5 million. See Ettingoff & Powell, *supra* note 1 at 1139, citing Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why it Doesn't Work and Why it Does*, HARV. BUS. REV., May-June 1994, at 121.

<sup>3</sup> See, e.g., Elisa Westfield, Note, *Resolving Conflict in the 21st Century Global Workplace: The Role for Alternative Dispute Resolution*, 54 RUTGERS L. REV. 1221, 1227 (2002) (noting that Congress and many jurisdictions mandate the use of ADR to "reduce case backlogs and expedite the resolution of disputes").

<sup>4</sup> See Anne Lawton, *Tipping the Scales of Justice in Sexual Harassment Law*, 27 OHIO N.U.L. REV. 517, 529 (2001).

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ing employees,<sup>5</sup> the desire to improve corporate culture by encouraging employees to have a problem-solving mindset,<sup>6</sup> and the desire to avoid public vindication.<sup>7</sup> Many U.S. companies have incorporated the use of alternative dispute resolution (ADR) mechanisms into their internal corporate policies and procedures.<sup>8</sup> There has been great debate in recent years surrounding the growing use of mandatory arbitration in employment contracts. However, studies have revealed that corporations use mediation and other types of dispute resolution procedures much more frequently than arbitration in order to resolve workplace disputes.<sup>9</sup> In fact,

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Internal grievance procedures are private. Neither employers nor educational institutions are required to report the number, nature, or outcome of sexual harassment complaints filed with the institution. Nor are employers or educational institutions required to undertake climate studies to determine the extent to which employees and students know about and trust the internal process. Hence, in the vast majority of cases that never make it to court, there is no oversight of the institution's internal grievance procedure.

*Id.* See also Ettingoff & Powell, *supra* note 1, at 1142-43. The confidentiality of ADR processes allows the corporation to save money that could be lost not only through litigation, but also through the unfavorable publicity that often results from litigation. For example, the law firm of Baker & McKenzie lost several million dollars due to a verdict rendered against them for employment discrimination. The verdict resulted in unfavorable publicity that caused a further monetary loss to the firm. Had the firm used an internal dispute resolution mechanism to resolve the dispute, the firm would not have faced the adverse publicity that was a direct result of litigation. See *id.*

<sup>5</sup> See Ettingoff & Powell, *supra* note 1, at 1142 (arguing that the use of mediation in resolving disputes is beneficial in that it avoids the development of a true adversarial relationship between the parties and allows the parties to confront and resolve the situation quickly, before animosity and mistrust prevent any resolution).

<sup>6</sup> See Interview with Simeon H. Baum, President, Resolve Mediation Services, Inc., Adjunct Professor, Benjamin N. Cardozo School of Law (April 1, 2005). This is important for the U.S. Postal Service that has many ex-military employees who are not typically trained as problem solvers. The use of IDR can be particularly effective in solving disputes between these employees and in changing their mindsets in order to avoid future conflicts.

<sup>7</sup> See Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135, 156-57 (1999) (highlighting the advantages of the private nature of alternative dispute resolution with specific focus on mediation); see also, Ettingoff & Powell, *supra* note 1 at 1160 (noting the ability of ADR to keep parties safe from public embarrassment).

<sup>8</sup> See Westfield, Note, *supra* note 3, at 1227 (noting that the current trend of corporate use of ADR is the integration of ADR into a corporation's overall business strategy).

<sup>9</sup> See Peter Phillips, *Current Trends in Management and Resolution of Employment Disputes*, FOR THE DEFENSE, July 2002. "Based on the statistics available, one trend is clear: nearly all disputes submitted to systemic employment dispute resolution programs are resolved by agreement, prior to the arbitration stage." *Id.* For example, the companies Halliburton and Johnson & Johnson each report that of the disputes that entered their programs, fewer than 2% went to arbitration. Similar results are seen in the U.S. Air Force, where 79% of disputes were resolved without arbitration. *Id.* See also Interview with Peter Phillips, Vice President, CPR Institute for Dispute Resolution, in New York, N.Y. (Nov. 11, 2003). "In reality, companies don't use arbitration. They provide for it, but cases just never get there." *Id.* The reason is

many employers<sup>10</sup> mandate that employees use internal ADR mechanisms as a prerequisite to filing a complaint with the court system.<sup>11</sup> This means that companies will require their employees to sign an employment contract in which each employee agrees to use the company's IDR procedures in lieu of, or prior to, pursuing a claim in court. Thus, although many of these programs are non-binding, they are nevertheless mandatory.<sup>12</sup> Other employers do not mandate the use of their IDR programs but require an employee to waive his or her right to bring a claim to court if he or she chooses to use the IDR program.<sup>13</sup> Additionally, the Supreme Court has upheld the use of ADR clauses that mandate the use of IDR mechanisms before an employee can file a formal complaint of sexual harassment with the court system.<sup>14</sup>

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because arbitration is generally the last step in a multi-step process through which an employee can resolve its disputes with a corporation. It is in the corporation's economic best interest to resolve the dispute before it reaches the arbitration stage, as the more time spent to resolve a dispute leads to a greater amount of company money and time that is lost. Additionally, employees who are content are more productive, and thus the longer a dispute lingers, the less productive the employees involved will be and the less money the company will make. *See id.*

<sup>10</sup> *See, e.g.,* M. Goldstein & A. Stempel, *Mandatory Arbitration Clauses in Employment Contracts*, N.Y.L.J., Oct. 1996, at 1. The authors state that in the securities industry, "any registered representative who solicits and sells securities and other financial products is required to sign a U-4 form that contains a mandatory arbitration clause." *Id.* The usage rates of mandatory IDR does, however, vary between and among industries.

<sup>11</sup> This is frequently seen in the context of mandatory, binding arbitration clauses in employment contracts. *See, e.g., id.; see also* Joseph T. McLaughlin & Karen M. Crupi, *ADR Agreements Enforceable When Intent, Limits Are Clear*, N.Y.L.J., July 19, 1993, at S-5, S-11. However, employers also mandate the use of other ADR mechanisms, such as mediation. *See* Phillips, *supra* note 9; *see also* Lawton, *supra* note 4, at 518-19 (noting problems with requiring Title VII claimants to use IDR mechanisms before filing suit in court).

<sup>12</sup> This is problematic, in part, because studies indicate that ADR is most effective when all sides participate willingly and in good faith. *See* Joseph T. McLaughlin & Karen M. Crupi-Fitzgerald, *Alternative Dispute Resolution in the Corporate Sector*, ALI-ABA Course of Study Materials: Civil Practice and Litigation Techniques in Federal and State Courts, Vol. II (March 2001), *quoting* *New Options for Disputes in Workplace*, Alternatives to the High Cost of Litigation, 153-54 (December 1995).

<sup>13</sup> For example, Alcoa offers a three-step dispute resolution program that employees can elect to use. However, if employees choose to utilize the dispute resolution program, they waive access to a judicial forum. *See* Phillips, *supra* note 9. The EEOC looks with disfavor on such waivers of employee rights to assert claims in a judicial forum.

One concern is that such attempts may be viewed as a less-than-evenly bargained-for agreement to waive statutory rights, and coercive to the individual employee. Another concern is that confidential resolution of individual disputes will deny the enforcement agency the opportunity to discover and correct employment policies and practice that constitute violations of the law.

*Id.*

<sup>14</sup> *See* Lawton, *supra* note 4, at 522, *citing* JOANNA L. GROSSMAN, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 710 (2000) (noting that "the Supreme Court's interpretation of institutional liability under both Title VII and Title IX basi-

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This Note will explore some of the concerns raised by the use of mandatory IDR mechanisms in the workplace, particularly in the context of resolving sexual harassment disputes. As previously noted, the use of IDR in the workplace can be highly effective and beneficial for both the employee and the employer. However, just as the Food and Drug Administration approves drugs that have potentially harmful side effects, the public and the U.S. government should approve of the use of IDR mechanisms despite the potential for abuse. In both circumstances, the public deserves to be warned about the possible dangers. This does not mean that the mechanism itself must be rejected in its entirety. Rather, by shedding light on some of the problems associated with mandatory IDR mechanisms, perhaps we can learn more about the system in order to make the appropriate changes to protect those who currently stand to lose and effectuate the ultimate goal of enhancing quality of work life for all employees.

IDR mechanisms have been criticized due to the perceived bias inherent in a program created and controlled by the employer that is meant to investigate and potentially penalize the employer.<sup>15</sup> The use of IDR in resolving sexual harassment disputes warrants particular scrutiny because the body of sexual harassment jurisprudence is not well defined. Thus, if sexual harassment claims in the employment context are resolved primarily through ADR mechanisms, this area of law may escape public review, which could inhibit the development of an evolved and contemporary body of sexual harassment case law. These problems can be ameliorated with a system that requires companies to publish all arbitration awards and notify the EEOC of all corrective actions taken as a result of internal mediations. The EEOC will be required to monitor IDR mechanisms to ensure that they are fair and afford due process to all involved.<sup>16</sup> The EEOC will also be responsible for the publication of a public document describing the

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cally requires plaintiffs alleging sexual harassment to use their institution's internal grievance procedure or risk losing in court, even at the summary judgment stage." It is, however, important to note that since employers can be held liable for the actions of their employees based upon the legal theory of respondeat superior, it is fair to permit companies to attempt to relieve themselves of liability by instituting internal complaint procedures. This allows companies to be proactive in protecting their employees instead of reactive to the negative results of litigation. See Interview with Simeon H. Baum, President, Resolve Mediation Services, Inc., Adjunct Professor, Benjamin N. Cardozo School of Law, *supra* note 6.

