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A Business Alternative: Changing Employers' Perception of the EEOC Mediation Program

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I. INTRODUCTION

The United States Equal Opportunity Employment Commission (EEOC) operates a mediation program that employers and employees voluntarily enter to resolve a charge of discrimination.[1] Specifically, EEOC mediators help parties agree to a mutually acceptable resolution.[2] The mediation is free for the participating parties, and any information disclosed during the mediation process is confidential.[3] Information disclosed during the mediation will not be revealed to anyone outside of the mediation, even the investigative or litigative staff of the EEOC.[4] If the employer and employee do not resolve the dispute in mediation, "the charge is investigated [by the EEOC] like any other charge."[5] However, although the EEOC guarantees complete impartiality, employers may still be weary of mediating with the EEOC because the regulatory agency is designed to eliminate discrimination, usually by litigating charges against the perpetrating employer. Transitively, this perception of the EEOC may dissuade employers from participating in the EEOC Mediation Program.

This paper will reveal employers' perception of the EEOC Mediation Program and offer viable changes that may encourage more employer participation in the mediation program. Although the mediation program is supposed to be fair and neutral,[6] the possibility of favoritism, bias, prejudice, or the perception thereof remains high because of the mediation program's structure. If the EEOC were to make changes to its program that also creates

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1. *Facts About Mediation*, EEOC, http://www.eeoc.gov/eeoc/mediation/facts.cfm (last visited Nov. 1, 2014).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Facts About Mediation*, *supra* note 1 ("Parties have an equal say in the process and decide settlement terms, not the mediator. There is no determination of guilt or innocence in the process.").

a perception of impartiality, then employers would be more willing to participate. To demonstrate this, Part II of this article will begin by discussing the history of the EEOC from its initiating mandate to its current form. Then, Part III will cover EEOC mediation by explaining how the process works and its limitations. Part IV will display statistics concerning the mediation program's work volume and resolution rates, and Part V will discuss reasons why employer participation in the mediation program is so low. Part VI of this article will then discuss the components needed to facilitate a fair and impartial mediation, and whether or not the current EEOC Mediation Program possesses those components. Lastly, Part VII will provide a feasible solution that could eradicate any impropriety, or perception of impropriety, in EEOC mediations.

II. HISTORY

In response to the increase of discrimination in the workplace during the Twentieth Century, President Lyndon B. Johnson signed the Civil Rights Act of 1964 into effect.[7] Specifically, this statute made it illegal for employers to discriminate against prospective and current employees on the basis of their race, color, religion, sex, or national origin.[8] Through the mandate of Title VII of the Civil Rights Act of 1964, the EEOC was established on July 2, 1965[9] to investigate and enforce the provisions of the Civil Rights Act of 1964,[10] codified as 42 U.S.C. § 2000e-2. The EEOC can investigate charges of discrimination against employers and file complaints against the employer if there is a finding of discrimination.[11]

The initial expectation was that the EEOC would be able to promptly investigate and voluntarily resolve a large number of disputes.[12] However, the EEOC could not resolve charges as quickly as they were filed. By June 1972, there were 53,000 backlogged charges, and by 1977 there were 130,000 unprocessed charges.[13] As such, the mediation program was introduced to reduce the number of backlogged cases through facilitating settlement. To facilitate settlements, the EEOC implemented mediation pilot programs in several offices in 1991. By 1999, the mediation program was

7. Jacqueline A. Berrien, *Statement on 50th Anniversary of the Civil Rights Act of 1964*, EEOC (July 2, 2014), http://www.eeoc.gov/eeoc/history/cra50th/index.cfm.

8. 42 U.S.C. § 2000e-2(a)(1) (1964).

9. Berrien, *supra* note 7.

10. *Overview*, EEOC, http://www.eeoc.gov/eeoc/index.cfm (last visited Oct. 18, 2014).

11. *Id.*

12. HENRY S. KRAMER, ALTERNATIVE DISPUTE RESOLUTION IN THE WORK PLACE 5-86 (2004).

13. E. PATRICK MCDERMOTT ET AL., EEOC, Order No. 9/0900/7632/2, AN EVALUATION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION MEDIATION PROGRAM § IV(B) (2000), http://www.eeoc.gov/eeoc/mediation/report/chapter4.html#IV.D.

fully funded and implemented in every district office.[14] Now, the EEOC can offer mediation soon after a charge is filed, or the parties can request mediation at any stage of the process.[15] Logistically, the EEOC's mediation program uses internal mediators employed by the EEOC, external contracted mediators, or pro bono mediators.[16]

III. EEOC MEDIATION PROCESS

Anyone who believes that he or she, or someone he or she knows was discriminated on the basis of race, religion, sex, national origin, age, disability, or genetic information can file a charge of discrimination with the EEOC.[17] In fact, if someone wants to file a discrimination lawsuit against his or her employer under a law enforced by the EEOC, then he or she is required by law to file a charge with the EEOC before filing a complaint in a court of law against the employer.[18] Once a charge of discrimination is filed, the charging party may elect to enter mediation. Only charges that have possible merit subject to the results of an investigation are eligible for mediation.[19] If the matter is not mediated or is not resolved at mediation, an investigator will look into the charge.[20]

An investigation of a charge usually involves interviews of witnesses and requests for documents.[21] The EEOC can also issue an administrative subpoena to uncooperative employers to obtain documents, interviews, or access to facilities.[22] If the EEOC does not find a violation of the law, the EEOC will send the charging party a notice of right to sue, which gives the charging party permission to file a complaint in a state or federal court.[23] If the EEOC finds a violation of law, the EEOC will try to voluntarily settle the matter with the employer; however, if settlement cannot be reached, the

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14. *History of the EEOC Mediation Program*, EEOC, http://www.eeoc.gov/eeoc/mediation/history.cfm (last visited Jan. 19, 2016).

