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ETHICAL INCENTIVES FOR EMPLOYERS IN ADOPTING LEGAL SERVICE PLANS TO HANDLE EMPLOYMENT DISPUTES

Michael Z. Green*

I. INTRODUCTION

Many employment disputes involve legal claims brought by employees without legal representation.[1] Inability to obtain adequate legal representation

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* Professor of Law, Texas Wesleyan University School of Law. This Essay expands on remarks I made at the University of Louisville Brandeis School of Law on June 17, 2005, as a presenter for the 22nd Annual Carl A. Warns, Jr. Labor & Employment Law Institute. I thank Professor Edwin R. Render for inviting me to speak at this event which annually commemorates the legacy of labor law giant, Carl Warns, and Dean Laura Rothstein for her hospitality. They helped me to enjoy my return to a city where I have many positive memories from my high school days and my first experiences as a practicing attorney. It was also gratifying to have the chance to speak to many of the same attorneys who acted as mentors for me including D. Patton Pelfrey, Michael Luvisi and James Cockrum about the subject matter in this Essay. I appreciate Margaret Green for her enduring support and guidance. Also, I am grateful for research assistance provided to me by Texas Wesleyan law students, Adam Burney, Shelley Jeri, and Eunice Kim. Anna Teller, a Texas Wesleyan Librarian, provided immeasurable support in finding legal service plan descriptions described herein including the Brown & Root plan.

[1] *See* Michael Z. Green, *Finding Lawyers for Employees in Discrimination Disputes as a Critical Prescription for Unions to Embrace Racial Justice*, 7 U. PA. J. LAB. & EMP. L. 55, 64-66, 72-77 (2004) (describing difficulties for employees in obtaining legal counsel for employment disputes in court and in alternatives to the court including mediation and arbitration); Ann C. Hodges, *Mediation and the Transformation of American Labor Unions*, 69 MO. L. REV. 365, 372-73, 394-95 (2004); William Howard, *Arbitrating Claims of Employment Discrimination*, 50 DISP. RESOL. J. 40, 44 (Oct.-Dec. 1995) (describing survey of plaintiff's counsel); William M. Howard, *Arbitrating Employment Claims: Do You Really Have To? Do You Really Want To?*, 43 DRAKE L. REV. 256, 288-89 (1994) (describing employees' difficulties in finding lawyers); Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105, 106-107 nn.1-3 (2003) (referring to a study finding that "a minimum level of provable damages of $60,000" is necessary before most plaintiffs' counsel will accept an employment case and noting the testimony by plaintiffs' counsel Paul Tobias, a founder of the National Employment Lawyers Association (NELA), in front of the Dunlop Commission, established jointly by the Secretary of Labor and Secretary of Commerce in 1993 to develop recommendations on workplace improvements, where Tobias acknowledged that because of financial necessity, "the plaintiffs' employment bar turns away at least 95% of those employees who seek its help"); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 57 (1998) (highlighting the financial difficulties in finding legal representation); David Sherywn et al., *Assessing the Case for Employment*

can create a significant hurdle for employees in resolving a dispute with their employer.[2] The lack of legal representation for employees in discrimination suits has reached a crisis level as employees only find lawyers to help them about 5% of the time.[3] When they pursue their claims, employees tend to lose lawsuits more than 90% of the time.[4] Even if an employee obtains that rare court win, a strong chance of being reversed on appeal makes the overall prospects even worse.[5] Professor Ann C. Hodges has recently highlighted this entire predicament for employees:

> In the nonunion workplace, employees must find legal representation or represent themselves. Pro se representation in complex legal disputes is extraordinarily difficult. Attorneys are rarely available except to employees with financial means, or those with very strong cases that make contingency fee representation financially feasible. While attorney's fees are awarded under many statutes when the employee prevails, a lawyer will be willing to risk representation only in a case that appears very strong. While some statutes hold potential for representation by a government agency, the overworked, underfunded agencies accept a limited number of cases for

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Arbitration: A New Path for Empirical Research, 57 STANFORD L. REV. 1557, 1574-75 (2005) (providing a discussion of the difficulties for employees to obtain legal services); Theodore J. St. Antoine, *Gilmer in the Collective Bargaining Context*, 16 OHIO ST. J. ON DISP. RESOL. 491, 499 (2001) (asserting that only about five percent of plaintiffs seeking counsel with an employment claim in court are ever able to obtain counsel).

[2] *See* Roberto L. Corrada, *Claiming Private Law for the Left: Exploring Gilmer's Impact and Legacy*, 73 DENV. U. L. REV. 1051, 1067 (1996) (describing the difficulty for employees in finding an attorney); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563-64 (2001) (describing difficulties for most employee plaintiffs in obtaining counsel in the court system).

[3] *See* Maltby, *supra* note 1, at 106-107 nn.1-3.

[4] Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 560-61 (2001) (describing how claimants lose discrimination cases more than 90% of the time).