<sup>15</sup> See Lauren B. Edelman, *When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law*, 33 *LAW & SOC'Y REV.* 941, 966 (1999).

<sup>16</sup> The AAA Due Process Protocol for arbitrations is a good example of a way in which due process can be afforded in ADR. See, e.g., <http://www.lawmemo.com/arb/res/aaa-dueprocess.htm>

types of behaviors that are acceptable and those that are not, based upon the reports it receives from companies. If this occurs, the problems of stare decisis, power imbalance, lack of public knowledge, clarity in acceptable norms in the context of sexual harassment, and potential for bias will be addressed.

## II. SEXUAL HARASSMENT

Sexual harassment cases are unique for a variety of reasons.<sup>17</sup> First, because sexuality is the crux of a sexual harassment complaint, which many women feel is a private, sensitive subject, women tend to avoid public fora when complaining.<sup>18</sup> Women often prefer to use corporate internal grievance procedures or to choose not to report such harassment at all.<sup>19</sup> Although this might seem to advocate for the role of internal dispute resolution mechanisms, it raises concerns in regards to procedural and substantive fairness in the resolution of these disputes.<sup>20</sup> Sexual harassment cases are highly fact-dependent.<sup>21</sup> A clear body of case law defining sexual harassment and providing boundaries of behavior which can be defined as violating Title VII is lacking.<sup>22</sup> This raises heightened public policy concerns about the use of mandatory IDR mechanisms

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(last visited April 17, 2005) (providing an example of the use of the AAA protocol in arbitrating and mediating employment disputes).

<sup>17</sup> Sexual harassment victims can be both male and female. I will specifically refer to women in this Note for ease of reading and because sexual harassment jurisprudence tends to focus on the harassment of females.

<sup>18</sup> See Amy Holzman, Note, *Denial of Attorney's Fees for Claims of Sexual Harassment Resolved Through Informal Dispute Resolution: A Shield for Employers, A Sword Against Women*, 63 *FORDHAM L. REV.* 245, 251 (1994); see also Barry S. Roberts & Richard A. Mann, *Sexual Harassment in the Workplace: A Primer*, 29 *AKRON L. REV.* 269, 271 (1996) (noting that as many as 95% of women who are victims of sexual harassment fail to report the harassment).

<sup>19</sup> See Holzman, *supra* note 18, at 251. The reason for such reluctance is "due to both the anticipated and established range of reactions to their complaints, from ignoring, disbelieving, or trivializing them, to the perception of the woman as blameworthy or unprofessional." *Id.* at 252-53.

<sup>20</sup> One way to foster fairness is to guarantee that both parties in a workplace sexual harassment complaint have equal access to legal counsel. See *id.* at 254.

<sup>21</sup> Legal clarity is particularly needed in sexual harassment jurisprudence because of the wide range of nuanced factual scenarios that arise in these cases. However, paradoxically, the fact-dependent, nuanced nature of sexual harassment disputes simultaneously puts these disputes outside the realm of legal determination and in the realm of factual determination. Thus, legal clarity is oftentimes not a possibility. See Interview with Simeon H. Baum, President, Resolve Mediation Services, Inc., Adjunct Professor, Benjamin N. Cardozo School of Law, *supra* note 6.

<sup>22</sup> See Susan A. FitzGibbon, *Arbitration, Mediation, and Sexual Harassment*, 5 *PSYCH. PUB. POL. & L.* 693, 701 (1999).

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for sexual harassment disputes because the use of such procedures may cause the law to remain in an unclear state.

Sexual harassment is very difficult to define because it is both “subjective” and “context dependent.”<sup>23</sup> Thus, defining harassment hinges upon the victim’s perception of the alleged harasser’s behavior in the particular context in which it occurred. Furthermore, there is a fine line between harassing behavior and ordinary social interaction.<sup>24</sup>

Title VII is typically the primary means through which an employee who claims sexual harassment seeks relief.<sup>25</sup> The U.S. Equal Employment Opportunity Commission (EEOC) classifies sexual harassment as a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964.<sup>26</sup>

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[S]exual harassment is not clearly defined. We have the substantive ‘contours’ of what constitutes actionable sexual harassment. On this issue alone facts are likely to be strongly disputed, and cases will turn on determinations of credibility as well as on the assessment of the severity or pervasiveness of the conduct.

*Id.* See also Carrie A. Bond, Note, *Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace*, 65 *FORDHAM L. REV.* 2489, 2492 (1997) (recognizing that although sexual harassment has existed as a cause of action under Title VII for over twenty years, the body of existing case law is contradictory and courts continue to struggle with the “vexing task of identifying and remedying sexual harassment”); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 *COLUM. L. REV.* 458 (2001) (identifying ‘second generation discrimination’ as discrimination that is characterized by “patterns of interaction among groups within the workplace that, over time, exclude nondominant groups” as opposed to overtly discriminatory behavior).

The complex and dynamic problems inherent in second generation discrimination cases pose a serious challenge for a first generation system that relies solely on courts (or other external governmental institutions) to articulate and enforce specific, across-the-board rules. Any rule broad enough to cover the variety of contexts and conduct that might arise will inevitably be quite general and ambiguous, and it will produce considerable uncertainty about the boundaries of lawful conduct. Ambiguous rules will provide inadequate guidance to shape conduct, and will undermine efforts at anticipatory compliance. This uncertainty in turn tends to induce gestures of compliance with the legal norm, without necessarily inducing any change in the underlying behavior causing the problem. Employers’ fear of sanctions if internal evaluation reveals previously unrecognized bias has the perverse effect of discouraging them from inquiring into or addressing second generation problems.

*Id.* at 461.

<sup>23</sup> See Bond, *supra* note 22, at 2491, quoting *The Civil Rights Act of 1991: Hearings on H.R.I. Before the House Comm. on Education and Labor*, 102d Cong., 1st Sess. 168, 185 (1991) (statement of Dr. Freada Klein).

<sup>24</sup> See Cynthia F. Cohen, *Legal Dilemmas in Sexual Harassment Cases*, 38 *LAB. L.J.* 681, 681 (1987).

<sup>25</sup> See Bond, *supra* note 22, at 2941.

<sup>26</sup> See The Equal Employment Opportunity Commission, at <http://www.eeoc.gov/facts/fs-sex.html> (last visited Mar. 1, 2004) (providing facts about sexual harassment in the workplace). Victims of sexual harassment file complaints with the EEOC, which then attempts conciliation and,

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment.<sup>27</sup>

The EEOC and Supreme Court precedent recommend that employers take preventative measures to eliminate sexual harassment in the workplace.<sup>28</sup> To this end, the EEOC recommends that victims of sexual harassment use the complaint mechanism or grievance system<sup>29</sup> established by the employer.<sup>30</sup>

### III. INTERNAL DISPUTE RESOLUTION MECHANISMS

The use of corporate ADR has grown significantly over the past several years.<sup>31</sup> The growth in popularity of ADR in America is particularly visible in the private sector.<sup>32</sup> There are various IDR mechanisms that American companies use in an effort to expeditiously resolve disputes and avoid the costs and efforts involved in

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at times, litigates claims on the victim's behalf. See Edward J. Costello, Jr., *The Mediation Alternative in Sex Harassment Cases*, 47 *ARB. J.* 16, 18 (1992).

<sup>27</sup> See The Equal Employment Opportunity Commission, *supra* note 26, at <http://www.eeoc.gov/facts/fs-sex.html>.

<sup>28</sup> See Equal Employment Opportunity Commission, *Guidelines on Discrimination Because of Sex*, 29 C.F.R. § 1604.11(f) (1980) ("Prevention is the best tool for the elimination of sexual harassment . . ."); see also, Roberts & Mann, *supra* note 18, at 284 (supporting the EEOC's recommendations that employers "take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise, and how to raise, the issue of harassment under Title VII, and developing methods to sensitize all concerned."). See also *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

<sup>29</sup> Both complaint mechanisms and grievance systems describe the dispute resolution processes embodied in company's IDR programs.

<sup>30</sup> See The Equal Employment Opportunity Commission, *supra* note 26, at <http://www.eeoc.gov/facts/fs-sex.html>.

<sup>31</sup> See McLaughlin & Crupi, *supra* note 11, at S-5, S-11 (noting that corporate ADR has grown to become a preferred method of dispute resolution).

<sup>32</sup> See *id.* Nearly ninety percent of private sector companies with over one hundred employees use some form of alternative dispute resolution to resolve employment discrimination. Alternatives to the High Cost of Litigation, *Big Companies Use ADR for Worker Cases; Factfinding Most Popular*, *GAO Study Finds*, 127-28 (Oct. 1995).