15. *Id.*

16. *Id.*

17. *Filing a Charge of Discrimination*, EEOC, http://www.eeoc.gov/employees/charge.cfm (last visited Dec. 15, 2014).

18. *Id. See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e); The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623; Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101.

19. Kramer, *supra* note 12, at 5-86.

20. *Filing a Charge of Discrimination*, *supra* note 17.

21. *The Charge Handling Process*, EEOC, http://www.eeoc.gov/employees/process.cfm (last visited Dec. 15, 2014).

22. *Id.*

23. *Id.*

EEOC will consider filing a complaint against the employer.[24] If the EEOC decides not to file a complaint against the employer, the EEOC will issue a notice of right to sue to the charging party, so the charging party can file a complaint against the employer.[25]

The mediation process usually begins soon after a charge is filed, if the parties agree to mediate the issue.[26] However, mediation can be requested at any time during the dispute resolution process.[27] The EEOC employs a staff of trained mediators or contracts external mediators to conduct the EEOC mediations.[28] The EEOC claims that the mediations are confidential because all parties, including the mediator, sign a confidentiality agreement, all notes are destroyed, and the mediation program itself is sheltered from the investigatory and litigative branches.[29] If the issue is not resolved in mediation, information revealed during the mediation cannot be communicated to the other branches of the EEOC.

IV. EEOC MEDIATION STATISTICS

The EEOC reports that in 2003, it received 81,293 charges of discrimination by employees.[30] The EEOC conducted 11,595 mediations in its mediation program,[31] which means that only 14.3% of the charges filed went to mediation. The EEOC resolved 7,990 of those disputes, with a resolution rate of 68.9%.[32] In 2013, the EEOC received 93,727 charges of discrimination.[33] During the same year, the EEOC conducted 11,513 mediations in the program;[34] thus, only 12.3% of the charges went to mediation. The EEOC resolved 8,890 of those disputes with a resolution rate of 77.2%.[35] Throughout the ten-year period from 2003 to 2013, the EEOC received 976,400 charges of discrimination.[36] Of those charges filed,

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24. *Id.*

25. *Id.*

26. *Mediation*, EEOC, http://www.eeoc.gov/employees/mediation.cfm (last visited Dec. 15, 2014).

27. *History of the EEOC Mediation Program*, supra note 14.

28. *Questions and Answers About Mediation*, EEOC, http://www.eeoc.gov/eeoc/mediation/qanda.cfm (last visited Dec. 15, 2014).

29. *Id.*

30. *Charge Statistics FY 1997 through FY 2013*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Dec. 19, 2014) [hereinafter *Charge Statistics*].

31. *EEOC Mediation Statistics FY 1999 through FY 2014*, EEOC, http://www.eeoc.gov/eeoc/mediation/mediation_stats.cfm (last visited Dec. 19, 2014) [hereinafter *Mediation Statistics*].

32. *Id.*

33. *Charge Statistics*, *supra* note 30.

34. *Mediation Statistics*, *supra* note 31.

35. *Id.*

36. *Charge Statistics*, *supra* note 30.

the EEOC conducted 130,393 mediations through the mediation program,[37] which means that 13.4% of the charges went to mediation. The EEOC resolved 94,962 of those mediations, with an average resolution rate of 72.8% over the ten years from 2003 to 2013.[38]

V. WHY ONLY A SMALL PERCENTAGE OF CHARGES ENTER MEDIATION

There are likely many different factors that contribute to an employer's decision not to participate in the EEOC mediation program. Firstly, not all charges are eligible to go to mediation; "[t]he EEOC evaluates each charge to determine whether it is appropriate for mediation considering such factors as the nature of the case, the relationship of the parties, the size and complexity of the case, and the relief sought by the charging party."[39] The mediation program targets "B Cases," or in other words, cases in which charges have possible merit subject to the result of the investigation.[40] This alone, may significantly lower the percentage of charges that go to mediation.

