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THE LAWYER'S ROLE IN INSTITUTIONALIZING ADR

Karen A. Intrater and Traci Gabhart Gann*

I. INTRODUCTION

In 1994, the United States Postal Service ("Postal Service") embarked on what would become a journey toward completely reconstructing how employment disputes are managed within the organization. The Postal Service began this paradigm-shifting journey by giving employees the option of mediation to resolve informal complaints of discrimination. This use of mediation, as an alternative to the traditional, federal Equal Employment Opportunity ("EEO") counseling process, is called REDRESSTM, an acronym for Resolve Employment Disputes, Reach Equitable Solutions SwiftlyTM.¹ The impressive results of the REDRESSTM pilot program led the Postal Service to implement REDRESSTM nationwide as a way to manage the steadily increasing number of EEO complaints in the organization.² By September 1999, REDRESSTM mediation in lieu of counseling was available to all of the Postal Service’s approximately 800,000 employees with only limited exceptions.³

REDRESSTM has been hailed as a success on many levels including participant satisfaction, case closure and reduction in number of new

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1. The REDRESSTM pilot program was implemented in three cities in the panhandle of Florida on October 31, 1994. For a more detailed background of this program, see infra Cynthia Hallberlin, Transforming Workplace Culture Through Mediation: Lessons Learned From Swimming Upstream, 18 Hofstra Lab. & Emp. L.J. 425 (2001).


3. For example, the Postal Service has made a policy determination that it cannot mediate disputes in which a criminal or Inspector General case or investigation is pending.

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The most important measure of success—improved communication and conflict management skills—is the most difficult to quantify. The Postal Service, however, made a conscious decision to use the transformative model of mediation in order to maximize the opportunity to address not only the immediate conflict but also the underlying issues and fundamental problems related to how people interact with each other.

This success of REDRESS™ at the earliest stage of EEO disputes led the Postal Service General Counsel ("General Counsel") to expand the use of mediation to EEO disputes at the formal complaint stage. This program expansion is known as REDRESS™ II. As a result of the increasing complexities of EEO litigation, postal attorneys rather than non-attorney representatives are handling these Equal Employment Opportunity Commission (EEOC) administrative cases more frequently, especially those that are likely to reach an EEOC hearing. Therefore, implementation of REDRESS™ II required training for, and marketing to, a new sector of the Postal Service universe—litigators. This article examines the unique challenges of integrating mediation as a component of a litigation practice within a large organization and illustrates the ways in which attorneys are essential partners in the institutionalization of alternative dispute resolution ("ADR").

II. THE PROGRAM

In addition to carrying forward the name "REDRESS™," the General Counsel chose to import all critical elements of the REDRESS™ program into REDRESS™ II. First, the transformative


5. Research demonstrates that REDRESS™ mediation is having a positive effect on the workplace environment as supervisors and managers report being better able to handle workplace conflict after participating in mediation. See Jonathan F. Anderson & Lisa Bingham, Upstream Effects from Mediation of Workplace Disputes: Some Preliminary Evidence from the USPS, 48 LAB. L.J. 601, 606-10 (1997).

6. The Civil Rights Act of 1991 added compensatory damages to the relief available to complainants and expanded the right to a jury trial to include Title VII actions. See 42 U.S.C. § 1981a (b) - (c) (1994).
model of conflict resolution was retained rather than moving to a more evaluative model. Second, the same roster of outside mediators for REDRESSTM is used in REDRESSTM II, and third, participation in the process is voluntary for employees. Additionally, as discussed below, measures of success were established which focus on the process more than the outcome.

In REDRESSTM II, a Postal Service attorney or representative reviews and evaluates each formal EEO complaint assigned and determines whether it is appropriate for mediation. Next, the advocate contacts the Postal Service manager who has the settlement authority for the case (the "client") and recommends mediation. Once the client has agreed to mediate the case, the advocate contacts the complainant or his representative to offer REDRESSTM II mediation. After the complainant agrees to participate in mediation, the responsibility for arranging the mediation shifts to Postal Service EEO/ADR professionals who hire a mediator, arrange for a location for the mediation, and send out confirmation letters to all the participants. To a great extent, the effectiveness of the mediation will depend upon how attorneys and representatives prepare their clients as well as the openness and good faith which the attorneys and clients bring to the mediation process.

III. ESSENTIAL PARTNERS

As numerous authors have noted, there are many barriers to increasing the use of ADR within an organization. One researcher observed that there are at least "four major factors that seem[ ] to create barriers to achieving faster and less costly resolution of disputes—contentious corporate cultures, the emotional investment of managers in disputes, misalignment of incentives for managers and outside lawyers, and what we might call the professional culture of lawyers."