[5] *See* Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 451-52 (2004) (describing "a troublesome *anti-plaintiff effect* in federal appellate courts" for employment discrimination claimants along with a bias against plaintiffs at the trial level where few cases even get to a jury); Kevin M. Clermont et al., *How Employment Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMPLOYEE RTS. & EMP. POL'Y J. 547 (2003); Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ From Negotiable Instruments*, 2002 U. ILL. L. REV. 947.

litigation. Accordingly, many employees lack the means to enforce their statutory rights.[6]

Employers can bridge this legal representation gap for their employees by providing legal service plans[7] as a reasonable and affordable employee benefit that resembles a group health plan.[8] If employees can obtain legal counsel through legal service plans, they can fairly overcome the hurdle to employment dispute resolution that the lack of legal representation currently presents.[9] Lawyer participation in legal service plans offered to public groups or organizations continues to rise.[10] With respect to private employers' use of legal service plans, the future also bodes well for their development as one commentator has recently asserted:

> I believe that legal-services plans will explode in popularity with the middle class as soon as a mega brand-name entity like Wal-Mart or Costco begins sponsoring one. The very people who shop at these stores are the working- and median- class members who are ideal for legal services plans.[11]

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[6] Hodges, *supra* note 1, at 372-73 (footnotes omitted).

[7] "A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation." MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 6 (2002).

[8] David Narkiewicz, *A 21st Century Blueprint for Providing Legal Services to the Middle Class*, 26 AUG. PA. LAW. 20, 28 (2004) ("Legal services plans similar to health care HMOs exist now for the middle class" under the approach that "the middle-class consumer, perhaps in conjunction with an employer or membership organization, pays a monthly fee for the right to receive certain personal legal services from a participating attorney in a legal services plan.").

[9] *See* Brian Heid & Eitan Misulovin, Note, *The Group Legal Plan Revolution: Bright Horizon or Dark Future?*, 18 HOFSTRA LAB. & EMP. L.J. 335 (2000) (describing the benefits of legal service plans for employees); *see also* Julia Field Costich, Note, *Joint State-Federal Regulation of Lawyers: The Case of Group Legal Services Under ERISA*, 82 KY. L.J. 627 (1993) (discussing legal service plans as an employment benefit and its regulation).

[10] *See* Wayne Moore & Monica Kolasa, *AARP's Legal Services Network: Expanding Legal Services to the Middle Class*, 32 WAKE FOREST L. REV. 503 (1997) (describing the expansive legal service plan available to members of the American Association of Retired Persons (AARP)); Narkiewicz, *supra* note 8, at 29 (stating that "AARP currently has a legal services network with more than 1,000 participating attorneys"). With the on-line potential, many lawyers have made their services available through legal service plans via the Internet or on-line auctions. *See* Jennifer Vaculik, Note, *Bidding By the Bar: Online Auction Sites for Legal Services, Inc.*, 82 TEX. L. REV. 445 (2003); Narkiewicz, *supra* note 8, at 29 (describing Fee Bid, Legal Match and Med Law Plus websites that pits lawyers against each other based on the lowest bidder).

[11] Narkiewicz, *supra* note 8, at 28-29.

Dealing with an employee who has no legal counsel can become a daunting challenge for all those involved with the dispute.[12] The employee does not trust a system based upon complex legal norms, especially when the employee has no legal counsel to explain those norms and become an advocate for the employee in navigating those complexities.[13] The employer may believe it is operating within the law and that the employee's legal claims have no merit. However, without full understanding of the legal consequences, the pro se employee may be less willing to move from an intransigent position and can stall any legitimate efforts at reaching a compromise to resolve the employment dispute.[14]

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[12] *See* Vivian Berger, *Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment*, 5 U. PA. J. LAB. & EMP. L. 487, 500 & n.83 (2003) (describing how an employee facing an employer's legal counsel without his or her own legal counsel has "virtually no chance of victory"); Jonathan D. Canter, *The Employment Arbitrator and the Pro Se Party*, 57 DISP. RESOL. J. 52, 53 (July 2002) (describing how "[e]mployment law as it stands today is a jumble of statutory and common law rights and remedies, sometimes overlapping and illogical, varying by jurisdiction, evolving case by case . . . implicating an array of legal disciplines, and well-stocked with traps for the unwary. Other kinds of disputes – commercial and construction – may produce difficult legal issues on a regular basis, but do not resemble the three-ring legal circus that employment law has become."); Green, *supra* note 1, at 64-66, 69-77 (describing difficulties in court proceedings, arbitration and mediation in handling an employee pursuing a claim without legal counsel).

[13] *See* Henry L. Chambers, Jr., *Recapturing Summary Adjudication Principles in Disparate Treatment Cases*, 58 SMU L. REV. 103, 114-22 (2005) (describing the complexities involved in proving and establishing employment discrimination claims due to confusing evidentiary doctrines established by the Supreme Court); Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277-82 (describing the need for employment lawyers to be "innovators" and noting that workplace inequities are becoming more complex and moving to a "second generation" requiring collaborative problem-solving skills); *see also* Green, *supra* note 1, at 72-76 (referring to difficulties for employees in navigating dispute resolution systems without counsel); Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L. J. 305-06 (2002) (describing the complexities that a pro se litigant must face without a lawyer).