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litigation.<sup>33</sup> A General Accounting Office (GAO) survey found that the most popular ADR mechanism used by corporations is fact-finding, used by approximately eighty percent of the companies surveyed.<sup>34</sup> The percentage use for other ADR mechanisms is as follows: negotiation,<sup>35</sup> 75%; internal mediation,<sup>36</sup> 38%; peer review,<sup>37</sup> 20%, and other methods such as open door policies<sup>38</sup> and informal internal investigatory procedures, 20%.<sup>39</sup> These, as well as various other popular ADR mechanisms are described below.

The types of ADR mechanisms each company utilizes are indicative of the organization's culture and tolerance of risk.<sup>40</sup> Although individual companies are free to structure their internal dispute resolution mechanisms in any manner they desire, including the option of not using IDR at all, there is an emerging corporate consensus that ADR is beneficial and should be used.<sup>41</sup> A recent survey demonstrated that companies who use IDR mechanisms have attributed this use to a judgment that, from the company's perspective, ADR provides "a more satisfactory process"

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<sup>33</sup> Corporations that implement their own ADR mechanisms are able to create programs that allow them to handle disputes in a faster, cheaper, and more convenient way than litigation. See McLaughlin & Crupi-Fitzgerald, *supra* note 11, at Vol. II. Some examples of costs saved are the elimination or great reduction in discovery and fees for expert witnesses and attorneys. See *id.*, citing *Calculating Cost Savings: Factors to Consider*, Alternatives to the High Cost of Litigation, 90 (July 1994).

<sup>34</sup> See Alternatives to the High Cost of Litigation, *supra* note 32, at 127-28.

<sup>35</sup> See Robert B. Fitzpatrick & Marissa S. Briggert, *Alternative Dispute Resolution — Types of ADR Mechanisms*, 1 ALI-ABA Course of Study Materials, *Current Developments in Employment Law*, 265 (1995) (describing the process of negotiation).

<sup>36</sup> See FitzGibbon, *supra* note 22. FitzGibbon defines mediation as "a facilitated negotiation process which, if successful, results in a contract which is subject to judicial regulation and enforcement as a contract." See *id.* at 702. She notes that it has been used as an alternative dispute resolution process for the past sixty years. See *id.* at 697; see also Fitzpatrick & Briggert, *supra* note 35, at 266 (describing the process of mediation); Ettingoff & Powell, *supra* note 1, at 1133 (noting that mediation and arbitration are the two most popular and most useful procedures for resolving employment related disputes).

<sup>37</sup> See Fitzpatrick & Briggert, *supra* note 35, at Vol. 1 (1995) (describing peer review processes).

<sup>38</sup> See Alexander J.S. Colvin, *The Relationship Between Employment Arbitration and Workplace Dispute Resolution Procedures*, 16 OHIO ST. J. ON DISP. RESOL. 643, 646-47 (2001).

<sup>39</sup> See Alternatives to the High Cost of Litigation, *supra* note 32, at 127-28.

<sup>40</sup> See Henry S. Kramer, *Alternative Dispute Resolution in the Work Place: Private ADR Systems*, § 4.01 (L.J. Seminars 2003) (detailing the ADR programs utilized in specific corporations). Aetna and Motorola, for example, use multiple ADR rather than single strategies. Corporate strategies for ADR include announcing pro-ADR corporate policies; ADR training; naming an ADR point person or committee; testing ADR in pilot programs; developing case screening criteria; using ADR contract provisions; and, encouraging the legal staff to use ADR consistently.

*Id.*

<sup>41</sup> See *id.*

and more “satisfactory settlements” than litigation.<sup>42</sup> It is very typical for companies to use a variety of dispute resolution mechanisms in resolving employment disputes.<sup>43</sup> Often these mechanisms are combined into a three step process: (1) identification of the problem by management; (2) mandatory, non-binding mediation; and (3) binding arbitration.<sup>44</sup>

### A. Mini-Trials

Mini-trials are designed to emulate the litigation process<sup>45</sup> and can be described as a form of advisory arbitration.<sup>46</sup> This is meant to afford the parties an opportunity to determine whether litigation will be in their best interest before expending time and money on litigation.<sup>47</sup> The primary rationale for expending resources on mini-trials is that, “if the decision makers are fully informed about the merits of their cases and that of the opposing parties, they will be better prepared to successfully engage in settlement discussions.”<sup>48</sup> Although the mini-trial is fashioned by the parties, as are many ADR processes,<sup>49</sup> there is a basic structure most mini-trials follow. The first stage of mini-trials emulates discovery.<sup>50</sup> During this stage, each side engages in a fact finding process in order to resolve factual disputes and to determine the strengths and weaknesses of his or her case.<sup>51</sup> Next, each party makes presentations to

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<sup>42</sup> See *id.* at § 4.01.

<sup>43</sup> There are several examples of companies that combine ADR mechanisms in an attempt to resolve employment disputes outside of the courthouse. Examples include UPS, UBS Paine Webber, and the U.S. Postal Service. See Peter Phillips, *supra* note 9.

<sup>44</sup> See interview with Peter Phillips, *supra* note 9 (detailing this three step process). The first step can involve such techniques as discussion, negotiation, peer review, ombuds investigation, and the receipt of complaints through use of open-door invitations and 1-800 numbers. Many large corporations have implemented this three-step approach of resolving employment disputes, including Anheuser-Busch, Alcoa, and Masco. *Id.*

<sup>45</sup> See Kramer, *supra* note 40, at § 4.06.

<sup>46</sup> See Fitzpatrick & Brigggett., *supra* note 35, at Volume 1, 9 (defining this process as a form of advisory arbitration due to its “limited discovery; court-like proceedings; and, the parties’ presence during all of the proceedings”).

<sup>47</sup> See Kramer, *supra* note 40, at § 4.06.

<sup>48</sup> ADR Policy, at <http://www.gc.doe.gov/adr/adr-terms.html> (last visited Feb. 28, 2004).

<sup>49</sup> See Fitzpatrick & Brigggett, *supra* note 35, at Volume 1; Fitzpatrick & Brigggett, *supra* note 35, at Volume 9. However, it is important to note that court-connected ADR and employer structured ADR are not created by both parties.

<sup>50</sup> Kramer, *supra* note 40, at § 4.06.

<sup>51</sup> See *id.*

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the representatives of the other party.<sup>52</sup> After hearing the presentations, the parties prepare to settle or to continue the mini-trial process.<sup>53</sup> Some companies use a third-party neutral to facilitate the mini-trial and to serve as mediator if the process results in settlement discussions.<sup>54</sup> The neutral can also act as an arbitrator, whose ultimate opinion will be binding on the parties.<sup>55</sup>

### B. Internal Mediation

Mediation is a widely used process<sup>56</sup> in which two or more parties come together to discuss their dispute in an attempt to reach a mutually acceptable agreement.<sup>57</sup> Parties can employ internal mediation pursuant to a pre-existing contract provision or by agreement made when the dispute arises.<sup>58</sup> The mediator is a neutral party who helps the parties discuss their issues and to understand each other. The mediator generally has no power to impose solutions upon the parties.<sup>59</sup> Rather, the mediator helps the parties determine what they believe is the best solution for themselves. The mediator's functions may include identifying the issues, clarifying the parties' interests, providing a channel of communication, focusing the negotiations on productive areas of discussion, assisting in the development of options for the resolution of the dispute, assisting the parties in documenting an agreement, clarifying alternatives to agreement, and coordinating and educating the parties.<sup>60</sup>

Mediators are often classified as being either "facilitative" or "evaluative."<sup>61</sup> Facilitative mediators are trained to foster an environment where parties feel safe to openly and honestly communi-

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<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> See, e.g., The Equal Employment Opportunity Commission at <http://www.eeoc.gov/federal/adr/mediation.html> (last visited Feb. 29, 2004) (listing nearly one-hundred organizations located within the federal government that use mediation as a means to resolve workplace disputes).

<sup>57</sup> See Kramer, *supra* note 40, at § 4.02.

<sup>58</sup> See McLaughlin & Crupi, *supra* note 11, at Vol. II.

<sup>59</sup> See *id.*

<sup>60</sup> See Kramer, *supra* note 40, at § 4.02.

<sup>61</sup> See, e.g., ADR Policy, *supra* note 48 at <http://www.gc.doe.gov/adr/adr-terms.html>. See also Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

cate their interests, options, and realistic alternatives.<sup>62</sup> Evaluative mediators typically formulate solutions and identify options and outcomes that the parties have not thought of themselves.<sup>63</sup> Mediators who subscribe to this approach will often propose settlement options and encourage the parties to make concessions in order to achieve a final and binding agreement.<sup>64</sup> In doing so, they will attempt to educate the parties on the relative strengths and weaknesses of their cases,<sup>65</sup> and in turn will often instruct the parties as to their opinion on the likely outcome of the case in court, including the merits of each party's claims and the potential for liability and damages.<sup>66</sup>

The use of internal mediation raises procedural fairness concerns, such as with confidentiality,<sup>67</sup> neutrality of the mediator who is typically paid or employed by the company,<sup>68</sup> and inequality in bargaining power between the company and a single employee alleging sexual harassment.<sup>69</sup> Attorney presence in IDR processes, particularly mediation, is one way to provide for procedural equality and fairness.<sup>70</sup>

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<sup>62</sup> See *id.* (comparing these behaviors with those of evaluative mediators, who often provide advice, propose solutions, and predict likely court outcomes).