Another factor that may affect whether an employer elects to participate in mediation is the merits of the charges pressed against them. In 2003, the EEOC released a report that captures some reasons employers decline to participate in EEOC mediation by listing close-ended sentiments, to which employers were asked to select all that applied.[41] Of the 629 participating employers, 93.8% stated that the "[m]erits of the case do no warrant mediation."[42] The second highest response to the survey, with 57.4% of employers selecting this as a reason for declining mediation, is a very similar statement: "[t]he low likelihood of the EEOC issuance of a 'Reasonable Cause' determination in this investigation."[43] The third highest response, with 50.2% of employers stating that the "[b]elief that the EEOC mediation program requires monetary settlement and unwillingness to offer any money in this case," was reason enough to decline mediation.[44] The top two responses to the survey relate to an employer believing that the claim has no

37. *Mediation Statistics*, *supra* note 31.
38. *Id.*
39. *Questions and Answers About Mediation*, *supra* note 28.
40. KRAMER, *supra* note 12, at 5-86.
41. E. PATRICK MCDERMOTT ET AL., EEOC, AN INVESTIGATION OF THE REASONS FOR THE LACK OF EMPLOYER PARTICIPATION IN THE EEOC MEDIATION PROGRAM § IV(D) (2003), http://www.eeoc.gov/eeoc/mediation/report/study3/chapter4.html (last modified Dec. 2, 2003).
42. *Id.*
43. *Id.*
44. *Id.*

merit. Thus, if the case has no merit, the employer likely believes that he or she can prevail at trial, and therefore, does not want to enter mediation despite the cost of litigation.

Interestingly enough, in its survey the EEOC never places as an option the belief that EEOC mediation is not impartial. In a 2013 survey conducted by EEO Legal Solutions, out of 604 participants, "73.19% (303) of practitioners reported that an EEOC mediator had stated or implied that the EEOC's Enforcement Unit could issue a Determination of Reasonable Cause."[45] Furthermore, the survey revealed "61.55% (259) of practitioners reported that an EEOC mediator had stated or implied that the EEOC could launch a 'systemic' or 'class' investigation if the employer did not settle in ADR."[46] Lastly, 68.67% "of practitioners reported that an EEOC mediator stated or implied that the EEOC may litigate the charge if not resolved at mediation."[47] Of the various interpretations these surveys may offer, the results strongly imply that employers are reluctant to participate in the EEOC Mediation Program because employers believe that mediators will not be impartial.

VI. COMPONENTS OF AN IMPARTIAL MEDIATION

Mediation is a form of Alternative Dispute Resolution where an impartial third party facilitates discussions to help parties in conflict reach a voluntary settlement.[48] A mediator can help "clarify the issues, consider options, and reach a workable settlement that fits their needs."[49] "Mediators come from many walks of life; they may be attorneys, therapists, counselors, or employees of administrative agencies."[50] To facilitate a fair and effective mediation, mediators must be impartial. There are three key components to a fair and successful mediation: (1) neutrality of the mediator; (2) confidentiality of information; and (3) voluntariness on the part of the mediating parties. If mediation has all three components, then it is likely that the mediation is impartial and fair to all parties involved.

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45. *UPDATE: EEOC Enforcement/Litigation Statistics Belie Common Statements EEOC Mediators Make*, EEO LEGAL SOLUTIONS (Dec. 2, 2013), http://eeolegalsolutions.com/behind-closed-doors-what-eeoc-mediators-say-to-make-employers-pay/ [*Statements EEOC Mediators Make*].

46. *Id.*

47. *Id.*

48. *How Courts Work*, AM. BAR ASS'N, http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/mediation_whatis.html (last visited Dec. 29, 2014).

49. *Id.*

50. Michelle D. Gaines, *Notes & Comment: A Proposed Conflict of Interest Rule for Attorney-Mediators*, 73 WASH. L. REV. 699, 701 (1998).

A. Neutrality of the Mediator

Neutrality can take two forms: internally-perceived neutrality and externally perceived neutrality.[51] Internally-perceived neutrality requires that "mediators be free of bias toward the parties, the parties' interests, or the substantive outcome of the mediation."[52] Therefore, a mediator should recuse him or herself as a mediator if he or she cannot set aside emotions or memories of a past experience. For example, a mediator should recuse him herself while he or she is mediating a sexual harassment if he or she had been a victim of sexual harassment in the past. The mediator will likely have a bias, and therefore, cannot impartially facilitate a settlement discussion. Also, a mediator that has interest in the outcome of the litigation may pose the biggest threat to a fair mediation. For instance, "if a mediator operates in an environment in which she is evaluated based on settlement rates, there is a potential conflict of interest between the mediator's interest in resolving the case and the parties' interest in settling the case."[53] A mediator with an interest in the outcome of the mediation may consciously work toward a particular resolution. A mediator must have internally-perceived neutrality in order to facilitate a fair mediation.

The second form in which neutrality can take is externally-perceived neutrality. This form of neutrality is crucial because without it, parties may not buy into the mediation, resulting in an unsuccessful mediation. Thus, "the integrity of the mediation process also requires that the parties perceive the mediator as unbiased."[54] If the parties view the mediator as impartial, it "enables the parties to collaborate and share information with the mediator and other parties, protects mediation agreements from subsequent challenges, and helps prevent abuse of the process. In addition, an appearance of impartiality promotes public confidence in the fairness of the process."[55] A mediator may believe that he or she is neutral; however, if a mediating party believes that the mediator is not neutral, that party may be reluctant to continue mediation or to accept any settlement offers. Therefore, it is crucial to the fairness and success of the mediation that the mediator take efforts to appear neutral.

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51. Jaime Henikoff & Michael Moffitt, *Practitioner's Corner: Remodeling the Model Standards of Conduct for Mediators*, 2 HARV. NEGOT. L. REV. 87, 101 (1997).