[14] *See* Canter, *supra* note 12, at 53 (explaining how "it is said that employers who establish an internal [dispute resolution] program are motivated in large part by a wish to regularize the dispute resolution process and control the transactional costs, neither of which is easily achieved in the presence of a pro se party – especially a pro se party who has invested a lot of emotion into the process and is not inclined to reach a compromise solution").

Lawyers for the employer also face several ethical dilemmas when dealing with an employee who has no legal counsel.[15] Even as we start to see the possibilities for development of private alternative dispute resolution (ADR) in employment matters especially through mediation,[16] a number of ethical concerns may arise for ADR professionals (referred to as neutrals) when charged with helping the parties reach a final resolution.[17] Accordingly, my thesis is that from an ethical perspective, all of the stakeholders including employees, employers and their attorneys, and any neutral involved in facilitating a private resolution would derive a benefit if an employee had some form of legal counsel when seeking to resolve an employment dispute. Likewise, employers may realize that their employees will make more productive contributions if there are opportunities for valuable legal counseling. Therefore, a key solution to the problem of finding counsel for employees in employment disputes and a response to the ethical dilemmas presented by the unrepresented or pro se employee is for employers to adopt legal service plans as an employment benefit to be used by their own employees.

At first blush, employers might recoil at the notion that it is in their interest to help find legal counsel to represent their own employees in challenges against them.[18] Instead, a contrary approach might resonate in the minds of employers. That approach might consist of the following reasoning: an employee without legal counsel offers an opportunity for the employer's legal counsel to destroy the employee in the court system or any alternative system when it comes to debating the strength of the employee's legal claim. So, why assist the employee by helping her find sound legal counsel when the employee's legal claim will likely prove fruitless, the employer will win and the employee, operating without legal counsel, will lose? This win/lose focus might work for an employer out of a visceral feeling that an employee who wrongfully makes a claim against an employer should be sent a strong message

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[15] *See infra* Section III (discussing several ethical dilemmas).

[16] *See* 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. (forthcoming Fall 2005).

[17] *See* Canter, *supra* note 12, at 53 (describing rules under American Arbitration Association for dealing with the difficulties of a pro se employee); Green, *supra* note 1, at 74-76 (describing ethical obligations under the Model Rules for Professional Conduct for a lawyer acting as a neutral in dealing with an unrepresented employee).

[18] *See* Heid & Mislulovin, *supra* note 9, at 343 (noting how most employer-sponsored legal service plans did not initially cover disputes with their own employers).

that he or she will lose.[19] However, from a cost and human resources perspective, employers recognize that it is best to resolve disputes at the earliest possible time.[20]

Nevertheless, an employer can certainly fight and win in defending most employment claims brought in the court system.[21] Many empirical studies are starting to document that employees do tend to lose their claims in the court system whether at the trial level or on appeal.[22] Employers and their legal counsel operate with a repeat player advantage because they must constantly resolve employment disputes.[23] In contrast, most employees are involved in their first and usually only shot at seeking an effective resolution of an employment dispute. In resolving these disputes and despite any repeat player advantage, employers still face some uncertainty in that a very small percentage of claims may get through the court system and subject the employer to the unpredictable whims of a jury.[24] Even if the claim is ultimately resolved in

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[19] A number of commentators believe that many employment discrimination claims are frivolous and based upon an employee's belief that he or she will hit the "employment lottery" by getting the claim in front of a jury. *See, e.g.*, Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 402-03 (2002).

[20] *See* Aimee Gourlay & Jenelle Soderquist, *Mediation in Employment Cases is Too Little Too Late: An Organizational Conflict Management Perspective on Resolving Disputes*, 21 HAMLINE L. REV. 261 (1998) (advocating the use of mediation but suggesting that it should be part of an overall conflict resolution system developed as early as possible).

[21] *See* Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 448 & n.175 (2000) (finding over ninety percent of cases are resolved in the employer's favor before trial).

[22] Clermont & Schwab, *supra* note 5, at 451-52.

[23] *See* Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 234 (1998) (finding that when one-shot employees face arbitration with repeat player employers, the employees win only about sixteen percent of the time as opposed to a seventy percent win rate when employees are not involved with repeat player employers); Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC'Y REV. 767, 768-69 (1996) (describing repeat player effect in mediation). *See generally* Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999) (commenting on the effects of repeat players in ADR). Professor Estreicher has recently explained that the repeat player problem is really a "repeat lawyer" problem. Estreicher, *supra* note 2, at 566 ("[T]he real repeat players in arbitration are not the parties themselves but the lawyers involved.").