<sup>63</sup> See McLaughlin & Crupi, *supra* note 11, at Vol. II.

<sup>64</sup> See *id.*

<sup>65</sup> See *ADR Policy*, *supra* note 48, at <http://www.gc.doe.gov/adr/adr-terms.html> (last visited April 17, 2005).

<sup>66</sup> See McLaughlin & Crupi, *supra* note 11, at Vol. II.

<sup>67</sup> See Ettingoff & Powell, *supra* note 1, at 1142-43.

<sup>68</sup> See Tim Hicks, *When and Why to Use an External Mediator*, at <http://www.mediate.com/workplace/hicksT7.cfm#> (last visited February 19, 2004) (noting that an internal mediator can not be completely neutral or impartial because of his or her working relationship with the company).

<sup>69</sup> See Holzman, *supra* note 18, at 277.

<sup>70</sup> The imbalance in bargaining power and potential for mediator partiality can be diminished if the employee is represented by an attorney. See Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It*, 79 WASH. U.L.Q. 787 (2001) (focusing on attorney participation in mediations). Studies have shown that participants perceive ADR processes to be fairer if they engage in the ADR process with an effective attorney.

The procedural justice literature strongly suggests that clients will perceive that they were given an opportunity for voice if they believe that their attorneys effectively communicated their stories . . . . In fact, there is some suggestion from procedural justice studies that disputants actually prefer dispute resolution processes in which their attorneys speak on their behalf and are more likely to perceive a quasi-legal procedure as unfair if they are not represented by attorneys.

*Id.* at 841-44. As such, many companies subsidize employee legal representation because "the involvement of competent plaintiff's counsel often makes proceedings more efficient, increases employee sophistication in assessing options, makes administrative matters (such as selection of neutrals) easier, and results in greater employee satisfaction." Phillips, *supra* note 9. Examples of companies who provide for employee attorney fees, at least in part, are GE, Halliburton, Philip Morris, and Shell. See *id.*

### C. Arbitration

Arbitration is described as a process in which disputing parties present evidence and conduct direct and cross-examination of witnesses in front of a neutral or a panel of neutrals selected by the parties.<sup>71</sup> After reviewing the evidence, the neutral(s) reach a decision.<sup>72</sup> This decision can be binding or non-binding.<sup>73</sup> Non-binding arbitration is typically favored in employment disputes because it provides for finality and prevents the disclosure of one party's case to the other when there is a potential for litigation.<sup>74</sup> Arbitration is often referred to as an adjudicatory process<sup>75</sup> that is similar to litigation.<sup>76</sup> However, the ability of the parties to choose if they want the arbitration to be confidential and if they want the arbitrator's decision to be binding distinguishes arbitration from litigation.<sup>77</sup> Once a binding arbitration decision is rendered, it will typically only be set aside by a court "if the arbitrator has clearly exceeded his authority by substituting his judgment for that of management."<sup>78</sup>

### D. Ombuds Programs

Ombuds offices originated in governmental organizations,<sup>79</sup>

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<sup>71</sup> See Ettingoff & Powell, *supra* note 1, at 1135.

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> See Westfield, *supra* note 3, at 1228.

<sup>76</sup> See Ettingoff & Powell, *supra* note 1, at 1135 (noting that the examination of witnesses at an arbitration is "somewhat akin to trial proceedings").

<sup>77</sup> Due to the ability of parties to control the arbitration by making these decisions, as well as decisions concerning the applicability of formal rules of evidence and procedure, arbitration has been described as "less formal" than litigation. See Joseph T. McLaughlin & Karen M. Crupi-Fitzgerald, *Alternative Dispute Resolution in the Corporate Sector*, ALI-ABA Course of Study Materials: Civil Practice and Litigation Techniques in Federal and State courts, SF42 ALI-ABA 877, 883 (Feb. 2001).

<sup>78</sup> Ettingoff & Powell, *supra* note 1, at 1135. See also Joseph T. McLaughlin & Karen M. Crupi, *Alternative Dispute Resolution in the Corporate Sector*, ALI-ABA Course of Study Materials: Civil Practice and Litigation Techniques in Federal and State courts, SF42 ALI-ABA 877, 883 (Feb. 2001) (finding that binding arbitration awards are typically enforceable by courts and not subject to appellate review unless there has been fraud or some other defect in the arbitration procedure).

<sup>79</sup> Several governmental organizations in the United States continue to use ombuds programs, including the Departments of Agriculture, Defense, Energy, Health and Human Services, Justice, Navy, and several other federal organizations. See The Equal Employment Opportunity Commission at <http://www.eeoc.gov/federal/adr/ombuds.html> (last visited Feb. 29, 2004).

but are now prevalent in the private sector.<sup>80</sup> One definition of an ombudsperson is:

[A] neutral or impartial administrator or manager within an institution, who may provide confidential and informal assistance to anyone within that institution in resolving work . . . related concerns, who may serve as counselor, go-between, mediator, fact-finder or upward-feedback mechanism, and whose office is located outside ordinary line management (or academic) structures.<sup>81</sup>

Corporate ombudspersons are employed and paid by the corporation, yet are intended to be outside of the normal management structure.<sup>82</sup> They handle a typical caseload of two to three hundred cases per year on issues ranging from employee salaries and terminations to discrimination and sexual harassment complaints.<sup>83</sup> Ombudspersons also serve the broader role of identifying and tracking systemic workplace disputes.<sup>84</sup>

Although the office of the ombuds is outside of the normal management structure, an ombudsperson remains an employee of the company, resulting in a tension between the desire to promote confidentiality and neutrality and the responsibility of the ombudsperson to the company or its control group.<sup>85</sup> One of the biggest challenges that corporate ombuds offices face is the duty to maintain confidentiality. Corporations often promulgate inter-office rules dictating that the records maintained by the ombuds office be kept confidential within the organization, or within the ombuds office itself, so that no one has access to the documents except the ombudsperson himself or herself.<sup>86</sup> Problems arise legally, how-

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<sup>80</sup> See Kramer, *supra* note 40, at § 4.04 (outlining the functions of various internal dispute resolution mechanisms).

Fifty-five corporations, or slightly over ten percent of the 528 corporations responding to a major survey of the 1,000 largest U.S. corporations reported that they have an ombuds on their staff. A few of the corporations using ombuds include Control Data, Federal Express, IBM, McDonald's Corporation, American Optical, and the Bank of America.

*Id.*

<sup>81</sup> *Id.* quoting Mary P. Rowe, *Ombuds Jobs are Proliferating, and Characterized by Diversity*, 2 *ALT. DISP. RESOL. REP.* (BNA) 198 (1988).

<sup>82</sup> See Lee P. Robbins & William B. Deane, *The Corporate Ombuds: A New Approach to Conflict Management*, *NEGOTIATION J.* 195, 197 (1986).

<sup>83</sup> See Mary P. Rowe, *The Corporate Ombudsman: An Overview and Analysis*, 3 *NEGOTIATION J.* 127 (1987).

<sup>84</sup> See ADR Policy, *supra* note 48, at <http://www.gc.doe.gov/adr/adr-terms.html> (noting that ombudspersons often offer suggestions as to ways of dealing with such problems).

<sup>85</sup> See Colvin, *supra* note 38, at 648.

<sup>86</sup> See Kramer, *supra* note 40, at § 4.04 .

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ever, because there is little case law protecting this confidentiality.<sup>87</sup> Thus, the level of confidentiality is controlled by the organization itself.

The fact that the office of the ombuds is located within the company, is created and controlled by the company, and could potentially be eliminated by the company, creates potential problems with regards to both conflicts of interests and confidentiality.<sup>88</sup> A company may truly be committed to maintaining a confidential ombuds program in the good faith hope that it will make for a better workplace, even if that means the company may be subject to sanctions. Additionally, the ombudsperson himself or herself may abide by a strict code of ethics as to maintain confidentiality and act ethically, even if that meant he or she may lose his or her job. In fact, many corporate ombudspersons join The Ombudsman Association, which has a personal code of ethics<sup>89</sup> to which each member subscribes.<sup>90</sup> However, even in a situation such as that, employee perception may inhibit the usefulness of the ombuds office.

This is particularly so in a situation involving a complaint of sexual harassment because of the highly emotional and intimate nature of sexual harassment.<sup>91</sup> Sexual harassment victims often feel a myriad of emotions that make complaining to an organization located within the company and run by the employer difficult.<sup>92</sup> Even if an employee's perception of bias and fear of a lack

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<sup>87</sup> *See id.* (noting that although three federal district courts have recognized an ombuds privilege, one of the decisions is unpublished and the other two have been implicitly overruled).

<sup>88</sup> *See* Bond, *supra* note 22, at 2501 (noting an ombudsman report that seventy-five percent of the 6,000 sexual harassment victims with whom he has assisted have feared employer retaliation or adverse consequences resulting from their complaint).