52. *Id.*

53. *Id.*

54. *Id.*

55. Gaines, *supra* note 50, at 702-03 (citing Poly Software Int'l, Inc. v. Su, 880 F. Supp. 1487, 1494 (D. Utah 1995); McEnany v. West Delaware County Community Sch. Dist., 844 F. Supp. 523, 532 (N.D. Iowa 1994)).

B. *Confidentiality*

Maintaining confidentiality is another component of facilitating a fair mediation. Mediators will likely learn confidential information in the process of mediation; therefore, to encourage meaningful disclosure, mediators have a duty to keep everything discussed in mediations confidential. This duty is recognized under contract theory, evidence theory, and common law.[56] Almost all jurisdictions recognize the importance of mediation communication and protect the confidential information to some degree.[57] Furthermore, nearly half of the jurisdictions have "statutes or provisions with confidentiality protections that apply to mediation generally."[58] Just as the attorney-client "privilege enhances candid communication by building on an existing foundation of trust that is inherent in a consultation with an advisor,"[59] the confidentiality of mediation encourages effective communications between conflicting parties and the mediator.

C. *Voluntariness of the Mediation and Settlement*

The last component to a fair and successful mediation is voluntariness or self-determination of the mediating parties. For the most part, conflicting parties must voluntarily decide to enter into mediation. Furthermore, the mediating "parties must fully understand that the process is voluntary and that they have the right to create, propose, evaluate, accept, or reject any possible solutions."[60] Any loss of control or perceived loss of control may result in an unfair mediation.

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56. *Id.* at 703-04.

57. Ellen, E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33, 39 (2001).

58. *Id. See e.g.*, Ariz. Rev. Stat. Ann. 12-2238 (West 1994); Ark. Code Ann. 16-7-206 (Michie 1999); Cal. Evid. Code 1115-1128; Iowa Code Ann. 679C.1-679C.5 (West Supp. 2000); Kan. Stat. Ann. 60-452a (Supp. 1999); La. Rev. Stat. Ann. 9:4112 (West Supp. 2001); Mass. Gen. Laws Ann. ch. 233, 23C (West, LEXIS through 2000 Sess.); Me. R. Evid. 408; Minn. Stat. Ann. 595.02(1a) (West 2000); Mo. Ann. Stat. 435.014 (West 1992); Mont. Code Ann. 26-1-813 (1999); Neb. Rev. Stat. 25-2901 to 25-2920 (1995); Nev. Rev. Stat. Ann. 48.109 (Michie 1996); N.J. Stat. Ann. 2A:23A-9(c) (West 2000); N.D. Cent. Code 31-04-11 (1997); Ohio Rev. Code Ann. 2317.023 (Anderson 1998); Okla. Stat. Ann. tit. 12, 1801-1813 (West 1993 & Supp. 2001); Or. Rev. Stat. 36.100-36.245 (1999); 42 Pa. Cons. Stat. Ann. 5949 (West 2000); R.I. Gen. Laws 9-19-44 (1997); S.D. Codified Laws 19-13-32 (Michie Supp. 2000); Tex. Civ. Prac. & Rem. Code Ann. 154.001-154.073 (Vernon 1997 & Supp. 2001);Va. Code Ann. 8.01-581.21 to 8.01-581.23 (Michie, LEXIS through 2000 Sess.); Wash. Rev. Code Ann. 5.60.070 (West 1995); Wis. Stat. Ann. 904.085 (West 2000); Wyo. Stat. Ann. 1-43-101 to 1-43-104 (Michie, LEXIS through 2000 Sess.).

59. Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. DISP. RESOL. 239, 245 (2002).

60. Henikoff & Moffitt, *supra* note 51, at 102.

One way a party may lose control of mediation is through inappropriate influence exerted by the mediator.[61] If the mediator is attempting to secure a particular resolution, the mediator is taking control away from the mediating parties and, thus, the mediation is less likely to be voluntary. This concept dove-tails with the externally-perceived neutrality because a mediator who does not act as a neutral third party takes control away from the mediating parties and exerts an appearance of bias. Therefore, to avoid this result, mediators should refrain from intentionally or unintentionally exerting an inappropriate influence that may pressure a party from accepting an agreement or continuing in mediation where the party would not have otherwise. Mediating parties should have complete uninfluenced control over their decision to continue mediation, and to accept or reject a settlement.

D. Is the EEOC Mediation Program Impartial?

To determine if the EEOC Mediation Program is impartial, the program's internally-perceived neutrality, externally-perceived neutrality, confidentiality policy, and the parties' self-determination will be analyzed. The EEOC claims that its mediation program is fair and neutral because the "[p]arties have an equal say in the process and decide the settlement terms. There is no determination of innocence or guilt in the process."[62] This claim, however, does not address the components of a fair mediation as listed above. The three component litmus test for an impartial mediation will be applied to the EEOC mediation program, beginning with neutrality. Because of the confidentiality of most mediations, the analysis will be limited to raw statistical data and opinions from surveys.