[24] Theodore O. Rogers, Jr., *The Procedural Differences Between Litigating in Court and Arbitration: Who Benefits?*, 16 OHIO ST. J. ON DISP. RESOL. 633, 640 (2001) (suggesting that

favor of the employer, it still presents significant costs in terms of legal fees that must be paid to reach this result.[25] Also, the organizational impact of the delay from pending claims can affect employee morale and lead to significant workplace upheaval.[26]

Thus, the prospect of having employment disputes resolved as quickly as possible redounds to the benefit of employers much more than getting a win in the court system. Allowing or helping an individual employee get some legal counsel at the earliest possible time also assists in resolving the dispute quickly. This approach further demonstrates to employees that they have an employer who cares about resolving disputes for its employees without trying to suppress legitimate legal claims.[27]

By providing legal services, employers signal to their employees that they have an employer who treats employees fairly by valuing their contributions as human resources. A number of employers have already realized the importance of providing a mechanism for employees to obtain legal counsel.[28] These employers have taken the lead in designing workplace conflict resolution systems that offer significant advantages for the twenty-first century workplace. Employers who provide legal service plans as benefits to help their employees obtain legal counsel represent the front wave of the future. Also, they offer the best way to address the host of ethical issues that arise when an employee pursues a claim against an employer without legal counsel.

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because of the uncertainty of litigation, employers may still choose to arbitrate even though there may be better results for them in court because arbitration is more predictable in terms of "knowing in advance how much a case might cost and how long it might last").

[25] *See* William L. Bedman, *The Future of ADR–From Litigation to ADR: Brown & Root's Experience*, 50 DISP. RESOL. J. 8, 10 (Oct.-Dec. 1995).

[26] *Id.* (describing the financial and other difficulties that Brown & Root experienced after a long delay in resolving an employment claim and how this led to a massive change in their dispute resolution system).

[27] *See* Michael Z. Green, *Opposing Excessive Use of Employer Bargaining Power in Mandatory Arbitration Agreements Through Collective Employee Actions*, 10 TEX. WESLEYAN L. REV. 77, 97-99 & nn. 89-93 (2003) (describing possible problems for employers who force mandatory arbitration as the dispute resolution process and how that could lead to poor morale issues and create incentives for union organizing); *see also* Michael Z. Green, *An Essay Challenging the Racially Biased Selection of Arbitrators for Employment Discrimination Claims*, 4 J. AMERICAN ARB. 1, 53, 56-57 (2005) (referring to the importance of the integrity of the dispute resolution system for employees).

[28] A number of commentators have noted the innovative dispute resolution program developed by Brown & Root (now Halliburton) in offering employees an opportunity to obtain legal counsel in resolving employment disputes through a legal service plan. *See infra* Section IV.

In Section II, this Essay will discuss how legal service plans operate in practice and how employers may use them as part of a group benefit plan to be offered to employees. In Section III, the Essay will examine the various ethical dilemmas that can arise when dealing with an employee who has no legal counsel and specific ethical concerns with legal service plans. In Section IV, this Essay examines the thesis of having employers provide legal help to employees through legal service plans by describing the high profile plan being used by Brown & Root (now Halliburton).[29] The Essay concludes that using some form of a legal service plan as an employee benefit provides employees with legal counsel in resolving disputes with their employers and it creates overall benefits both ethically and from a conflict resolution perspective for all those involved in employment disputes.[30]

II. LEGAL SERVICE PLANS: A SOLUTION TO THE SIGNIFICANT GAP IN LEGAL REPRESENTATION AND A VALUABLE HUMAN RESOURCE BENEFIT FOR EMPLOYEES AND EMPLOYERS

For several decades, commentators have explored possible solutions to the difficulty for those seeking to find legal services including the use of legal service plans.[31] Any clamor about the inability to obtain legal services and the expansion into considering legal service plans as a response probably started as long ago as 1975, when the organized bar stopped opposing the use of legal

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[29] Although Brown & Root has since become Halliburton, for consistency I will refer to it as only Brown & Root because that was the original company name on the plan and it is still referred to as Brown & Root in many of the cases and articles cited herein. Hereinafter, references to either Brown & Root or Halliburton refer to the same entity.

[30] The legal service plan can be part of an overall comprehensive conflict resolution program designed at providing fair mechanisms for employee voice. *See* Lisa B. Bingham, *Control Over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221, 251 (2004) (referring to the importance of the conflict resolution system design); Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873, 907 (2002) (suggesting the importance of having employees involved in the dispute resolution system design); Michael Z. Green, *Addressing Race Discrimination Under Title VII at Forty: The Promise of ADR as Interest Convergence*, 48 HOW. L.J. 937, 965-66 (2005) (discussing the importance of employee involvement in the design of the dispute resolution system).

[31] *See, e.g.*, Russell G. Pearce et al., Note, *Project, An Assessment of Alternative Strategies for Increasing Access to Legal Services*, 90 YALE L.J. 122, 151-52 (1980); *see also* Wayne F. Foster, Annotation, *Prepaid Legal Service Plans*, 93 A.L.R.3d 199 (2004).

service plans and instead embraced the concept.[32] Since then, a number of commentators have lamented about the difficulties for individuals in obtaining legal services and what this means for justice in our courts.[33] Although providing legal services for the poor has offered a consistent theme for those criticizing the lack of legal representation for individuals in the court system,[34] others have also started to bemoan the same concern about lack of legal representation for those in the middle class.[35] In either respect, legal service plans can bridge the significant legal representation gap for the working class who cannot normally afford legal services. Indeed, "[e]mployer-paid [legal service] programs cover 7.6 million Americans, with Hyatt Legal Plans and the United Auto Workers being the largest providers."[36]