<sup>89</sup> The Ombudsman Association provides the following code of ethics:

The ombudsman, as a designated neutral, has the responsibility to maintain strict confidentiality concerning matters that are brought to his or her attention unless given permission to do otherwise. The only exceptions, at the sole discretion of the ombudsman, are where there appears to be imminent risk of serious harm. The ombudsman must take all reasonable steps to protect any records and files pertaining to confidential discussions from inspection by all other persons, including management. The ombudsman should not testify in any formal judicial or administrative hearing about concerns brought to his or her attention. When making recommendations, the ombudsman has the responsibility to suggest actions or policies that will be equitable to all parties.

The Ombudsman Association at <http://www.ombuds-toa.org/> (last visited Feb. 26, 2004).

<sup>90</sup> *See* Kramer, *supra* note 40, at § 4.04.

<sup>91</sup> *See* Bond, *supra* note 22, at 2501 (1997).

<sup>92</sup> Victims fear that bringing a sexual harassment complaint will adversely affect their relationships with co-workers and supervisors. Many perceive themselves as culpable for the harassment, and worry that others will think they are "oversensitive" or "childish". *See id.*

of confidentiality between the office of the ombuds and the employer is unwarranted, the misconceptions can still hinder the effectiveness of the IDR system. It is also true, however, that litigation is not a viable alternative for employees who want to keep the dispute confidential.<sup>93</sup>

### E. Open Door Policies

This is the most basic and informal type of internal dispute mechanism. An open door policy simply means that managers' doors are open to employees who wish to discuss concerns and complaints. A workplace policy embracing this process encourages employees to meet with their immediate manager or supervisor to discuss workplace problems.<sup>94</sup> Many employers elaborate this system by having an appeals process whereby an employee who is not satisfied with his or her discussion is directed to a second person with whom to discuss the situation.<sup>95</sup> A flaw of this system is that an employee is often appealing up a chain of command in his or her workplace.<sup>96</sup> This is problematic because supervisors will often feel pressure to support the decisions of lower-level managers and supervisors below themselves.<sup>97</sup> Corporations sometimes seek to ameliorate this issue by creating an appeals system that goes outside the direct chain of command.<sup>98</sup> Other corporations create appeal boards comprised of a group of three or more managers that hear employee grievances.<sup>99</sup>

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<sup>93</sup> Unlike litigation, parties involved in ADR processes can agree to keep the proceedings confidential. This protects both parties from potentially adverse publicity that might injure the reputations of the parties and harm the corporation by which both parties are employed. See Joseph T. McLaughlin & Karen M. Crupi, *Alternative Dispute Resolution in the Corporate Sector*, ALI-ABA Course of Study Materials: Civil Practice and Litigation Techniques in Federal and State Courts, SF42 ALI-ABA 877, 882 (Feb. 2001) (listing the advantages of corporate use of ADR).

<sup>94</sup> See American Arbitration Association, *National Rules for the Resolution of Employment Disputes* at <http://www.thecre.com/fedlaw/legal89/15717.htm> (1997) (last visited Mar. 1, 2004) (detailing several ADR processes). Some companies allow employees to approach anyone in the chain of command and do not provide a rigid system of appeal. See *id.*

<sup>95</sup> See Colvin, *supra* note 38, at 646-47.

<sup>96</sup> See *id.*

<sup>97</sup> See *id.*

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

## F. Peer Review Panels

Peer review panels are groups of employees who review and decide grievances.<sup>100</sup> These panels have been instituted in various organizations<sup>101</sup> as a way to combat the suspicion of employees using other internal dispute resolution mechanisms in which they must grieve to managers and supervisors.<sup>102</sup> Employees often suspect that supervisors and managers will sympathize with each other, and thus will be predisposed to disfavor employee complaints.<sup>103</sup> Therefore, the most essential aspect of a peer review panel is that it is comprised of a majority of peer employees,<sup>104</sup> even though the panels are management-designed and administered.<sup>105</sup> This panel reviews the dispute and provides a non-binding decision.<sup>106</sup> The primary goal of peer review is to resolve disputes prior to the filing of a formal complaint.<sup>107</sup>

## G. Fact-Finding Procedures

Internal dispute resolution often involves an internal investigation of the employee's complaint.<sup>108</sup> Fact-finding is a mixed pro-

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<sup>100</sup> *See id.*

<sup>101</sup> Various public agencies have implemented peer review programs. The EEOC lists the three federal agencies offering this service: The Department of the Army, The Department of Health and Human Services, and The National Transportation Safety Board. *See* The Equal Employment Opportunity Commission at <http://www.eeoc.gov/federal/adr/peerreview.html> (last visited Feb. 29, 2004).

<sup>102</sup> *See Colvin, supra* note 38, at 647.

<sup>103</sup> *See id.*

<sup>104</sup> *See* The Equal Employment Opportunity Commission, *supra* note 79, at <http://www.eeoc.gov/federal/adr/peerreview.html> (noting that peer review panels typically consist of employees and managers who volunteer to participate and who are "trained in listening, questioning, and problem-solving skills as well as the specific policies and guidelines of the panel").

<sup>105</sup> *See Colvin, supra* note 38, at 647.

<sup>106</sup> *See* The Equal Employment Opportunity Commission, *supra* note 79, at <http://www.eeoc.gov/federal/adr/peerreview.html> (defining a "non-binding decision" as one in which the employee can seek relief in "traditional forums for dispute resolution" if he or she is not satisfied with the panel's decision). But note, since this process is party determined, the decision may be binding if the parties so choose. *See* ADR Policy at <http://www.gc.doe.gov/adr/adr-terms.html> (last visited Feb. 29, 2004).

<sup>107</sup> *See* The Equal Employment Opportunity Commission, *supra* note 79, at <http://www.eeoc.gov/federal/adr/peerreview.html>.

<sup>108</sup> *See Colvin, supra* note 38, at 647-48.

cess<sup>109</sup> in which a neutral, or someone uninvolved in the controversy, conducts a hearing at which both sides present their arguments. The neutral, whose role varies from purely investigatory to evaluative,<sup>110</sup> then reports his or her non-binding factual findings.<sup>111</sup> The parties ultimately decide whether or not to accept the findings of the neutral.<sup>112</sup>

Fact-finding can take several forms. A neutral can be appointed by the company to investigate the complaint. The parties will often decide in advance if the opinion of the neutral will be advisory or conclusive.<sup>113</sup> One specific type of fact-finding is termed “expert fact-finding,” in which the company will appoint an expert to make a conclusive or non-binding opinion on a technical matter.<sup>114</sup> Another form of internal investigation involves each party electing a representative to negotiate with the other party’s representative in an effort to resolve factual disputes. This system is commonly called “joint fact-finding.”<sup>115</sup> Formal investigatory procedures, such as the one used at IBM, mandate that a senior manager, from outside the chain of command of the employee filing a grievance, investigate the employee’s complaint and prepare a report recommending a resolution to the office of the Chairman.<sup>116</sup> All costs are incurred by IBM and strict timelines are set for the investigation and resolution.<sup>117</sup>

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<sup>109</sup> See Robert B. Fitzpatrick & Marilissa S. Briggett, *Alternative Dispute Resolution—Types of ADR Mechanisms*, ALI-ABA Course of Study Materials, Current Developments in Employment Law, Vol. 1 (1995).

Fact finding encompasses elements of both mediation and binding arbitration. A neutral third party serves as an investigator and a judge. Often a full evidentiary hearing ensues; sometimes witnesses are heard separately at different times and sometimes all submissions are in writing. The neutral third party prepares a written opinion reciting his/her findings and recommendations.

*Id.*

<sup>110</sup> A fact finder’s role can be limited to investigating the factual matter and filing a report establishing the facts. However, his or her role can also be extended to that of an evaluator, whose job it is to assess the facts and issue a specific procedural or substantive recommendation on how the dispute should be resolved. See The Equal Employment Opportunity Commission, at <http://www.eeoc.gov/federal/adr/factfinding.html> (last visited Feb. 29, 2004).

<sup>111</sup> See Fitzpatrick and Briggett, *supra* note 109, at Vol. 1, 6-7.

<sup>112</sup> See *id.*

<sup>113</sup> See McLaughlin & Crupi, *supra* note 11, at Vol. II.

<sup>114</sup> See *id.*

<sup>115</sup> See *id.*

<sup>116</sup> See Colvin, *supra* note 38, at 643, n.16.

<sup>117</sup> See *id.*

IV. PROBLEMS WITH RESOLVING SEXUAL HARASSMENT  
DISPUTES THROUGH INTERNAL DISPUTE  
RESOLUTION MECHANISMS

A. Introduction

The use of mandatory<sup>118</sup> IDR mechanisms in resolving sexual harassment claims in the workplace can benefit both employees as well as management. However, there are several concerns that should be addressed in order to adequately protect the disputing parties from unfair procedures and unjust results, and to maximize the potential of mandatory IDR processes. First, the internalization of a body of law that is neither well defined nor well settled leads to problems with the structure of our legal system and with the evolution of societal norms and expectations.<sup>119</sup> Another problem that arises with the growing use of IDR mechanisms is the lack of public vindication for victims of sexual harassment when the dispute is settled in the privacy of the harasser's own company.<sup>120</sup> Similarly, IDR allows the harasser and his employer to keep the situation private. It also deprives society of knowledge as to the identity of the harasser, as well as the process and specific evidence that was useful in resolving the dispute.<sup>121</sup> This has marked implications for sexual harassment cases, as they are highly fact dependent and there is not a cohesive body of sexual harassment case

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<sup>118</sup> See Lauren B. Edelman, *When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law*, 33 *LAW & SOC'Y REV.* 941, 969 (1999).

