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Working Models: An Analysis of Workplace Mediation Programs Available to New York City Complainants

Nina Martinez
University of Pennsylvania

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Advanced Mediation Seminar

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Abstract: I will compare and contrast the various agency and court-annexed models for workplace mediation projects in New York City and analyze the advantages/disadvantages of the different models in order to develop a hybrid model that will potentially serve as a platform for my project as a Skadden Fellow at New York Legal Assistance Group.

Central focus: What are the important considerations/elements in developing a free-standing workplace mediation clinic? What are aspects of existing agency and court-annexed workplace mediation programs that we can borrow/alter in the creation of a new/hybrid project?

I. Introduction

In this piece I will analyze the existing institutional workplace-related mediation programs available to complainants in New York City. I have limited the scope of my analysis to only the viable options currently available to the standard complainant in New York City. While the range of programs I am studying may seem small, they are representative of the dearth of options available to the low-income/middle-income complainant. I have opted to hone my focus on these programs in order to get a genuine sense of the landscape available to potential parties. My analysis will center on the employment mediation programs housed in the New York Southern District Court, the New York Eastern District Court, and the Equal Employment Opportunity Commission. I will compare and contrast these court-annexed and agency models in order to draw out the advantages and disadvantages of some of the key features of the different programs. Ultimately, I seek to use the lessons of this analysis in order to further develop a hybrid model that will potentially serve as a platform for a workplace mediation project housed in the nonprofit, New York Legal Assistance Group.

To briefly summarize, my analysis is limited to free programs that exclusively provide employment-related mediation or largely focus on employment-related grievances. While there are a range of alternatives for litigants seeking private mediators, they will not be discussed in this piece for several reasons. Private mediators available via sources such as JAMS are a beneficial alternative to litigants embroiled in an employment dispute.[1] However, private

[1] JAMS is the "largest private alternative dispute resolution (ADR) provider in the world. With its prestigious panel of neutrals, JAMS specializes in mediating and arbitrating complex, multi-party, business/commercial cases – those in which the choice of neutral is crucial." *About JAMS*, JAMS ALTERNATIVE DISPUTE RESOLUTION, http://www.jamsadr.com/aboutus/xpqGC.aspx?xpST=AboutUs (last visited Apr. 24, 2015).

mediators often come with a hefty price tag.[2] As a result, private mediators' services are generally inaccessible to low-income plaintiffs with grievances ranging from wage theft, employment discrimination, or failure to accommodate. Further, organizations such as JAMS serve as a database for parties seeking mediation but do not necessarily operate as free-standing mediation programs for the purposes of my systems analysis.

It should also be noted that while a number of other organizations in New York City offer reduced cost or free mediation services, such as the New York Peace Institute[3] and Community Mediation Services,[4] they are not included in my analysis because they do not offer employment dispute-related mediation services. Generally, these organizations offer holistic mediation services for issues ranging from custody disputes, community conflicts, and education-related matters. While these organizations serve as meaningful ombudsman for communities struggling with interpersonal conflicts, they do not reflect the key components of mediation programs dealing with employment-related issues that I sought to identify in my analysis. Finally, my analysis does not include successful internal workplace mediation programs such as the United States' Postal Service's mediation program, Resolve Employment Disputes Reach Equitable Solutions Swiftly (REDRESS),[5] or RESOLVE, the Equal Employment Opportunity

[2] In an interview with a plaintiff's attorney, he explained that his client recently split the $5,000 per day fee of a private mediator for a matter involving wrongful termination with the defense. While this matter was resolved in a day, the attorney explained that this would not have been a viable alternative had they anticipated needing a longer period of time to settle the matter.

[3] The New York Peace Institute is a nonprofit organization that touts "professionally trained mediators [who] are volunteers and [] services [] provided cost free to New York City residents in Brooklyn and Manhattan." *Mediation Services*, NEW YORK PEACE INSTITUTE, http://nypeace.org/mediation-services/ (last visited Apr. 24, 2015).

[4] Community Mediation Services, located in Queens, New York, has a staff of over eighty trained professionals and over one hundred volunteers. COMMUNITY MEDIATION SERVICES, http://mediatenyc.org/ (last visited Apr. 24, 2015).