There are typically two types of legal service plans, either access plans or comprehensive plans.[37] Access plans "combine prepayment" for access to a lawyer to obtain "advice and consultation with a fee-for-service benefit" for any additional legal service needs beyond the advice and consultation.[38] Comprehensive plans are "designed to meet 80% to 90% of an average person's legal needs in a given year" by paying "[p]remiums or membership

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[32] *See* Judith L. Maute, *Pre-Paid and Group Legal Services: Thirty Years After the Storm*, 70 FORDHAM L. REV. 915, 916-17, 926-28 (2001) (describing historical opposition to legal service plans by the organized bar as demonstrated by negative approaches to their development under the Code of Professional Responsibility and the climate change in 1975 leading to the acceptance of legal service plans under the Model Rules).

[33] *See id.*; Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785 (2001); Deborah L. Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369 (2004).

[34] *See, e.g.*, John O. Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201 (1982); Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531 (1994); Samuel J. Levine, *Legal Services Lawyers and the Influence of Third Parties on the Lawyer-Client Relationship: Some Thoughts From Scholars, Practitioners, and Courts*, 67 FORDHAM L. REV. 2319 (1999); Tina Drake Zimmerman, *Representation in ADR and Access to Justice for Legal Services Clients*, 10 GEO. J. ON POVERTY L. & POL'Y 181, 186 (2003) (asserting how "as much as eighty percent of the legal needs of the poor go unmet").

[35] *See* Susan D. Carle, *Re-Valuing Lawyering for Middle-Income Clients*, 70 FORDHAM L. REV. 719 (2001); George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn From the Medical Profession*, 70 FORDHAM L. REV. 775 (2001); Nancy J. Moore, Symposium, *Lawyering for the Middle Class*, 70 FORDHAM L. REV. 623 (2001); Moore & Kolasa, *supra* note 10; Narkiewicz, *supra* note 8.

[36] Maute, *supra* note 32, at 935 (footnote omitted).

[37] *See* Types of Legal Services Plans, 14 EMP. COORD. PERSONNEL MANUAL § 12:119 (2005); *see also* Costich, *supra* note 9, at 635 n.63 (describing different types of legal service plans).

[38] Types of Legal Services Plans, *supra* note 37.

fees . . . to a third party," and "all legal services covered by the plan are available at no additional charge except for deductibles and co-payments."[39] The premium cost then varies based on services and relies on the use of a panel of lawyers in private practice who must meet certain qualifications.[40] A majority of legal service plans tend to focus on telephone services, while more comprehensive legal services usually warrant a higher premium.[41]

Also, a key distinction in legal service plans is whether they are open or closed.[42] A closed plan restricts and an open plan expands the choices of attorneys for the plan.[43] In addition, plan coverage may be restricted for other legal actions, e.g., criminal or pre-existing cases.[44] Furthermore, "most plans prohibit employees from using group legal services against their employer."[45] The typical rationale for this prohibition is that "companies would not want to offer a service that could be used against them."[46] However, the ethical difficulties that employers and their counsel may face when dealing with an unrepresented employee warrant the consideration of allowing employees to use their legal service plans in disputes with their own employers.[47] Likewise, the human resource benefit of having disputes resolved quickly and overall employee satisfaction support the need for employees to use their legal services plan in disputes with their own employers. Thus, using legal service plans to help employees in disputes with their own employers suggests a major opportunity for improving human resource issues, especially given the increasing use of ADR to resolve employment disputes.

III. ETHICAL MOTIVATIONS TO ADOPT LEGAL SERVICE PLANS

Initial concerns about the use of legal service plans led the organized bar to establish a Disciplinary Rule in the Model Code of Professional Responsibility that substantially regulated the use of legal service plans.[48] However, the later

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[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*; *see also* Maute, *supra* note 32, at 925 (noting the battles within the organized bar about open versus closed legal plans).
[43] *See* Types of Legal Services Plans, *supra* note 37.
[44] *Id.*
[45] Heid & Misulovin, *supra* note 9, at 343.
[46] *Id.*
[47] *See infra* Section III.
[48] *See* Costich, *supra* note 9, at 634-36 (describing bar efforts to limit legal service plans in response to the 1960s civil right movement and up to amendments to the Code of Professional Responsibility in 1975).

Model Rules of Professional Conduct involved a change in terms of the organized bar's efforts to regulate legal service plans. Model Rule 1.8(f) provides:

> A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6 [confidentiality of information].[49]

Comment 11 to Rule 1.8(f) recognizes that third parties such as "a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees)" may pay for a lawyer's compensation as long as "there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client."[50] Also, Model Rule 5.4(c) prohibits a lawyer from permitting "a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."[51] Accordingly, an attorney's participation in an employer-sponsored legal service plan does not present a concern as long as the attorney performs his duties without being controlled or influenced or dominated by the plan or the employer.