Although disputants generally retain the right to remove their claims to the public legal system, organizations often seek to curtail this right by, for example, requiring that prospective employees (and other contractual partners) agree in advance to forgo future lawsuits and to rely solely on private ADR/IDR should a dispute arise. *Id.* at 969.

<sup>119</sup> See generally Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073 (1984).

<sup>120</sup> See, e.g., Ettingoff & Powell, *supra* note 1, at 1160. However, oftentimes when disputes are litigated, there is no clear winner and the reputation of both parties is damaged. A provocative example of this is the O.J. Simpson trial in which O.J. was acquitted, yet a substantial part of the population still believes that he committed the crime. See Interview with Simeon H. Baum, President, Resolve Mediation Services, Inc., Adjunct Professor, Benjamin N. Cardozo School of Law, *supra* note 6.

<sup>121</sup> See Harkavy, *supra* note 7, at 163. This is problematic because others can gain from knowing which procedures work and which are ineffective. It is also problematic for the employer who has a conflicting commitment to keep internal matters confidential while simultaneously improving its workplace based on the information it learns through the internal disputes. See Martha West, *Preventing Sexual Harassment: The Federal Courts' Wake-Up Call for Women*, 68 *BROOK. L. REV.* 457, 489-90 (2002).

law.<sup>122</sup> Finally, IDR often empowers the powerful to design, implement and enforce the procedures that their employees must use in order to obtain relief.<sup>123</sup>

One basic critique of the expansion of IDR without clearly defined limitations is that in negotiation, the law and the legal system are often the BATNA, or Best Alternative to a Negotiated Agreement.<sup>124</sup> The presence and threat of law creates a security net for the interests of the complaining employees, particularly for entry-level and other low-skill employees. In looking at this situation in the extreme version, the problem becomes more apparent. If all sexual harassment disputes were subject to mandatory IDR, and thus the only litigated cases were those brought by the EEOC, the legal BATNA would be largely removed and the less powerful employee would be further disadvantaged by the lack of legal authority to support her claim.

#### B. Circumventing the Legal System and Avoiding Precedent Setting

The use of IDR to resolve disputes is problematic because it avoids using the public legal system that was established in this country to settle disputes and set lasting precedent for the future.<sup>125</sup> A crucial difference between courts and alternative dispute resolution is the function of the former in publishing decisions that interpret the law and guide future conduct. As described by Professor Owen Fiss,

adjudication uses public resources, and employs [public officials] whose job is not to maximize the ends of private parties, nor

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<sup>122</sup> See Harkavy, *supra* note 7, at 159-60.

<sup>123</sup> See Ettingoff & Powell, *supra* note 1, at 1160.

<sup>124</sup> See Interview with Peter Phillips, *supra* note 9. *But see* Interview with Simeon H. Baum, President, Resolve Mediation Services, Inc., Adjunct Professor, Benjamin N. Cardozo School of Law, *supra* note 6 (noting that sometimes the BATNA is to give the employee a different job title or better position).

<sup>125</sup> [C]ourts generally issue written decisions that, when published, have precedential effect on future rulings involving different parties. In other words, courts have a law-giving function. Whether it is in the development of common law, in the interpretation of statutes, or in enforcing the Constitution, courts frequently issue opinions that have the force of law. In contrast, private decision-makers rarely issue rulings with any effect beyond the parties to the particular dispute, and in no way do such rulings bind future decision-makers.

Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 AM. BANKR. L.J. 109, 111 (1997).

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simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.<sup>126</sup>

Thus, if we believe that there is a public good served by litigating disputes, removing a plaintiff's option of litigation by imposing mandatory IDR schemes may disadvantage the public even though it could potentially advantage the plaintiff-employee.<sup>127</sup> The threat to the public good is particularly problematic in sexual harassment cases as this area of law is highly fact dependent and is riddled with many ambiguities that have yet to be clarified by case law.<sup>128</sup> Because it is not a well-settled area of the law, many ambiguities remain in defining and implementing Title VII law for sexual harassment controversies.<sup>129</sup> Similarly, as Title VII sexual harassment cases are extremely fact dependent, in the absence of trials it is difficult to know which types of behavior legally constitute sexual harassment.<sup>130</sup> By circumventing the court system and relying on internally established mechanisms to resolve sexual harassment disputes in the workplace, IDR will likely impair the evolution of sexual harassment jurisprudence. “[W]ithout the realistic threat of legal sanctions, women’s voices too often go unheard or unheeded.”<sup>131</sup> Additionally, as more case law emerges and society

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<sup>126</sup> See *id.* at 109, quoting Fiss, *supra* note 119, at 1085.

<sup>127</sup> See Interview with Simeon H. Baum, President, Resolve Mediation Services, Inc., Adjunct Professor, Benjamin N. Cardozo School of Law, *supra* note 6 .

<sup>128</sup> See Harkavy, *supra* note 7, at 159-60 (noting that valuing a sexual harassment claim is “difficult and non-standardized”). *Id.*

<sup>129</sup> See Harkavy, *supra* note 7. This text outlines several areas in which sexual harassment law remains ambiguous. Stemming from these ambiguities are a variety of questions the author examines, including: how can courts distinguish between conduct that is offensive and conduct that is actionable as hostile and abusive; what constitutes “tangible employment action”; whether there is a way to measure objectively when an employees terms, conditions, and privileges of employment are altered to her detriment in the absence of a tangible employment action; what liability an employee should bear for harassment perpetrated by a co-employee or other individual with no supervisory power over the victim; what liability an employer should bear for harassment perpetrated in a non-hierarchical workplace; what kind of complaint procedures will satisfy the first prong of an employers affirmative defense to a hostile environment claim; and, under what circumstances a victim may be excused from invoking an employer’s complaint procedure under the second prong of that affirmative defense.

<sup>130</sup> See Interview with Peter Phillips, *supra* note 9 (noting that without legal precedent, the range of acceptable and unacceptable behavior remains legally undefined). *But see* Interview with Simeon H. Baum, President, Resolve Mediation Services, Inc., Adjunct Professor, Benjamin N. Cardozo School of Law, *supra* note 6 (stating the case that jury verdicts are highly variable and, thus, do not help the public understand the range of acceptable behavior).

<sup>131</sup> See DEBORAH L. RHODE, *SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY* 104 (1997).

becomes more informed, the law changes to adapt to societal notions of fairness and justice.<sup>132</sup> If, however, sexual harassment law is resolved almost exclusively in alternative fora, the law will not develop even when society does.<sup>133</sup>

This is dangerous not only for future litigants, but also for those who will wish to settle their disputes outside the courtroom because the law forms a backdrop for negotiation.<sup>134</sup> Each party comes to the table with certain bargaining chips that they receive from the legal rules that could govern the litigated resolution of the dispute.<sup>135</sup> If sexual harassment law remains unsettled and does not evolve with society, harassers will be empowered because the victims will not have adequate support to back their positions at the bargaining table.<sup>136</sup> Resolving sexual harassment disputes internally is dangerous for future litigants because “lawyers may well be deprived of a body of law and the legal precedents necessary to advise clients adequately and with a reasonable degree of confidence that the advice is based on fair and widely accepted commercial standards.”<sup>137</sup>

On the other hand, it can be argued that the use of IDR mechanisms cannot circumvent the use of the public legal system because of the power that rests with the EEOC to prosecute Title VII cases.<sup>138</sup> This statement, however, is true only to an extent. The EEOC need not, and does not, prosecute the majority of cases.<sup>139</sup> The EEOC has limited resources and must carefully select the cases to which it chooses to allocate these resources. Thus, if an employee waives her right to sue, it is most likely that the case will

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<sup>132</sup> See Daniel Purcell, *The Public Right to Precedent: A Theory and Rejection of Vacatur*, 85 CALIF. L. REV. 867, 867 (1997) (arguing that vacatur exacerbates the power imbalance between parties and deprives the public of important precedent). “Courts also may play a significant role in the development or articulation of social norms.” *Id.* at 869.

<sup>133</sup> This situation is referred to by Owen Fiss when he states that settlement is inappropriate in cases where “there is a genuine social need for an authoritative interpretation of law” in order to achieve social justice. See Fiss, *supra* note 119, at 1087.

<sup>134</sup> See Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 954-57 (1979) (noting that legal rules create “bargaining endowments” that influence the parties’ respective bargaining power).

<sup>135</sup> See *id.*

<sup>136</sup> See Fiss, *supra* note 119, at 1076-78 (discussing problems associated with disparities of bargaining power in private dispute resolution).

<sup>137</sup> See McLaughlin & Crupi, *supra* note 11, at S-11.