1. The Neutrality of the EEOC Mediation Program

To be an impartial program, the EEOC Mediation Program must have internally-perceived neutrality and externally-perceived neutrality. The former will be analyzed first; internally-perceived neutrality requires that "mediators be free of bias toward the parties, the parties' interests, or the substantive outcome of the mediation."[63] The EEOC's Alternative Dispute Resolution Policy Statement sheds light on the internally-perceived neutrality of the mediation program:

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61. *Id.* at 103.
62. *Facts About Mediation*, *supra* note 1.
63. Henikoff & Moffitt, *supra* note 51, at 101.

> Commission ADR proceedings will rely on a neutral third party to facilitate resolution of the dispute. ADR proceedings are most successful where a neutral or impartial third party, with no vested interest in the outcome of a dispute, allows the parties themselves to attempt to resolve their dispute. Neutrality will help maintain the integrity and effectiveness of the ADR program.
>
> The facilitator's duty to the parties is to be neutral, honest, and to act in good faith. Those who act as neutrals under EEOC auspices should possess a thorough knowledge of EEO law and must be trained in mediation theory and techniques.[64]

From this policy statement, it is clear that the EEOC, in theory, intended for the mediation program to be internally-perceived as neutral. The EEOC hires only mediators with sufficient training as is generally recognized in the dispute resolution profession.[65] Furthermore, these mediators are expected to have no interest in the outcome of a dispute. The EEOC's Mediation Program uses internal mediators employed by the EEOC, external contracted mediators, or pro bono mediators.[66] Can mediators employed by the EEOC or contracted by the EEOC be internally-perceived as neutral? Those mediators are paid by an agency whose mission is to eradicate discrimination in the workplace. Moreover, the EEOC takes pride in the resolution rates of their mediation program. For instance, on its History of the Program page, the EEOC states, "From 1999 through 2010, almost 136,000 mediations have been held and over 94,000 charges or almost 70 % have been successfully resolved."[67] Since the EEOC boasts about its resolution rates, would it be a stretch to argue that behind closed doors, the EEOC encourages mediators to pressure parties into settlement? Without evidence, these are merely questions, and it should be presumed that the EEOC does in fact have internally-perceived neutrality. However, these questions greatly impact the externally-perceived neutrality of the program.

To have a fair and successful mediation, it is not enough for the mediator to be neutral. The mediating parties must also perceive the mediator to be neutral. If a party does not perceive the mediator as neutral, then the party may not participate in mediation or may be unwilling to confide in the mediator or agree to a settlement. According to the EEOC's ADR Policy Statement, their mediators have a duty to be neutral, honest, and

64. *EEOC's Alternative Dispute Resolution Policy Statement*, EEOC, (July 17, 1995), http://www.eeoc.gov/policy/docs/adrstatement.html#N_3_ [hereinafter *ADR Policy Statement*].

65. *Id.*

66. *History of the EEOC Mediation Program*, *supra* note 14.

67. *Id.*

act in good faith.[68] Therefore, in theory, EEOC mediators should have externally-perceived neutrality. In practice, however, participants to EEOC mediation have reported a different outcome. An EEO Legal Solutions survey yielded 604 responses, some of which may portray EEOC mediators as biased.[69] For example, the survey revealed that "[o]ver 80% (82.13%, 340) of practitioners reported that their EEOC mediator referenced the cost of defense as a reason to resolve the EEOC charge."[70] An employer may perceive the mediator as hostile or adversarial after such a statement, and if the employer does, the fairness of the mediation and the benefit of a mediator are lost. The context of this statement is important because if the parties asked for such evaluative information, then the statement itself is not improper. Without such a request however, referencing the cost of litigation may be crossing the line of internal and external neutrality. When over 80% of employers respond that EEOC mediators made such a statement, it is likely that some of the statements were made inappropriately.

The EEO Legal Solutions Survey also reported that mediators alluded to the employer losing in litigation of the parties did not settle in mediation.[71] For instance, participants of EEOC mediations have reported that the mediators made statements such as "juries dislike employers," or "the jury won't like [us]," or "a judge will not grant summary judgment."[72] Again, depending on the tone and context of these statements, all of them can be seen as statements of intimidation. The mediator may merely be reality testing, which the employer must take into consideration. Seeing as roughly 50% of the survey participants responded that the mediator made such a statement, it is likely that at least some of the employers perceived the mediator as biased following the statement.

Since the EEOC Mediation Program is falls within the operations of the regulatory agency, the EEOC, to ensure externally-perceived neutrality, the mediation program must be completely sheltered from the investigatory and litigative branches of the EEOC. To ensure separation, in theory, information disclosed during the mediation will not be revealed to anyone outside of the mediation, even the investigative or litigative staff of the EEOC.[73] Employers' perception, however, may be that such division is merely superficial. For example, in the EEO Legal Solutions survey,

68. *ADR Policy Statement*, *supra* note 64.
69. *Statements EEOC Mediators Make*, *supra* note 45.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Facts About Mediation*, *supra* note 1.