The continued growth of employment dispute resolution systems and persistent legal and ethical issues involving an unrepresented employee now warrants serious concern.[52] With the significant need for employees to obtain legal assistance, plaintiffs' attorneys should embrace legal service plans as a mechanism to provide a host of economical and efficient legal services for employees. With the primary need to develop human resources and design effective workplace conflict resolution systems that address matters at the earliest possible stages, employers should create and sponsor legal service plans and offer them as a benefit to their employees. The following hypothetical

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[49] MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (2002).

[50] MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 11.

[51] MODEL RULES OF PROF'L CONDUCT R. 5.4.

[52] *See* Kenneth L. Jorgensen, *Counsel for the Organization: Employee Conflicts*, 61 AUG. BENCH & B. MINN. 12 (2004); Gregory V. Mersol, *Ethical Issues in Class Action Employment Litigation*, 20 LAB. LAW. 55 (2004); Nancy J. Moore, *Conflicts of Interest for In-House Counsel: Issues Emerging from the Expanding Role of the Attorney-Employee*, 39 S. TEX. L. REV. 497 (1998). *See also* Canter, *supra* note 12, at 53.

examples are intended to highlight the ethical issues that warrant consideration when dealing with an unrepresented or pro se employee:

> Hypothetical A: SmartMart hires you as counsel to defend it in an employment discrimination matter against an employee who is acting pro se. The pro se employee approaches you during a break of a mediation session and asks how the McDonnell Douglas v. Green[53] test works because he cannot agree to settle unless he can understand this test. Can you explain the test? ANSWER: No. Model Rule 4.3 states: "[A] lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows . . . that the interests of such a person are . . . in conflict with the interests of the client."[54] However, Comment 2 says if the lawyer explains that he represents an adverse party and not the unrepresented person, the lawyer may "explain . . . the lawyer's view of the underlying legal obligations."[55]

> Hypothetical B: You are a lawyer mediating an employment discrimination matter brought by John acting pro se. John approaches you during a break and asks how the McDonnell Douglas v. Green[56] test works versus the Desert Palace v. Acosta[57] test and says he cannot agree to settle until he can understand these tests. Can you answer John's question? ANSWER: No.[58] Model Rule 2.4(b) states: "A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them."[59] If a "lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client."[60] Comment 3 also states that the "potential for confusion is significant when the parties are unrepresented in the process. . . . [Therefore,] a lawyer-neutral [must] inform unrepresented parties that the

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[53] 411 U.S. 792, 802 (1973) (establishing framework for proving intentional discrimination by circumstantial evidence under Title VII).

[54] MODEL RULES OF PROF'L CONDUCT R. 4.3 (2002).

[55] MODEL RULES OF PROF'L CONDUCT R. 4.3 cmt. 2.

[56] 411 U.S. 792, 802 (1973) (establishing framework for proving intentional discrimination by circumstantial evidence under Title VII).

[57] 539 U.S. 90, 92 (2003) (establishing that direct evidence is not required to establish a mixed motive jury instruction).

[58] *See generally* Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81 (2003).

[59] MODEL RULES OF PROF'L CONDUCT R. 2.4(b).

[60] *Id.*

lawyer is not representing them."[61] This disclosure works for "parties who frequently use dispute resolution" but for "those who are using the process for the first time, more information will be required."[62]

Hypothetical C: You are a lawyer defending a corporation in a sexual harassment claim by Jane. Jane approaches several supervisors and fellow employees and asks them questions about the corporation's enforcement of its sexual harassment policy. Can you ethically challenge Jane's ex parte inquiries? ANSWER: Possibly.[63] Are the supervisors and fellow employees represented by you as their counsel? Are they within the control group of the corporation or "a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer . . . or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability"?[64] Do you have a joint representation agreement?[65] Is Jane represented by counsel? If the answer to these questions is yes, then Model Rule 4.2 provides: "In representing a client in a matter, a lawyer shall not communicate . . . with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has consent of the other lawyer or is authorized to do so by law or court order."[66] Jane cannot act for her lawyer either, as he merely "clos[es] his eyes to the obvious."[67]

Hypothetical D: You are a lawyer defending a corporation in a sexual harassment claim by Jane. Jane deposes several supervisors and fellow employees and asks them questions about the corporation's enforcement of its sexual harassment policy. Can you ethically direct the supervisors and employees to refuse to answer any questions on the basis of privilege? ANSWER: Possibly.[68] Are the supervisors and fellow employees represented by you as their counsel, and is there no conflict of interest between them and the corporate client? If yes, then okay.[69] If no, then Model Rule 3.4(f) says:

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[61] MODEL RULES OF PROF'L CONDUCT R. 2.4 cmt. 3.

[62] *Id.*

[63] *See generally* Ellen J. Messing & James S. Weliky, *Contacting Employees of an Adverse Corporate Party: A Plaintiff's Attorney's View*, 19 LAB. LAW. 353 (2004).

[64] MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2002).

[65] MODEL RULES OF PROF'L CONDUCT R. 1.7.

[66] MODEL RULES OF PROF'L CONDUCT R. 4.2.

[67] MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 8.