[5] "The REDRESS program was born out of the settlement of a class action lawsuit filed by employees in the Northern District of Florida. Among their complaints was that the Equal Employment Opportunity (EEO) complaint process was too slow, remote, and ineffective in addressing workplace disputes. After reviewing the alternatives, all parties agreed that the development of a workplace mediation program might be an effective way to address these concerns. Thus, REDRESS mediation began as a pilot program in 1994 with three Florida sites…Today it is available to all Postal employees nationwide." *About REDRESS*, UNITED STATES POSTAL SERVICE, https://about.usps.com/what-we-are-doing/redress/about.htm (last visited Apr. 24, 2015).

Commission's internal mediation program.[6] I opted not to include these programs in my study of the various models available to complainants in New York City because these are only available to institutional employees. Further, internal mediation programs also tend to operate quite differently because they do not require the same attorney participation, litigation considerations, and infrastructure development.

Given the limited comparators available in my study of free employment mediation programs, I will narrow my focus extensively on the key elements I have distilled from each program. In studying the Southern District, Eastern District, and EEOC's programs, I have noted key aspects present in each of these models. These considerations drive much of the mediation process in each of these programs. These key considerations are: intervention timing, mediator qualifications/subject-area expertise, and attorney participation. Each of these elements serves as a touchstone for comparing and contrasting the various models in an effort to develop a hybrid that will serve as a free-standing employment mediation program at New York Legal Assistance Group.

II. Background

In recent years, scholars have extolled the virtues of mediation in the context of employment-related matters.[7] The tangible benefits of mediating employment disputes were recognized early on by New York's Eastern and Southern District Courts and the Equal

[6] The "EEOC seeks to develop a model workplace where employees, supervisors and managers can effectively and efficiently accomplish the mission of the agency in a harmonious environment…The RESOLVE Program, which provides a forum for the informal resolution of a variety of employment disputes, [] help[s] the agency achieve this goal." *Handbook for The Resolve Program EEOC's Internal Alternative Dispute Resolution Program*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/federal/adr/resolvehandbook.cfm (last visited Apr. 24, 2015).

[7] *See generally* Michael Z. Green, *Tackling Employment Discrimination with ADR: Does Mediation Offer A Shield for the Haves or Real Opportunity for the Have-Nots?*, 26 BERKELEY J. EMP. & LAB. L. 321 (2005); *see also* Vivian Berger, *Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment*, 5 U. PA. J. LAB. & EMP. L. 487 (2003).

Employment Opportunity Commission. It is worth briefly discussing the factors that catalyzed the creation of the court-annexed programs in the Southern and Eastern Districts of New York as well as the EEOC's successful mediation program. While mediation has long been recognized in matters involving custody and divorce as an important means towards resolution, it has of late been touted as particularly useful in dealing with claims of employment discrimination, "given the difficulties that employees face when attempting to adjudicate their discrimination claims in the formal court system."[8] The importance of mediation in the employment setting is particularly evident in this, the "second generation" of the Civil Rights era, in which discrimination tends to be more discrete and interpersonal.[9] Berger explains that "[t]o a great extent, discrimination has 'gone underground,'" in the sense that "in a number of cases, an objective person would have trouble distinguishing between "unlawful bias and garden-variety unfair treatment."[10] As a result, "[i]llegality has [] become more difficult to prove."[11] Similarly, Berger explains that the "line between subtle or unconscious bias and mere bad management, miscommunication, insensitivity, or 'equal opportunity' nastiness is often indiscernible" and "beyond the purview of statutory bans."[12]

Mediation in this landscape has offered meaningful recourse to complainants because it creates a cathartic space in which a party may articulate their grievances regardless of whether there are actual legal remedies available to them. Separate of the "doctrinal hurdles" a potential employee-plaintiff may need to tackle, the practical realities of litigating a workplace-related

[8] Green, *supra* note 7 at 324.
[9] *See generally* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach,* 101 COLUM. L. REV. 458 (describing the complexity of bias based on interactions); *see also* Berger *supra note 7* at 488.
[10] Berger *supra note 7* at 488.
[11] *Id.*
[12] *Id.* at 498.