While the Postal Service encountered all of these barriers in

7. There are some instances when REDRESS II mediation is mandated by the EEOC. See infra Section V.
implementing REDRESS™ II, this article focuses primarily on the lawyer’s role and how the Postal Service worked to align attorney goals and attitudes with the organizational goal of increasing the use of ADR. From the outset, it was clear that postal attorneys would be essential partners in the effort to overcome the other barriers to success. The attorneys are in the best position to “sell” ADR to complainants’ attorneys (or non-attorney representatives), to persuade postal managers to participate in ADR, and to prepare them to participate effectively. Without the postal attorneys’ understanding of and commitment to the process, there could be no REDRESS™ II program. Therefore, the first and perhaps most significant step in implementing REDRESS™ II was to educate postal attorneys and non-attorney advocates about the transformative mediation process. It was important to convey to these experienced litigators how they could add value in a non-directive, non-adversarial setting and how they could effectively and zealously represent their clients in a transformative process. They needed to understand not only the dynamics of transformative mediation but also its benefits for their clients. It was also necessary to assure them that full participation in REDRESS™ II mediation would not jeopardize the Postal Service’s litigation position in the event there was no resolution and the case proceeded to a hearing.

To this end, the Postal Service worked with the Institute for the Study of Conflict Transformation (“ISCT”) to develop a comprehensive two-day seminar curriculum on mediation advocacy for all postal attorneys. The seminar is being presented to small groups of attorneys by instructors from the ISCT and the Postal Service Law Department. Since November 1999, more than 150 postal attorneys have participated in this seminar.¹⁰ The first day of the seminar engages the attorneys in a rigorous examination of the nature of conflict, the various models of conflict resolution, the theoretical underpinnings of transformative mediation and the practical business reasons for the Postal Service’s decision to adopt the transformative model for REDRESS™ and REDRESS™ II. Much attention is given to the roles of the mediator and the advocate in a transformative process, focusing on the meaning of zealous advocacy in the context of such a process. The first day concludes with a live demonstration of a transformative mediation, with the “action” stopped periodically for comments by the instructors and

¹⁰ A one-day version of the attorney’s course is also being given to non-attorney postal advocates who handle some EEO formal cases. Postal attorneys are conducting this one-day course.
the attorneys. The discussion is provocative and raises serious issues—both abstract and concrete—about conflict and conflict resolution. The second day of the seminar includes discussions and exercises covering a wide range of mediation advocacy issues: EEOC regulations, the need for—and tips on—gaining client buy-in, effective preparation of clients and guidelines on ethics and confidentiality in mediation. The session ends with a mediation role-play in which the attorneys take turns acting as the advocate in a mediation session.

As a result of the seminar, attorneys discover new ways to represent clients in an unfamiliar setting. They are able to articulate the ways in which mediation—because of its speed, efficiency and flexibility—often better serves the business interests of the Postal Service than does a lengthy litigation process. As a result, most postal attorneys are now well prepared to recommend REDRESS™ II to clients in appropriate cases, to “sell” the program to complainant’s counsel and to capably guide clients in making the most effective use of mediation. This is not to suggest that a two-day seminar completely converted a corps of litigators into champions for transformative mediation. But a paradigm shift has begun. There appears to be strong general agreement among postal attorneys that, in the context of employment disputes, winning is often less relevant than achieving resolution of the parties’ underlying problems and improving workplace relationships—and that REDRESS™ II offers a means to that end.

IV. ORGANIZATIONAL ANCHORS

Change is difficult for both individuals and organizations and there are always forces at play which discourage change. Integrating REDRESS™ into the fabric of an organization like the Postal Service required changes in both procedures and attitudes. One factor in the success of REDRESS™ was that the Postal Service dedicated positions to REDRESS™ and the people in those positions became “organizational anchors” promoting a new paradigm for resolving


12. The authors would like to thank Kenneth H. Fox, J.D., for articulating this concept and coining the phrase “organizational anchors” in this context. Mr. Fox is the Director for conflict resolution program development at Hamline University in St. Paul, Minnesota and a part of the ISCT.
Likewise, REDRESSTM II created its own organizational anchors by designating one attorney in each law department field office as an ADR Liaison. These ADR Liaisons are members of the law department's ADR Working Group, and act as champions for ADR within their offices, providing support and advice to their colleagues. The ADR Working Group is a forum for sharing successes, exchanging information, and considering new ADR initiatives in the law department. To some extent all postal attorneys are organizational anchors, as their involvement with managers in REDRESSTM II sends a consistent message regarding the Postal Service's commitment to resolving employment disputes early and the potential for transformative mediation to improve the workplace climate.

V. COMPLAINANTS' COUNSEL

Several postal attorneys quickly noted a gap in the implementation plan for REDRESSTM II. What about attorneys who represent complainants in the EEO process? They will not have received the training provided to their postal counterparts, which raises important questions: Will they be familiar with the transformative process? Be willing to participate? Participate in a way that would maximize opportunities for the parties (rather than the advocates) to communicate? As a result of this input by attorneys, the Postal Service is preparing to launch an external website geared toward complainants and their representatives. The website will describe REDRESSTM and REDRESSTM II, answer a wide range of questions about both programs, provide suggestions for preparing and representing clients in REDRESSTM II, and provide links to additional sources of information about transformative mediation.