"[n]early 70% (68.67%, 287) of practitioners reported that an EEOC mediator stated or implied that the EEOC may litigate the charge if not resolved at mediation."[74] This statement may be perceived as a threat to employers. Without asking the mediator about the chances of EEOC filing a complaint, this is an inappropriate statement because the mediation program is supposed to be segregated from the other branches of the EEOC. A mediator does not know what an investigation will reveal, nor does the mediator know if the EEOC would litigate the charge. With 68.67% of participants responding that a mediator has made a statement similar to this, it is clear that the mediation program does not have externally-perceived neutrality.

A neutral mediation requires both internally-perceived neutrality and externally-perceived neutrality. The EEOC Mediation Program likely has internally-perceived neutrality but lacks externally-perceived neutrality. As a result, employers likely believe to some extent that mediators in the EEOC mediation are not completely impartial. This may be one of many reasons why employer participation in the EEOC Mediation Program is so low.

2. Confidentiality of the EEOC Mediation Program

An effective mediation requires confidentiality because mediating parties need to communicate honestly and candidly in order to reach the most mutually beneficial settlement. The EEOC ADR Policy Statement reads as follows:

> Maintaining confidentiality is an important component of any successful ADR program. Subject to the limited exceptions imposed by statute or regulation, confidentiality in any ADR proceeding must be maintained by the parties, EEOC employees who are involved in the ADR proceeding, and any outside neutral or other ADR staff. This will enable parties to ADR proceedings to be forthcoming and candid, without fear that frank statements may later be used against them. To accomplish this purpose, the Commission will be guided by the nondisclosure provisions of Title VII and the confidentiality provisions of ADRA, which impose limitations on the disclosure of information. In order to encourage participation in a Commission sponsored ADR program, the Commission will include confidentiality provisions in all of its ADR programs or projects, and will

74. *Statements EEOC Mediators Make*, *supra* note 45.

> notify the parties to the dispute of the protection offered by confidentiality provisions.
>
> In order to ensure confidentiality, those who serve as neutrals for the Commission should be precluded from performing any investigatory or enforcement function related to charges with which they may have have [sic] been involved. The dispute resolution process must be insulated from the investigative and compliance process.[75]

Theoretically, it appears that the EEOC Mediation Program is in fact confidential because of the insulation from the investigatory and enforcement branches, as well as two non-disclosure provisions of Title VII and ADRA. Once again, however, it is likely the employer's perception of EEOC mediators that they may disclose to members of the other branches, intentionally or unintentionally.

This perception may have spread around by word of mouth from employers who had bad experiences with EEOC mediators. For instance, in the EEO Legal Solutions survey, "61.55% (259) of practitioners reported that an EEOC mediator had stated or implied that the EEOC could launch a 'systemic' or 'class' investigation if the employer did not settle in ADR."[76] This statement needs to be taken in context; however, with 61% of survey participants reporting such a statement, it is likely that at least some of those statements were posed as a threat, rather than a reality test. No matter the context, without skillfully phrasing the statement, the mediator loses his or her externally-perceived neutrality. Moreover, after a perceived threat, the employer may fear disclosure of his or her communications to the other branches of the EEOC by the mediator. Although it is quite unlikely that mediators would break the law and disclose such confidential information, employers nonetheless, who have this perception are less likely to participate in the EEOC Mediation Program.

3. Voluntariness of EEOC Mediation

The final component of a fair and effective mediation is the voluntariness of the mediation. Mediating parties must be able to decide whether or not to participate in the mediation, and to accept or reject a

75. *ADR Policy Statement*, *supra* note 64.
76. *Statements EEOC Mediators Make*, *supra* note 45.

proposed settlement agreement. The EEOC ADR Policy Statement addresses the voluntariness of the mediation program:

> ADR programs developed by the Commission will be voluntary for the parties because the unique importance of the laws against employment discrimination requires that a federal forum always be available to an aggrieved individual. The Commission believes that parties must knowingly, willingly and voluntarily enter into an ADR proceeding. Likewise, the parties have the right to voluntarily opt out of a proceeding at any point prior to resolution for any reason, including the exercise of their right to file a lawsuit in federal district court. In no circumstances will a party be coerced into accepting the other party's offer to resolve a dispute. If the parties reach an agreement, the parties will be allowed to settle as long as the proposed agreement is lawful, enforceable, and both parties are informed of their rights and remedies under the applicable statutes.[77]

Again, the EEOC addresses the key principles of this component in its ADR Policy Statement. Both parties may elect to enter the EEOC Mediation Program or elect to opt out of the mediation program[78]. Furthermore, the mediator has the duty to refrain from inappropriately influencing a party's decision to accept or reject the terms of a settlement agreement. This includes coercing parties to settle.

The issue is that the mediator works for or is contracted by the same agency that will conduct an investigation into the matter if it is not settled in mediation.[79] While entering the mediation program, the parties already know that the charge will be investigated if not settled; therefore, it can be seen as a form of coercion if the mediator uses the likelihood of litigation as means to influence a party's decision to settle. The EEO Legal Solutions survey reports that

73.19% (303) of practitioners reported that an EEOC mediator had stated or implied that the EEOC's Enforcement Unit could issue a Determination of Reasonable Cause. After a Determination of Reasonable Cause, the EEOC initiates the "conciliation process," a settlement conversation in which the EEOC may also impose its standard trinity of injunctive relief: training, posting, and reporting.[80]

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77. *ADR Policy Statement*, *supra* note 64.
78. *Id.*
79. *Filing a Charge of Discrimination*, *supra* note 17.
80. *Statements EEOC Mediators Make*, *supra* note 45.