dispute are daunting.[13] Generally, low wage and middle income workers have trouble obtaining counsel in order to pursue their grievances because of the cost-benefit analysis plaintiffs lawyers must undergo in order to assess the viability of a case. Often individual claims do not garner the expected monetary damages that would make a case worthwhile for a plaintiff's counsel to pursue. Mediation lowers the level of risk for the attorney. Alternatively, mediation offers plaintiffs an opportunity to pursue their claims *pro se*, particularly at the EEOC. The district court and EEOC employment mediation programs have also recognized the significant impact an impartial neutral may have in parties' ability to reach an agreement. While "[m]ost of the[] benefits of [mediation] could, theoretically, be achieved by unassisted negotiations," a mediator is capable of employing an arsenal of tools such as the caucus, shuttle diplomacy, and persuasion tactics, in order to improve the process.[14]

The U.S. District Court for the Southern District of New York has been an innovator in alternative dispute resolution and has offered alternative opportunities to litigants since as early as the 1980s.[15] Initially, the Southern District offered a small arbitration program in collaboration with the American Arbitration Association.[16] The program further expanded in 1991 with the creation of a pilot mediation program for civil cases in Manhattan involving only money damages.[17] During the very early stage of the pilot program, an advisory group of judges in the Southern District recommended cases for mediation and provided training to volunteer mediators.[18] Between 1991 and 2011, the mediation program handled roughly 200-250 cases on

[13] *Id.* at 500.
[14] *Id.* at 508.
[15] Rebecca Price, *An Alternative Approach to Justice: The Past, Present, and Future of the Mediation Program at the U.S. District Court for the Southern District of New York*, ADR AS PUBLIC POLICY: DOMESTIC AND INTERNATIONAL PERSPECTIVES, 6 Y.B. ON ARBITRATION & MEDIATION 170, 170 (2014).
[16] *Id.*
[17] *Id.* at 171.
[18] *Id.*

an annual basis.[19] However, the load of cases accepted for mediation by the program grew dramatically in 2011 because the Court mandated that employment discrimination cases filed in the Southern District of New York were automatically ordered into mediation when an answer was filed.[20] As a result, a total of 1011 cases were referred to the Southern District's program in 2014, a large proportion of which involved employment discrimination claims.[21]

Given these changes, the Court has dealt with the challenge of a changing program: "[w]here participation had been largely voluntary since the inception of the program it was now mandatory for the great majority of participants."[22] In an interview with Rebecca Price, I learned that the program continues to grow its base of employment discrimination mediations.[23] In contrast to the Southern District, the Eastern District's program tends to be less robust. Although the Eastern District's Court-Annexed Arbitration Program is mandated and was implemented relatively early in the evolution of alternative dispute resolution in 1986, mediation remains a voluntary, non-mandatory option for litigants.[24] The Court-Annexed Mediation Program established in 1992 grants litigants the opportunity to either use a mediator from the Court's

[19] *Id.*
[20] *Id.*
[21] Rebecca Price, MEDIATION PROGRAM: ANNUAL REPORT JANUARY 1, 2014 – DECEMBER 31, 2014, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK (March 23, 2015) ("Of the cases referred in 2014, 828 have closed with the following rates of settlement: Automatic Employment (50%), Pro Se Employment (68%), Referrals from Individual Judges (non-pro se employment) (65%), § 1983 Plan (76%)). *Id.*
[22] *Id.* at 173.
[23] I met with Ms. Price, director of the Southern District's Mediation Program, on April 3, 2015 to discuss the current state of the program and efforts to seek mediation advocates for the *pro se* litigants in employment discrimination matters.
[24] *Dispute Resolution Procedures,* UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, *available at* https://img.nyed.uscourts.gov/files/forms/DisputeResolutionProcedures.pdf (2015).

qualified panel or select their own mediator.[25] The Eastern District provides a generalized rubric for mediators and separates mediators by specialty area.[26]

The Equal Employment Opportunity Commission has been recognized by many scholars as a champion of mediation and alternative dispute resolution. The EEOC's mediation program was first piloted in 1991 in the Philadelphia, New Orleans, Houston, and Washington, D.C. field offices.[27] The EEOC expanded the pilot to all of its district offices in 1995 and by 1999 the Mediation Program was fully implemented.[28] As the champion organization for mediation of workplace disputes (specifically, employment discrimination under its statutory obligations), the EEOC has committed extensive resources to the program and has conducted a number of surveys in order to study its impact on parties.[29] As the agency tasked with enforcing Title VII of the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, the EEOC prides itself as having "enthusiastically endorsed the use of mediation to resolve employment discrimination charges filed."[30] Like the Eastern District's program, the EEOC's mediation program is optional and voluntary.