[68] *See generally* Lawrence J. Fox, *Defending a Deposition of Your Organizational Client's Employee: An Ethical Minefield Everyone Ignores*, 44 S. TEX. L. REV. 185 (2002).

[69] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 and 1.13 (2002).

"A lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information."[70] Comment 4 says this "permits a lawyer to advise employees of a client to refrain from giving information to another party . . . ."[71] If there is a conflict, the best solution is to have the employees obtain their own counsel who can consent to allow you to represent them at depositions, because you may be able to assert privilege for the company but not for the individual employee.

Hypothetical E: You are a lawyer defending a corporation in a sexual harassment claim by Jane. You have previously talked to Jane about the claims when you helped the corporation investigate the matter and before she had any legal counsel. Jane now has legal counsel who has moved to have you disqualified from representing the corporation at trial because you may be called as a witness. Can you ethically represent the corporation? ANSWER: Possibly.[72] Rule 3.7 states: "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client."[73] Thus, if it is merely an uncontested issue as to whether the attorney met with the employee and the employee made certain statements, the lawyer may still represent the employer.[74] Also, you must balance the hardship to the client-employer with any confusion involved in having the lawyer testify. Furthermore, whether "one or both parties could reasonably foresee that the lawyer would probably be a witness" is relevant.[75] Either the attorney should not talk to the employee or wait until the employee is represented by counsel who has consented to the discussion.

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[70] MODEL RULES OF PROF'L CONDUCT R. 3.4(f).

[71] MODEL RULES OF PROF'L CONDUCT R. 3.4 cmt. 4.

[72] *See generally* Judith A. McMorrow, *The Advocate as Witness: Understanding Context, Culture and Client*, 70 FORDHAM L. REV. 945 (2001); Jeffrey A. Van Detta, *Lawyers as Investigators: How Ellerth and Faragher Reveal a Crisis of Ethics and Professionalism Through Trial Counsel Disqualification and Waivers of Privilege in Workplace Harassment Cases*, 24 J. LEGAL PROF. 261 (2000).

[73] MODEL RULES OF PROF'L CONDUCT R. 3.7.

[74] *See* MODEL RULES OF PROF'L CONDUCT R. 3.7 cmt. 3.

[75] MODEL RULES OF PROF'L CONDUCT R. 3.7 cmt. 4.

With the ethical minefields involved in dealing with an unrepresented employee as demonstrated by these hypothetical examples, employer's counsel should recommend that their clients make legal assistance available through some form of legal service plan.

IV. A BRIGHT SHINING EXAMPLE: BROWN & ROOT'S LEGAL SERVICE PLAN

There is probably no legal service plan that has received as much notoriety over the past decade as the one encompassed within the trailblazing dispute resolution program of Brown & Root.[76] In 1992, Brown & Root formed several task forces to develop a comprehensive program for handling employment disputes after it had to pay almost $450,000 in legal fees despite obtaining a favorable verdict in a case involving a sexual harassment and state tort claim.[77] The members of those task forces "included senior operations management, representatives of the Legal and Employee Relations Departments, outside legal experts, representatives from the American Arbitration Association, outside consultants in conflict management design (Chorda Conflict Management, Austin, Texas), and experts in employee relations communications (Sheppards Associates, Glendale, Calif.)."[78]

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[76] *See also* E. Patrick McDermott & Arthur Eliot Berkeley, ALTERNATIVE DISPUTE RESOLUTION IN THE WORKPLACE: CONCEPTS AND TECHNIQUES FOR HUMAN RESOURCE EXECUTIVES AND THEIR COUNSEL 129-30, 136-37, 161-66 (1996) (providing an Appendix describing Brown & Root's Dispute Resolution Program, Brown & Root's Dispute Resolution Plan and Rules, and Brown & Root's Employment Legal Consultation Plan); John W. Zinsser, *Employment Dispute Resolution Systems: Experience Grows But Some Questions Persist*, NEGOTIATION J. 151 (Apr. 1996) (analyzing the Brown & Root Dispute Resolution Program); *see generally* Robert J. Lewton, Note, *Are Mandatory, Binding Arbitration Requirements a Viable Solution for Employers Seeking to Avoid Litigating Statutory Employment Discrimination Claims?*, 59 ALBANY L. REV. 993, 994 (1996) (describing Brown & Root's overall ADR program as "innovative," a "success story," and "praised as a model for others") (footnotes omitted); Andrea McGrath, *The Corporate Ombuds Office: An ADR Tool No Company Should Be Without*, 18 HAMLINE J. PUB. L. & POL'Y 452, 480-86 (1997) (critiquing the Brown & Root plan);

[77] *See* Bedman, *supra* note 25, at 8.

[78] *Id.* at 8-9; *see also* Ann L. McNaughton & Gary A. Munneke, *Practicing Law Across Geographic and Professional Borders: What Does the Future Hold?*, 47 LOYOLA L. REV. 665, 705 (2001) (referring to the "Halliburton Dispute Resolution" program as being "created by an interdisciplinary team made up of lawyers and human resource professionals" along with "interdisciplinary outside resources includ[ing] psychologists, communications professionals, mediators, and arbitrators").