The manner in which the likelihood of finding a reasonable cause determination is stated is important. A mediator can be seen as threatening if the employer is told in an aggressive manner, while a mediator may remain impartial if this statement is qualified as a reality test. Because of the confidentiality of mediations, it is unknown whether the settlements were coerced or not, but from survey responses, there seems to be a perception of coercion.

4. Verdict: A perception of Bias

To be an impartial mediation program, each mediation must have internally-perceived neutrality, externally-perceived neutrality, confidentiality, and voluntariness. Although the EEOC Mediation Program may be internally perceived as neutral, confidential and voluntary, there is a perception amongst employers that the EEOC Mediation Program is or has the potential to be biased. The fear of disclosure or even coercion is something that may prevent employers from participating in the program. This fear was not addressed in any of the EEOC research studies, but may be a reason as to why there is only an average of 13.4% of charges went to mediation from 2003-2013. All of the statements recorded in the EEO Legal Solutions survey related to some sort of bias or perception of such. Therefore, it is not necessarily that the EEOC mediators are biased, but employers perceive the program as a whole as biased.

VII. PROPOSED SOLUTION

To reach a fair resolution, a mediator needs to be a neutral party.[81] The opportunity for bias based on funding and employment ties are a real concern for employers entering into EEOC mediation.[82] Thus, the logical solution would be to take the mediation out of the EEOC's hands.

The United States Bankruptcy Court for the Central District of California has established a well-run mediation program, which the EEOC

81. *See* Agnes Wilson, *Resolving Employment Disputes: A Practical Guide*, 578 PLI/LIT. 119, 129-30 (1998), *reprinted in* WILLIAM L.D. BARRETT, WHAT THE BUSINESS LAWYER NEEDS TO KNOW ABOUT ADR 127 (1998); Allison Balc, *Making it Work at Work: Mediation's Impact on Employee/Employer Relationships and Mediator Neutrality*, 2 PEPP. DISP. RESOL. L.J. 241, 254 (2002) ("Regulations and common sense state that an ADR mediator must be a neutral party and the employer's mediation procedure for resolving disputes must be established and fair.").

82. Wayne D. Brazil, *Comparing Structure for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715, 747-49 (1999)(referring to five "models" of mediation).

could re-model its mediation program after. Under the Bankruptcy Court's mediation program, "[t]he Court shall establish and maintain a panel (Panel) of qualified professionals who have volunteered and been chosen to serve as a mediator (Mediator) for the possible resolution of matters referred to the Mediation Program. The Panel shall be comprised of both attorneys and non-attorneys."[83] From the panel of mediators, both parties will select one mediator and one alternative mediator.[84] The selected mediator is required to work on a pro bono basis and shall not be reimbursed for the "first full day of at least one Mediation Conference per quarter per year."[85] If the parties do not settle the dispute after the first full day of mediation, then the mediator can either continue mediating on a pro bono basis, or request compensation from the parties for the remainder of mediation.[86] If a matter is settled, then one of the parties will draft the necessary writings to dispose of the matter.[87] The mediator will file a certificate of completion with the Court, which simply states whether the parties complied with the terms of the mediation, and whether a settlement was reached.[88] The mediator conveys no further information to the Court. This process allows the mediators to be truly impartial, and just as importantly, it allows parties to perceive the mediator as impartial.

A solution to the EEOC's problem with its perception of bias could be to remove the EEOC mediators from the program and allow the parties to select a mediator, just as the Bankruptcy Court in the Central District of California does. For example, after a charge is filed with the EEOC, the EEOC could refer the parties to a list of court approved mediators. From that list, the parties can select their preferred mediator, and alternative mediator in the event the primary mediator is unavailable. The mediator would work pro bono for the first full day of mediation, but could request compensation from the parties for work done after the first full day. If the parties settle the dispute, one party will draft the necessary settlement agreement. Once mediation has ended, the mediator will file a certificate of completion with the EEOC, which simply states whether the parties complied with the terms of the mediation, and whether or not the parties settled.

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83. Third Amended General Order at 2, In re Adoption of Mediation Program for Bankruptcy Cases and Adversary Proceedings, No. 95-01 (Jan. 5, 2010), http://www.cacb.uscourts.gov/sites/cacb/files/documents/general-orders/3rd%20Amended%20G.O.%2095-01.pdf.

84. *Id.* at 8.

85. *Id.* at 14.

86. *Id.*

87. *Id.* at 13-14.

88. *Id.* at 14.

A. *The Proposed Solution's Neutrality*

The proposed solution thrives off volunteer mediators. The mediators who are selected for the panel are not employed by the EEOC, nor are they compensated by the EEOC. These mediators likely mediate as a side commitment because the mediators who would volunteer for this program likely practice law or work elsewhere as full time mediators. These mediators will not have a "bias toward the parties, the parties' interests, or the substantive outcome of the mediation."[89] Thus, mediators on the panel have internally-perceived neutrality.