After carefully studying the Southern and Eastern District's models, as well as that of the EEOC program, I isolated some of the essential elements of the programs in an effort to better understand their similarities and distinctions. The key component considerations that permeated each of the models were: intervention timing, mediator qualifications, and attorney participation.

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[25] *Id.*; FEDERAL JUDICIAL CENTER, *available at* http://www.fjc.gov/public/pdf.nsf/lookup/adrtwod.pdf/$File/adrtwod.pdf
[26] Further discussed *infra* Part III.
[27] *History of the EEOC Mediation Program*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/mediation/history.cfm (last visited Apr. 24, 2015).
[28] *Id.*
[29] *Studies of the Mediation Program,* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/mediation/studies.cfm (last visited Apr. 25, 2015).
[30] Green, *supra* note 7 at 333.

While these factors are relevant in the design of any mediation program, regardless of the kind of dispute, they are distinctively important in the context of employment mediation for the reasons discussed below.

III. Key Considerations

A. Intervention Timing - When to Mediate?

The timing of mediation is particularly significant with respect to employment matters because of the time sensitive nature of discovery. Mediations at the Southern District, Eastern District, and EEOC exist alongside a legal claim filed either in federal court or in the Commission. As a result, aspects of litigation such as discovery are intimately connected to timelines in mediation. Berger contends that while mediation is "almost always to be preferred to court resolution of employee claims," "mediation's considerable benefits are reduced as time goes by" and "should occur as soon as possible after the controversy arises."[31] While mediators and the designers of employment mediation programs tend to prefer an earlier start to mediation, counsel for parties tend to pursue mediation at various stages depending on specific goals.[32] At times attorneys' objectives regarding timing can directly conflict with the general preference for early mediation. For example, some scholars counsel that attorneys should pay close attention to the timing of a mediation because it can be reflective of strategy and "give away your hand." In particular, Reeves explains that a defense attorney should be wary of suggesting early mediation because "the plaintiff's attorney [will] probably assume that the defendant is essentially conceding liability," consequently, the plaintiff's attorney will approach the mediation with the

[31] Berger, *supra* note 7 at 489.
[32] *See* Pamela L. Reeves, *Working in Out: Mediation Advice for Employment Law Disputes,* 34 TENN. BAR J. (2003). Reeves urges counsel to choose the time of mediation carefully: "If the initial investigation into the facts shows that a case has significant problems from the defense perspective, consider mediation early in the process. If a client admits to having sex with three other female employees, in addition to admitting that he attempted to have sex with the claimant, the odds are good that the employer is not going to get out on a motion for summary judgment. It is probably better to try to cut the employer's losses as early as possible in that type of situation." *Id.*

expectation that the case is more valuable than merely a nuisance settlement.[33] However, the influence of attorneys' agendas in this respect is somewhat ameliorated in the context of mediation in the Eastern and Southern Districts and the EEOC because of the specific timelines set forth by the courts and government that limit timing flexibility.

In the Southern District, cases enter the Mediation Program either through a process of automatic referral or by referral of a specific case from the assigned judge.[34] Employment discrimination claims are automatically mandated to participate in mediation and are directly referred to the mediation program. As a result the timeline to mediate is rather expedited in contrast to traditional litigation and the first mediation session should take place within one hundred and fifty days of the last responsive pleading.[35] The program received "consistent suggestions for improvement from both mediators and the employment bar" regarding the timeline.[36] Critiques of the Southern District's program suggested that the timing of referral should occur later in the litigation process because it sometimes failed to "accommodate the participants' needs for early limited discovery."[37] In my interview with Ms. Price, I discussed the timeline, which remains unchanged despite critiques. She articulated the program's rationale and explained that allotting more time for discovery would defeat the purpose of mediation in the context of mandated and judge-referred claims. Ms. Price referenced the myriad benefits of mediating at an early stage as the reason for remaining with the current timeline.