<sup>138</sup> See The Equal Employment Opportunity Commission, at <http://www.eeoc.gov/policy/vii.html> (last visited Feb. 29, 2004) (detailing the powers vested in the EEOC to enforce Title VII and define key statutory terms).

<sup>139</sup> See *id.* (providing statistics for the number of cases filed, settled, and litigated).

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never be brought to a public forum.<sup>140</sup> The EEOC has a general policy that it will press charges in ten percent of cases where the employer is systemically discriminatory and is clearly violating the law, and will refuse to do so in all cases where the employee's claim is clearly frivolous and unmeritorious. The remaining eighty percent of cases are sent to mediation.<sup>141</sup> Thus, even if the EEOC becomes involved, sexual harassment disputes will likely go to mediation and thus skirt the public fora.

### C. Depriving the Public of Pertinent Information

IDR simultaneously permits the harasser to avoid public disapproval<sup>142</sup> and deprives society of useful information about the specific situation, the state of the law, and the consequences for breaking it.<sup>143</sup> Although public vindication may be seen as an important aspect of many cases, it is particularly important in sexual harassment cases, as they have only recently gained legitimacy in America.<sup>144</sup> As women now constitute a large portion of the U.S. workforce, it is increasingly important to send a public message that sexual harassment in the workplace is not tolerated by our laws or by our society. If sexual harassment claims are settled outside the courtroom, this type of public message and vindication on an individual level will not occur.<sup>145</sup> Resolving sexual harass-

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<sup>140</sup> See Interview with Peter Phillips, *supra* note 9.

<sup>141</sup> See *id.* However, if the mediation is not successful, the cases return to investigation and proceed the the EEOC process, which can lead to litigation. See [http://www.eeoc.gov/charge/overview\\_charge\\_processing.html](http://www.eeoc.gov/charge/overview_charge_processing.html) (last visited Apr. 12, 2005). Thus, the eighty percent figure is slightly misleading, but the general proposition remains true that the majority of cases are not resolved in a public forum.

<sup>142</sup> See Harkavy, *supra* note 7, at 162-63. "Mediated settlements may not fully serve the deterrence objective of Title VII because the lack of public disapproval, the prospect of cheaper and quicker settlements, and other advantageous aspects of privately negotiated and confidentially performed settlements may, in effect, provide an insufficient incentive to employers to control the conduct of supervisors." *Id.* at 162.

<sup>143</sup> See *id.* at 163.

<sup>144</sup> See Roberts & Mann, *supra* note 18, at 269 (advocating for businesses to take preventative measures in addressing sexual harassment in the workplace and noting the "cavalier" attitude many businesses have toward sexual harassment disputes). "The American court system did not decide the first sexual harassment case under Title VII until 1976. Moreover, the wider public appears not to have fully appreciated the problem's scope until 1991, when the Senate Judiciary Committee held hearings on Anita Hill's charges against Supreme Court nominee Clarence Thomas." *Id.* at 270.

<sup>145</sup> See, e.g., Ettingoff & Powell, *supra* note 1, at 1160. "Mediation keeps all parties safe from public embarrassment where a confidentiality agreement is included." *Id.*

ment claims internally removes a substantial incentive for individuals, as well as corporations, to take steps to ensure that sexual harassment does not occur because they know that the result will not be released to the public.<sup>146</sup> Thus, the deterrence objective of Title VII is not adequately served when sexual harassment disputes are settled outside the courtroom.<sup>147</sup> This is problematic both because it allows harassers and companies that permit harassment to avoid public scrutiny, and also because it deprives the community of pertinent information about the status of the law, who is violating the law, and the consequences of breaking the law.<sup>148</sup>

There is, however, an argument that public vindication can be harmful to the employee, and as such, litigation is often not viewed by victims of harassment as a viable alternative.<sup>149</sup> Thus, the public nature of a trial might deter future harassers, but might also stifle the voices of the harassed.<sup>150</sup> Eliminating the option of litigation, however, is similarly not a viable solution to the problem, particularly because many victims of harassment choose to sue despite the public nature of litigation and despite the financial and emotional toll it may have upon themselves and their families.

#### D. Empowering the Powerful

The use of IDR in resolving workplace disputes can have the effect of empowering the already powerful.<sup>151</sup> Companies that use IDR mechanisms for sexual harassment disputes, which are particularly fact-dependent, have the power to “internalize law-like control over their “problem cases.”<sup>152</sup> This is so because not only does

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<sup>146</sup> See Harkavy, *supra* note 7, at 162.

<sup>147</sup> See *id.*

<sup>148</sup> See *id.* at 163.

<sup>149</sup> See Theresa Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273, 320 (2001) (describing problems associated with litigating sexual harassment disputes). Beiner notes that women tend to place great weight on the impact the public nature of the litigation process and the costs associated with litigation will have upon their families before they decide whether to sue in court. See *id.*

<sup>150</sup> See *id.* at 320 (noting that litigation can exacerbate the psychological problems many victims of sexual harassment experience as a result of the harassment).

<sup>151</sup> See Edelman, *supra* note 118, at 941.

<sup>152</sup> *Id.* at 949. Edelman analogizes the corporate power in structuring and controlling IDR mechanisms and their results to repeat players who have control over the litigation process due to their superior knowledge of the process and greater access to resources through money and connections. See *id.* at 960-61. Compare Jennie Kihnley, *Unraveling the Ivory Fabric: Institutional Obstacles to the Handling of Sexual Harassment Complaints*, 25 LAW & SOC. INQUIRY 69,

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the employer have the means to implement the type of program he or she feels is best, but also because the boundaries of sexual harassment law are not well defined.<sup>153</sup> This allows a company to manipulate the vagaries of the law to its advantage. Large corporations are already seen as having an advantage in the litigation process.<sup>154</sup> The increased implementation of ADR in corporations “carr[ies] the potential to transform the large bureaucratic organization from being merely a structurally privileged actor in the public legal order to being a private legal order in its own right.”<sup>155</sup>

Additionally, the more closely the company’s IDR mechanisms resemble the structure of our public legal system, the more insulated the companies become from external scrutiny and review.<sup>156</sup> Lauren Edelman posits that organizations who use IDR mechanisms become legislators, adjudicators, lawyers, and constables.<sup>157</sup> Organizations act as legislators in the sense that they promulgate their own rules and implement their own mechanisms to enforce these rules.<sup>158</sup> This “shifts the locus of lawmaking activity inside the corporate hierarchy, often with substantial consequences.”<sup>159</sup> For example, corporations may attempt to internalize the lawmaking process to the greatest extent possible by structuring an elaborate IDR system that allows them to insulate themselves from litigating employment discrimination suits.<sup>160</sup> This becomes problematic when the corporation uses IDR, particularly

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72 (2000) (arguing that the inability of ADR to set legal precedent is “especially problematic for traditionally oppressed groups” such as women), with Marc Galanter, *Why the Haves Come Out Ahead?: Speculation on the Limits of Legal Change*, 9 *LAW & SOC’Y REV.* 95 (1974) (describing the ways in which repeat players, particularly large bureaucratic organizations, in the legal system have an advantage over one-shot litigants).

<sup>153</sup> See Harkavy, *supra* note 7, at 163-64.

<sup>154</sup> See *id.* Galanter posits several reasons why large corporations have an advantage in our legal system, including: (1) knowledge and resources to plan transactions in advance; (2) ongoing access to specialists, reduced start-up costs, and economies of scale; (3) connections with people who work in the system; and (4) experience with the legal system, which provides knowledge as to which rule changes will “penetrate” into the law in action. See Lauren B. Edelman, *supra* note 118, at 941-42, *citing* Galanter, *supra* note 152.

<sup>155</sup> See Edelman, *supra* note 118, at 943.

<sup>156</sup> See *id.* at 965. Edelman states that courts will be more likely to dismiss a plaintiff’s claim if she fails to exhaust her in-house remedies when her employer’s IDR mechanisms are formal, with strict standards and appeals procedures, than to dismiss a plaintiff suing a company who has less “courtlike” IDR mechanisms, such as open door policies. See *id.*

<sup>157</sup> See *id.* at 961.

<sup>158</sup> See Chemerinsky, *supra* note 125, at 111 (recognizing the power that comes with such enforcement capabilities).

<sup>159</sup> Edelman, *supra* note 118, at 961.

<sup>160</sup> See McLaughlin & Crupi, *supra* note 11, at Vol. II.

arbitration, solely as an attempt to resolve grievances internally rather than using it as a means to challenge the discrimination that is occurring internal to the corporation while still preserving employees' rights.<sup>161</sup>

Organizations also act as adjudicators in many respects. Instead of utilizing public legal institutions for resolving workplace disputes,<sup>162</sup> an organization can keep the dispute private by mandating that the complainant use the organization's dispute resolution mechanisms.<sup>163</sup> This is problematic when these mechanisms are internal to the company because the company is both the defendant and the judge.<sup>164</sup> The employees are the disputants, the third-party "neutrals," the system designers and the administrators.<sup>165</sup> Thus, although the company's intentions may be pure, the process is inherently imbalanced<sup>166</sup> and presents clear conflicts of interest.<sup>167</sup> The following description of this imbalance is helpful in understanding the problems inherent with mandatory IDR:

[I]nternalized adjudication also has an opposite potential to increase the power of organizational "haves" vis-à-vis the "have nots." In particular, when lawlike disputing moves in-house, the meaning of a "neutral" forum becomes muddy, indeed. In theory, legalization may reframe the organization as a liberal polity, complete with well-institutionalized citizenship rights and formal due process protections; but in practice, the organization nonetheless remains a bureaucratic hierarchy, and the power

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<sup>161</sup> See Edelman, *supra* note 118, at 962.