VI. MEASURING SUCCESS

The challenges present in mediating EEO cases at the formal complaint stage caused new definitions and measurements of success to

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13. The Postal Service has eighty-five Managers of Dispute Resolution (MDR) who are responsible for offering mediation to employees who file informal complaints and scheduling the mediation sessions. The Postal Service also has 10 EEO/ADR Coordinators who each oversee a group of MDRs, provide training for MDRs, other postal employees and outside mediators and analyze ADR activity.

14. At the time of publication, the address for the Web site is unavailable.
evolve. The General Counsel set two ADR goals to encourage and measure participation by attorneys in REDRESS™ II. First, each law department field office was given a numerical goal for “ADR Attempts”—the cases in which postal attorneys offer REDRESS™ II to complainants or their representatives. Second, each office has a goal for “ADR Use,” measuring how many cases actually used an ADR process. There is no goal for number of settlements.

This focus on the process rather than the outcome is designed to encourage greater use of ADR. It also underlines the point that bringing a case to mediation can be considered a success even when no settlement is reached, as when the parties are able to gain better clarity about the issues or begin to communicate better. In addition to monitoring attorneys’ progress toward these goals, the law department examines the cost-effectiveness of REDRESS™ II by calculating the potential liability avoided when a dispute is resolved.

As in REDRESS™, the Postal Service continues to use anonymous exit surveys to capture data on the participants’ satisfaction with the process, the mediators and the outcome. Continued high satisfaction rates in REDRESS™ II—indicating that participants view the process as neutral and credible—are a critical factor in promoting the program to the plaintiffs’ bar.

A new section of the exit survey captures information uniquely relevant to REDRESS™ II cases. For example, one new area of examination will be the age of the case. The exit survey will capture the date the initial informal complaint was filed as well as the date of the mediation. Analyses of the satisfaction and resolution rates of REDRESS™ and REDRESS™ II will be conducted to see to what extent the age of the case is a variable. Based on the new survey

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15. ADR goals have been set and tracked for federal district court cases since Fiscal Year 1998. Fiscal Year 2001 is the first time ADR goals have been applied to EEOC administrative cases under REDRESS™ II.
16. These exit surveys are completed immediately after the mediation session and mailed by the mediator directly to Professor Lisa Bingham at Indiana University.
17. In Fiscal Year 2000, the satisfaction rates for REDRESS™ participants averaged 93% for satisfaction with the process, 98% for satisfaction with the mediators, and 76% for satisfaction with the outcome, with remarkable consistency of rating by employees, supervisors, and employee representatives (on file with Lisa B. Bingham, J.D., Associate Professor and Director of the Indiana Conflict Resolution Institute, Indiana University School of Public and Environmental Affairs).
18. REDRESS™ mediation occurs within two to three weeks of an employee filing an informal complaint. In contrast, REDRESS™ II mediation takes place after an employee files a formal complaint of discrimination but before an EEOC hearing. Based on the regulatory timeframes and backlogs at the EEOC, the formal complaint stage can last as long as two years. See
data, we also will be able to examine whether conducting discovery or filing a dispositive motion has an effect on resolution rates. For example, are cases more likely to settle when mediation is conducted before rather than after depositions?

The survey will also indicate whether the REDRESS™ II mediation was voluntary or mandated by the EEOC. When an employee requests an EEOC hearing of their complaint, the administrative judge assigned to hear the case can order mediation. Some administrative judges have mandated the use of mediators employed by or volunteering their services to the EEOC while others have ordered the parties to participate in REDRESS™ II mediation. Much has been written about the significance of the voluntary nature of mediation, and careful evaluation to determine whether there are differences in the satisfaction with and outcomes of voluntary and mandated mediation will begin.

Multiple mediation is another factor we will be analyzing in REDRESS™ II. The question is whether REDRESS™ II is less likely to resolve a dispute if the dispute was already mediated at the informal complaint stage. The answer will assist the Postal Service in deciding whether to screen out previously mediated cases. We also intend to analyze the survey data to assess the impact of attorneys—postal attorneys and opposing counsel—on the satisfaction and resolution rates of REDRESS™ II. Finally, and most important, we will be looking for indications that participation in the REDRESS™ II process, as in REDRESS™, contributes to a better work environment by improving the communication and conflict management skills of employees and their supervisors.

VI. CONCLUSION

The Postal Service is committed to resolving employment disputes through means other than litigation whenever it is reasonable to do so.

For the past two years, REDRESS™ has shown the power of transformative mediation in reducing the number of new formal complaints. Now, with REDRESS™ II, the Postal Service is taking transformative mediation to the next level—seeking to reduce the number of formal complaints that become federal district court cases. The Postal Service's attorneys are pivotal partners in this new venture. Training, goals, and measures of success have been designed to maximize their effectiveness. The degree and impact of their participation in REDRESS™ II should be of considerable interest to the legal and ADR communities.