In contrast, the Eastern District's procedure for scheduling mediation tends to be far more flexible and lenient. A case may be referred to mediation at any point in the litigation process as

[33] *Id.*
[34] Price *supra* note 21.
[35] FEDERAL JUDICIAL CENTER *supra* note 24.
[36] Price *supra* note 15 at 172.
[37] *Id.*

long as the parties consent and the judge approves.[38] The only time constraint placed on parties mediating in the Eastern District is that the first mediation must take place within three weeks of the mediator's appointment.[39] While the Eastern District's program favors flexibility, it potentially lacks the urgency set forth in the Southern District's program because it can occur at any point in litigation. Without a more consistent system like that of the Southern District, the Eastern District's current timeline contains a certain level of uncertainly that may be troublesome to parties who are unsure of where they stand in the process.

In theory, mediation at the EEOC takes place rather early in the process, however, in practice, given the quantity of charges the EEOC receives, mediation may take place much later than anticipated. While the EEOC mediation timeline is somewhat aligned with the pace of litigation and discovery, it is more fluid than the court-annexed programs at the Southern and Eastern Districts. Mediation at the EEOC takes place before formal investigation of a charge filed at the EEOC.[40] The EEOC provides mediation at this early stage in order to preserve the resources the Commission would have likely expended in an investigation and "prevent[] the hardening of positions that can occur during a lengthy investigation."[41] Despite its stated preference to mediate early in the process, the EEOC may also mediate during an investigation or even in the midst of the conciliation process.[42]

It is difficult to assess whether a rigid timeline approach like that of the Southern District or a more flexible timeline such as the Eastern District and EEOC's is preferable because the

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[38] FEDERAL JUDICIAL CENTER *supra* note 24.
[39] *Id.*
[40] Questions And Answers About Mediation, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/mediation/qanda.cfm (last visited Apr. 25, 2015).
[41] *Id.*
[42] *Id.* The conciliation stage follows an investigation of a workplace that the EEOC has issued a finding of discrimination. *Id.* During the conciliation phase the EEOC and the employer negotiate efforts to remedy the discriminatory aspects of the workplace.

efficacy of strategic timing is often a fact and case intensive inquiry. However, I tend to prefer consistency, particularly for the sake of "repeat players." Buy-in from both parties, but particularly from the employer-defendant, tends to be difficult to obtain. A process that is sporadic and allows for manipulation of timing could be problematic. My concern regarding the inconsistency of timing and the potential to disincentive parties from seeking recourse in a particular venue has been confirmed in several interviews with plaintiff and defense attorneys. For example, in an interview with Ryan Hancock, plaintiff's counsel and former supervising attorney at the Pennsylvania Human Rights Commission (PHRC), he explained his preference for filing and mediating at the PHRC was in part linked to his knowledge of the procedures and processes at the Commission.

B. Mediator Qualifications/ Subject-Area Expertise

Each of the programs I analyzed sets forth different standards of qualifications and subject-area expertise for mediators. In some respects the varying degrees of qualification required of mediators is intrinsically tied to the conflict of evaluative and facilitative methods.[43] Scholars have noted that court-connected programs tend to prefer a model of mediation that tends towards evaluative and legalistic approaches.[44] This largely due to the fact that parties are often represented in this context and lawyers tend to "prefer mediators who can accurately evaluate the merits and value of the case, and [] can help them control unreasonable clients."[45]

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[43] Price *supra* note 15 at 174. "This trend toward mediators with subject matter expertise may well be linked to the debate between evaluative and facilitative practice. Mediators who are strongly evaluative require knowledge to support their evaluation. Likewise, litigants who prefer an evaluative approach may feel more comfortable if the mediator's practice as a litigator is or was relevant to the subject matter of the dispute." *Id.*

[44] Bingham et al, *Mediation in Employment and Creeping Legalism: Implications for Dispute Systems Design*, 2010 J. DISP. RESOL. 129, 138 (2010).

[45] *Id.* at 139. The article explains that the American Bar Association commissioned a task force on mediation quality to conduct a number of focus groups "seeking to gather perspectives on mediator quality in large stakes civil litigation." *Id.* The article further elaborates that the task force found that "lawyers prefer what amounts to legalism in court-connected mediation…[s]pecifically, eighty percent believed analytical input appropriate…ninety-five

Mediators' ability to make evaluations and offer opinions is often drawn from specific subject-area experience. While the debate continues to roar as to the extent of subject-area expertise that is preferable or necessary for employment mediation, the programs I studied articulated clear guidelines in preference of expertise.