<sup>162</sup> See Chemerinsky, *supra* note 125, at 111 (noting that the use of public legal institutions has the advantage of a clearly defined body of procedural rules that are intended to provide for thorough and fair consideration of the issues by a neutral third party, whereas IDR mechanisms have no such rules).

<sup>163</sup> See Edelman, *supra* note 118, at 962.

<sup>164</sup> See *id.* at 966-67. The corporation becomes the defendant in the sense that if the dispute ends up in the public legal system, the organization is often vicariously liable for the acts of its agents, who are its employees. In addition, if the dispute progresses into a lawsuit, the internal "judge" or "neutral" would likely become either a key witness for the organization or the attorney for the organization itself. See *id.* at 967. The potential for partiality may be diminished if the company hires an outside neutral to be the arbitrator, mediator, etc. See Interview with Simeon H. Baum, President, Resolve Mediation Services, Inc., Adjunct Professor, Benjamin N. Cardozo School of Law, *supra* note 6. However, since the company pays the neutrals, if the neutrals are, or desire to be, repeat players, they might have the incentive to side with the employer in their decisions in order to be re-hired.

<sup>165</sup> See Edelman, *supra* note 118, at 965.

<sup>166</sup> See Fiss, *supra* note 119, at 1076-78 (highlighting the problems associated with disparity of bargaining power in negotiations, such as the greater needs of the party with less resources to have a quicker resolution and the inequality in resources available to each side to research available options and prepare bargaining positions accordingly).

<sup>167</sup> See Edelman, *supra* note 118, at 965.

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and authority patterns of that hierarchy inevitably define the relationships between the parties and the court. Not infrequently, a worker complainant will face a manager respondent before a “judge” who is also a member of the organization’s management team. Thus, irrespective of their formal roles within the disputing arena, the judge and the respondent share a structural bond that creates a substantial potential for perceptual bias, if not conscious favoritism.<sup>168</sup>

Judges, who are often corporate managers, possess great leeway in their decision-making.<sup>169</sup> They are not bound by legal precedent,<sup>170</sup> and in fact will often ignore both substantive and procedural legal precedent and decide in a way that is best for the organization, which is not necessarily what is best for the individual employee.<sup>171</sup>

On the other hand, the argument that the use of IDR to resolve workplace conflicts does not empower the already powerful stems from the position that a rational company will act to promote its economic interest.<sup>172</sup> Assuming this is true, the company will have a desire to resolve disputes quietly, efficiently and cost-effectively.<sup>173</sup> It will do this not to enhance its power, but to resolve the dispute and increase the productivity of its employees, which in turn will lead to greater corporate profitability.<sup>174</sup> If the employee alleging sexual harassment continues to be harassed at work, he or she will not be productive, which will lead to economic loss for the corporation.<sup>175</sup> Thus, if the corporation values this employee, it will want to resolve the problem. Mediation is an IDR process that can be highly beneficial for both parties. Transformative mediation is designed to foster empowerment in all parties, which can lead to beneficial results that continue long after the mediation has ended. Facilitative mediation helps to legitimize the employee’s interests

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<sup>168</sup> See *id.* at 966.

<sup>169</sup> See *id.* at 968.

<sup>170</sup> See *id.*

<sup>171</sup> See *id.*

<sup>172</sup> See Interview with Peter Phillips, *supra* note 9.

<sup>173</sup> See *id.*

<sup>174</sup> See *id.*

<sup>175</sup> See Roberts & Mann, *supra* note 18, at 272 (recognizing that costs associated with sexual harassment in the workplace are significant, even without litigation).

According to *Working Woman Magazine*, a typical Fortune 500 corporation can expect to lose \$6.7 million, in 1988 dollars, annually. Losses can result from absenteeism, lower productivity, increased health-care costs, poor morale, and employee turnover. These losses do not include litigation costs or court-awarded damages. Also not included is damage to a company’s image.

*Id.* at 271-72. See generally Interview with Peter Phillips, *supra* note 9.

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to the company by stating her interests as discussion topics and can help the employee to recognize and identify with the corporate interests. This can be valuable for the dispute at hand, as well as for the future relationship of both parties.

This argument fails, however, when one considers the entry-level, low skill employee who complains of sexual harassment. A company has much less incentive to assist this employee in resolving the situation, because it is often in the corporation's best economic interest to simply fire this employee and replace him or her with another employee.<sup>176</sup> Since this employee presumably does not possess any special skill, his or her position is easily replaced by another employee who either will not face the same problem or will be more willing to tolerate harassment in order to simply maintain a paying job. Thus, the availability of a public legal forum is necessary to protect those employees who possess the least amount of power.

## V. PROPOSALS FOR CHANGE

The EEOC, as the governmental agency charged with regulating employment disputes, and the companies who use mandatory IDR mechanisms should both play a role in addressing the problems of precedent setting, public guidance, and empowering the powerful.

The use of mandatory IDR mechanisms limits the number and types of cases that go to trial, and thus, we are left with a smaller body of precedent to look to in guiding us in future cases. One way to provide the public with guidance while still allowing for mandatory IDR to be used would be to require companies who use arbitration to publish all decisions rendered by the arbitrators. The actual names of the disputants could be redacted, and perhaps should be required to be redacted, in order to protect the privacy of the disputants. The body of these decisions would add societal value, because, like case law, these decisions could be used for guidance as to which actions are appropriate and will be tolerated in the workplace. This would reduce the problems associated with a stagnant body of law that does not evolve with changing public expectations and norms.

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<sup>176</sup> See Interview with Peter Phillips, *supra* note 9.

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In addition to company publications of arbitration decisions, Congress should require companies to report data to the EEOC outlining the types of mechanisms used, the types of claims handled, and a basic assessment of their resolution or lack thereof. This type of recording would be similar in form to the reporting already done by the EEOC regarding cases it mediates and litigates.<sup>177</sup> Companies should also be required to notify the EEOC of all corrective actions taken in mediation. In turn, the EEOC would be required to keep this information confidential, so as not to restrict employer actions in the future. That is to say, an employer may be less willing to offer something to an employee in the course of a mediation that he would not want to extend to other employees if he knew that his offer would become public information upon the termination of the mediation. The company would be required to send this information to the EEOC so that the EEOC could use the information to publish a code of regulations indicating the types of behaviors that are acceptable in the workplace. The information that is shared in mediations and other IDR processes will be helpful in allowing the EEOC to understand the kinds of problems that are arising in the workplace and the types of solutions that are satisfactory to both employees and employers.

In addition to promulgating a body of regulations, the EEOC would also be charged with the task of monitoring corporate IDR procedures and usage. For example, the EEOC could send officers to make periodic visits to companies and sit in on mediations, peer review sessions, and the like. If the EEOC then found that the company was not, for example, providing due process for its employees or had biased neutrals, the company would be required to amend its practices or face sanctions. This would temper the problem of IDR empowering the powerful because the company would no longer have unfettered power over the process. However, the creation and implementation of internal dispute resolution systems should be left in the hands of the companies themselves, as they have the information required to create a system that is the best suited for their own business.

Because alternative dispute resolution is premised on the notion that the process be voluntary in order to reach optimal results, the use of such processes in the workplace should not be mandatory. If the process becomes more closely regulated so that

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<sup>177</sup> See The Equal Employment Opportunity Commission "*Statistics*," at <http://eeoc.gov/stats/index.html> (last visited Mar. 24, 2005) (reporting statistics on the types, numbers, and outcomes of disputes resolved through mediation and litigation).

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employees are provided greater protection in using IDR processes, IDR programs will likely continue without the need to mandate their use, particularly because litigation is frequently not a viable alternative. The body of sexual harassment case law will simultaneously evolve because of the essential role the EEOC plays in prosecuting sexual harassment cases on behalf of both public and private employees, and the role it will play in promulgating a code of regulations for those disputes resolved internally.

## VI. CONCLUSION

Our current regime that advocates for the use of alternative dispute resolution without providing adequate procedural safeguards for individual Title VII claimants must be amended. Society, through Congress and the EEOC, must make attempts to allay the concerns about justice and fairness to the individual employee complainant implicated under our current system in which companies are permitted to structure, implement, and mandate the use of internal dispute resolution mechanisms without public oversight. Attention must be paid to the unique nature of sexual harassment complaints on a personal and public level when designing appropriate systems to resolve such complaints. IDR mechanisms may be appropriate and beneficial to a sexual harassment complainant in some circumstances. However, giving private companies a blank check to design and implement internal grievance programs that supplant the public justice system endangers individual rights and further enhances the power of the employer in relation to the less powerful individual employee.