The biggest advantage that this mediation panel has over the current EEOC Mediation Program is that the panel style mediation program will have externally-perceived neutrality. The EEOC does not select the mediator; the mediating parties have the opportunity to select their own mediator and alternative mediator from a panel of mediators. The mediators on this panel apply to the District Court, and the Court approves the mediators, so the EEOC is not involved. These mediators work pro bono; therefore, are not paid by the EEOC. After the first full day of mediation, a mediator can request compensation from the parties, not the EEOC; thus, the mediator maintains his or her integrity. Lastly, the only contact between the mediator and the EEOC is at the conclusion of mediation, where the mediator sends a certificate of completion to the EEOC, which states whether or not the mediating parties followed the mediation protocol, and whether a settlement was reached. This minimal contact with the EEOC ensures externally-perceived neutrality that is required for a truly neutral mediation.

B. *The Proposed Solution's Confidentiality*

Just as in the Bankruptcy Mediation Program, the proposed solution would have a non-disclosure provision and require both parties and the mediator to sign a non-disclosure agreement.[90] For example, the non-disclosure provision should contain language such as:

> No written or oral communication made, or any document presented, by any party, attorney, Mediator, Alternate Mediator or other participant in connection with or during any Mediation Conference . . . may be disclosed to anyone not involved in the Mediation, nor may any such

89. Henikoff & Moffitt, *supra* note 51, at 101.
90. Third Amended General Order, *supra* note 83, at 6.

> communication be used in any pending or future proceeding in this Court or any other court.[91]

Furthermore, the volunteer mediators are not a part of the EEOC. There is less of a chance that employers would fear disclosure of the confidential information because the mediators do not work for a regulatory agency. The proposed solution is likely no more confidential than the EEOC's current mediation program; however, its perception by employers will be that the proposed solution is far more confidential.

C. The Proposed Solution's Voluntariness

The proposed solution, like the current EEOC Mediation Program, will be voluntary.[92] Parties whose charges are eligible for mediation may elect to enter mediation, continue mediation, and accept or reject settlement agreements.[93] Since the panel of mediators are not employed or contracted by the EEOC, they do not have to worry about resolution rates. These volunteer mediators can work in the mutually beneficial interest of the parties. There is no benefit from a mediator coercing a party to accept or reject a resolution under this model. Therefore, employers will feel more comfortable mediating under this new panel system because they will feel that they have self-determination and will not have to make any decisions under duress.

D. The Proposed Solution is Impartial

This proposed solution would more likely eliminate any favoritism, bias, or prejudice because the mediators are not being compensated by the EEOC, nor are the mediators employed by the EEOC. This solution even eliminates the appearance of impropriety in the mediators because of their minimal contact with the EEOC. The proposed solution will be more impartial; however, resolution rates may lower. Any resolution reached by improper means is an injustice and is worse than a stalemate by both parties. Thus, the proposed solution may harm the EEOC's resolution statistics, but it is for the benefit of all parties involved.

E. Potential Objections

Restructuring the EEOC mediation program would be met by various objections. Firstly, it is possible that fewer cases would be mediated. The

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91. *Id.*
92. *ADR Policy Statement*, *supra* note 64.
93. *Id.*

EEOC conducts roughly 11,000 to 13,000 mediations a year.[94] By eliminating mediators employed and contracted by the EEOC, there may not be enough mediators to meet the demand for mediation. However, it is likely that many the mediators who currently work in the mediation program or those who regularly contract with the program would apply for a position on the volunteer mediation panel. It would be up to the Court to screen each mediator to ensure that each mediator is impartial. The second objection would be that mediations would cost money more money. This is not necessarily true; the average EEOC mediation takes about three to four hours,[95] since the first full day of mediation, likely eight hours, is done pro bono, there would likely be no extra cost to mediation. The EEOC currently hires some pro bono mediators in its mediation program;[96] therefore, it is likely that some mediators would work pro bono even after the first full day of mediation. Although parties may have to pay for mediation, it still may be cheaper for the parties if they avoid litigation. There may be certain drawbacks to taking mediation out of the EEOC's hands; however, the requirement of impartiality in mediation trumps any potential disadvantage.

VIII. CONCLUSION

While the EEOC created the mediation program in a good faith effort eliminate discrimination in the workplace, the program itself may not do so impartially or effectively. The impropriety of a mediator may be a greater injustice than the discrimination charge itself. The EEOC may conduct its mediation neutrally but there is a growing perception that EEOC mediations are not neutral. This growing perception is one of many reasons why employer participation in the EEOC Mediation Program hovers around 13%. Thus, to eliminate the threat of favoritism, bias, or prejudice by mediators or the perception of such, the EEOC should relinquish control over mediations and restructure the mediation program into a panel system similar to the mediation program under the United States Bankruptcy Court for the Central District of California. Court approved mediators who have minimal communications with the EEOC would eliminate any perception of bias, favoritism, or prejudice by the mediators, and, as a result, more charges could be resolved without litigation because of the increased participation in the revamped EEOC Mediation Program.

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94. *Mediation Statistics*, *supra* note 31.
95. *Questions and Answers About Mediation*, *supra* note 28.
96. *History of the EEOC*, *supra* note 14.