The Southern District maintains strict requirements and high standards for both mediator quality and subject-area expertise. Originally, the employment mediation program did not require mediators to have specific subject-area competence, however, after receiving critiques from stakeholders "express[ing] an interest in a baseline level of qualification for employment mediators," the mediator requirements were altered.[46] Prior to 2012, the Court generally assigned mediators to cases based on considerations such as "availability, interests, and mediation style."[47] The program's process for selecting mediators to employment discrimination matters was initially in line with the Court's "long standing practice" of assigning mediators without regard to subject matter expertise.[48] Price explains that at the inception of the program, the "prevailing mindset" was that a strong mediator with developed process management skills could mediate any kind of case, however, in early 2013, the Court reconsidered the question of subject area expertise.[49]

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percent wanted the mediator to make suggestions and about seventy percent valued the mediator giving opinions." *Id.*

[46] Price *supra* note 15 at 172. In addition to the stakeholders' critiques, the Southern District also assessed participants and mediators feedback: "…many panel mediators also informally reported that they both preferred to mediate and felt more proficient when mediating disputes where they had substantive areas of knowledge." *Id.* at 174.
[47] *Id.*
[48] *Id.*
[49] *Id.*

In an effort to develop basic criteria for expertise in employment mediation, the Southern District assembled a team of employment law specialists.[50] In addition to its goal of streamlining standards, the Southern District has also designed trainings for currently empaneled mediators who did not meet the criteria set forth by the team of specialists.[51]

The Southern and Eastern District both set forth minimal standards for neutrals included on the roster of mediators, although as discussed above, the Southern District has recently further raised subject-area requirements in the context of employment mediation. In both courts mediators must have practiced law for at least five years, be admitted to practice in their respective districts, and complete a minimum of two days of mediation training either through the court training program or through a recognized ADR organization.[52] Separate of the baseline requirements of attorney practice and ADR training, the Eastern District has not articulated additional requirements of mediators. While the Eastern District provides litigants with a list of mediators within the realm of employment and employment discrimination subject-area, it does not specifically define any particular preferences in terms of expertise or experience within a particular subject matter.

The starkest contrast between the EEOC and the court-annexed programs is the requirement that mediators have both earned legal degrees and practiced law for a minimum of five years. Unlike the Southern and Eastern Districts, the EEOC maintains staff mediators as well as a roster of mediators.[53] The EEOC's staff and contract mediators are extensively trained

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[50] *Id.* at n.13. The team of specialists included members of the American Bar Association, Cornell Industrial and Labor Relations faculty, National Employment Lawyers Association, the New York Bar Association, and the New York Bar Association. *Id.*
[51] *Id.*
[52] FEDERAL JUDICIAL CENTER *supra* note 24.
[53] *Mediation Contact List*, Equal Employment Opportunity Commission, http://www.eeoc.gov/eeoc/mediation/contact.cfm (last visited Apr. 27, 2015).

in both mediation and the laws enforced by the EEOC, and while they are often trained attorneys, the EEOC does not require that volunteer or staff mediators be lawyers.[54] The lack of legal training as a requirement reflects a slant towards facilitative methods of mediation and the trend towards the "professional status of mediators."[55]

The tension between the EEOC's emphasis on mediator training as sufficient qualification versus the court-annexed programs' focus on legalistic employment law training suggests that there is a deep schism in the alternative dispute resolution community regarding mediator competency. While I think the creators and directors of the three programs can agree that the skills of a mediator, gained through extensive ADR experience are invaluable, there remains the question of the extent of subject-matter familiarity required in a mediator to effectively resolve an employment matter.

C. Attorney Participation

In the three models I have studied, lawyers tend to play an intrinsic role. Kovach astutely notes that "[b]ecause significant mediation use has been in the context of pending lawsuits, it is not surprising that lawyers have occupied a key role in the process."[56] This can often lend itself to problematic results. Kovach notes that problems arise when dealing with the question of

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[54] *Id.*

[55] Kimberlee K. Kovach, *The Vanishing Trial: Land Mine on the Mediation Landscape or Opportunity for Evolution: Ruminations on the Future of Mediation Practice*, 7 CARDOZO J. CONFLICT RESOL. 27, 51 (2005) ("As the use of mediation has increased, a trend to establish a professional status for mediators has evolved. If, as many mediators contend, a new profession has been created, then regulatory aspects of practice such as establishing and enforcing ethics, credentialing, and the existence of a complaint process are inevitable.").

[56] *Id.* at 53.

attorney participation because "[b]ehaviors are often quite different in mediation and litigation."[57] Kovach explains:

> When mediation joined with the legal system, the fact that the goals of each process were so different was not emphasized or even acknowledged. As a result, most lawyers and judges failed to appreciate these differences, and tried to blend the dissimilar processes into one familiar process. In many ways, the legal system has engulfed mediation, so much so that in some versions mediation and court-based settlement are hardly distinguishable.[58]

In the case of court-annexed programs, courts tend to mandate or refer cases to mediation but "stop short of setting a time certain or choosing the mediator," leaving broad discretion to attorneys in the process of selection and timing.[59] In contrast, the mediation process at the EEOC is handled in largely by the EEOC's mediators and while attorney presence is advisable, it is not necessary for parties in mediation.

Although the Southern District has historically only accepted cases for mediation in the context of employment discrimination on the basis that parties are represented, at the start of 2014, the Mediation Program expanded to explicitly include *pro se* parties.[60] During our interview, Price and I discussed at length the program's decision to accept *pro se* claims for mediation. She explained that this deviation from the origins of the attorney-driven program was inspired by a strong commitment to the expansion of remedies for unrepresented parties in light of mediation's various benefits. Ms. Price explained that currently the program receives about four hundred employment discrimination cases annually in which parties are represented. While these are automatically referred to the program under the mandated mediation requirement,

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[57] *Id.* at 54. "Even with the strong recommendations of civility in law practice as a practical matter, there is still little expectation of cooperation and collaboration when engaged in the adversarial arena." *Id.*
[58] *Id.*
[59] *Id.* at 58.
[60] Price *supra* note 15 at 177. "At the start of 2014 the Mediation Program of the Southern District of New York promulgated a new Local Civil Rule 83.9 and Procedures of the Mediation Program." (in order to set forth more uniform goals and standards for mediators). *Id.* "The expansion to explicitly include pro se parties is directly related to an identified benefit of mediation; increased experience of procedural justice." *Id.*

approximately one hundred and forty additional cases involving employment discrimination are not referred to the program because one or both parties are unrepresented. The Southern District partnered with Seton Hall University in 2011 and began providing clinical law student advocates to *pro se* parties for the purpose of mediation. While this initiative represents the Court's pledge to expand alternative dispute resolution to all parties, it also suggests a deep-seated commitment to the notion of representation and advocacy in the process of mediation.

Both the Southern and Eastern Districts rely on representation in order to structure mediation. In both courts, attorneys are expected to submit detailed pre-hearing mediation statements.[61] The Eastern District instructs parties to submit in advance of the mediation written statements that include exhibits and an outline of key facts and legal issues in the case.[62] The statements often set the tone for mediation and suggest that the process will be legally-oriented. Attorneys are well-aware of the significance of pre-mediation statements and often consider the efficacy of a strong summary of records or explanation of dense legal issues.[63] This attorney-centric approach is in some ways problematic because it fails to allow room for discussion of intangible issues and concerns.

In contrast, the EEOC tends to counsel parties anticipating mediation that representation is optional and not particularly essential.[64] While the emphasis in the Southern and Eastern Districts' communications with parties tends to revolve around the attorney's participation, the

[61] FEDERAL JUDICIAL CENTER *supra* note 24.
[62] *Instructions to the Mediator, ,* UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, *available at* https://img.nyed.uscourts.gov/files/forms/dearMediatorfnl.pdf
[63] Reeves *supra* note 31. Reeves counsels attorneys approaching mediation that "[b]ecause of the large number of factual disputes as well as the large amount of documentation that seem to surround these types of claims, it is important to provide thorough pre-mediation statements to mediators…If there are unusual legal issues that are going to be raised, it is a good idea to provide a brief summary of those issues to the mediator and to provide the mediator with copies of the relevant cases." *Id.*
[64] EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *supra* note 40.

EEOC articulates no preference for attorney presence. The EEOC merely advises that parties with decision-making authority should be present.[65] Further, the EEOC cautions that while a party *may* bring an attorney to the mediation, a mediator has the discretion to ask that the attorney "not speak for the party."[66] This approach represents a more party-centric method consistent with the EEOC's purposeful decision to not require mediators to have legal formal training. Despite the EEOC's neutral approach towards attorney participation, parties often feel inclined to seek representation for the purposes of mediation. The use of counsel at EEOC mediations has become so commonplace that in many cases unrepresented parties are at a disadvantage.[67]

In my own efforts to develop an employment mediation program I struggle with the question of degree of attorney participation. While in many cases attorneys add value to the negotiation and offer hesitant parties meaningful advice, counsel can also at times be a bulwark to resolution. The Southern and Eastern Districts' presumption of attorney presence and participation is problematic given the difficulty low and middle-income parties may have in obtaining counsel. While the Southern District is slowly accepting more *pro se* matters through its partnered advocacy program with Seton Hall University, there remains a large pool of would-be complainants stifled by their inability to access the court system in the first place.

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[65] *Id.*
[66] *Id.*
[67] The use of counsel at EEOC mediations has become so prevalent that there exists a wealth of information available to attorneys seeking advice in serving as counsel for the purpose of participation in an EEOC mediation. *See generally* Robert E. Talbot, *A Practical Guide to Representing Parties in EEOC Mediations*, 37 U.S.F. L. REV. 627 (2003); *see also* Marilynn Mika Spencer, *Do I Need an Attorney for an EEOC Mediation?*, AVVO, http://www.avvo.com/legal-guides/ugc/do-i-need-an-attorney-for-an-eeoc-mediation (last visited Apr. 29, 2015) (advising parties to obtain counsel for the purposes of mediating at the EEOC, stating that "[i]n nearly every case, yes, you need your own attorney. The EEOC is not your representative. A mediator for the Equal Employment Opportunity Commission (EEOC) has one client - the United States of America. Some EEOC mediators are great and will do their best to protect you rights even though they are not your advocate. Some EEOC mediators stink and care more about closing the case than they than they care about your rights.").

IV. Conclusion

While the various challenges of developing a free-standing employment mediation program exceed the capacity of this paper's analysis, I have studied the key components of New York City's main employment mediation venues in order to better understand the lingering needs of parties confronted with this landscape. While the Eastern District offers flexibility, it remains underdeveloped for parties in need of a more extensive intervention. Further, it is largely inaccessible to *pro se* parties and those unable to navigate the dense labyrinth that is the federal court system. In contrast, the Southern District has developed a flourishing program that seeks to further enhance the accessibility of remedies to charging parties. However, the program's growing emphasis on subject-matter expertise may trap parties in an evaluative quasi-arbitration environment despite interests in a more holistic resolution. While the EEOC avoids some of the pitfalls of legal formality that accompany the court-annexed programs, the increasingly *de facto* nature of attorney participation, particularly for defendants, imposes on unrepresented parties an unfair disadvantage.

Ideally, I seek fill the gap in representation by developing a program that offers parties free or low-cost mediation in the context of their employment grievances (not limited by the legal boundaries of Title VII, the ADA, and the ADEA). This may be best accomplished via the participation of mediation advocates throughout the course of mediation. Borrowing from the New York Legal Assistance Group's existing divorce mediation model, NYLAG will arrange

limited scope representation for charging parties for the purposes of mediation. Through access to a network of attorneys in the private bar and advocates currently employed in NYLAG's employment law division, I will ensure that volunteer advocates serve as representatives to plaintiffs who would otherwise be unrepresented at the EEOC, Southern, or Eastern Districts. In exchange for advocates' commitment of ten to fifteen hours to assist in preparation before the mediation, participation during the mediation, and assistance in completing any final documents, advocates will have the opportunity to later co-mediate a different matter with me. This rotating model has proven successful in the context of divorce mediation at NYLAG and I am eager to employ it to resolve workplace disputes. While this model is certainly not the silver bullet envisioned to remedy the lack of alternative dispute venues and representation for parties seeking remedies for workplace-related disputes, it has been designed with an eye towards the existing gaps in options for workers in New York City.