The Brown & Root Dispute Resolution program received final approval in February 1993 and proceeded with formal implementation in June 1993.[79] This program offers four resolution options to employees that includes both inside and outside company processes along with "an employee benefit designed to ensure fairness . . . [and] access to legal counsel of the employee's choosing."[80] The first level is an "'Open Door Policy' encourag[ing] employees to first contact a supervisor or manager with their dispute."[81] The second level is a "conference" which could lead to a "loop back" to level one, an in-house mediation, or a move to levels three or four.[82] The third level is mediation conducted by an outside mediator involving legal rights.[83] Finally, the fourth level consists of arbitration involving legal rights.[84] In the first two years of operation, Brown & Root learned that "[e]ven with an employee benefit plan which compensates employees for their legal expenses, fewer than 80 employees have requested the assistance of counsel" and in "two-thirds of the arbitrations which have occurred, the employees have elected to proceed without the use of legal counsel."[85] Furthermore, after more than "10 years of the program, about 7,700 disputes were handled."[86] Of those disputes, "about 90% got resolved within the company, and the remaining 10% were resolved through mediation or arbitration."[87] These numbers suggest that the Brown & Root dispute resolution program allows quick and fair resolutions without the disputes spiraling into a federal case. The employees must trust the program and the employer enough not to use lawyers very often, even though they are available to them through the legal service plan.[88]

The "Employment Legal Consultation Plan" of Brown & Root states that its "purpose is to provide certain specified legal services for all Employees of Brown & Root who have a Dispute with the Company which is subject to the

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[79] Bedman, *supra* note 25, at 9.

[80] *Id.*

[81] McGrath, *supra* note 76, at 481 (footnotes omitted).

[82] *Id.* at 482.

[83] *Id.*

[84] *Id.*

[85] Bedman, *supra* note 25, at 13.

[86] Sally Roberts, *Employer Concerns Slow Growth in Mandatory ADR*, 38 BUS. INS. 22 (Feb. 16, 2004).

[87] *Id.*

[88] Of course, a contrary reason for the results could be that employees are lulled into thinking that they do not need lawyers or they just decide that they can handle their claims without lawyers. Even if that is true, the legal service plan allows those employees who really want legal representation, but could not normally obtain it, to now have it.

Brown & Root Dispute Resolution Plan . . . ."[89] The "Legal consultations are paid much like benefits under [Brown & Root's] medical plan, that is, you pay a deductible and a copayment" and "Brown & Root pays the balance."[90] The participant pays a deductible of $25 and then 10% of the balance, while Brown & Root pays the remaining 90% up to a maximum annual benefit of $2,500 per employee.[91] "For example, if the legal consultation was $1,000, you would pay a deductible of $25 and then 10% of $975 or $97.50" and Brown & Root "would pay $877.50."[92]

The legal plan benefits that may be provided to the participant by an Attorney include:

> i. Initial consultation regarding the Participant's Dispute with the Company.
>
> ii. Negotiation or mediation of the Dispute prior to Decision by Referee.
>
> iii. Representation of the Participant during any proceeding before a Referee, including any necessary discovery and preparation for the proceeding.
>
> iv. An amount equal to the participant's federal, state, and local income taxes and the Participant's portion of payroll taxes on the benefits provided to the Participant under the Plan (including the benefits provided pursuant to this paragraph), the amount of which shall be deemed to be equal to the tax withholding requirement with respect to such benefits.[93]

Some of the key limitations on the benefits under Brown & Root's Employment Legal Consultation Plan are that "no benefits are payable for services rendered after a decision by a Referee" and "no benefits will be paid in excess of $2,500 with respect to the representation of any one Participant per calendar year."[94] Further monetary requirements as mentioned above include payment of "a $25 deductible for each dispute" and then "the Plan shall pay

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[89] McDermott & Berkeley, *supra* note 76, at 161.
[90] *Id.* at 129.
[91] *Id.*
[92] *Id.*
[93] *Id.* at 163.
[94] *Id.*

90% of the fees approved by the Director up to the pre-approved amount in relation to each dispute."[95]

With respect to selection of the attorney, the Brown & Root Plan "Director may, in his discretion, establish Panels from which Participants may select Attorneys."[96] The Plan does not require that a participant "consult an Attorney from a Panel as a condition of receiving benefits under this Plan."[97] Instead, participants "may consult with a lawyer or any other adviser of [their] choice."[98] A participant is "not required, however, to hire a lawyer to participate in arbitration," and if the participant chooses "not to bring a lawyer to arbitration, [Brown & Root] will also participate without a lawyer."[99] The "number, types, and qualifications of Attorneys to be placed on any Panel" shall be determined by the Director "in his or her sole and absolute discretion."[100] Nevertheless, "any person placed on a panel must be . . . [l]icensed to practice law in a state of the United States; [r]egularly engaged in the practice of law; and [q]ualified to represent Participants hereunder within the scope of his or her license."[101]

The payment "for services rendered" by an Attorney pursuant to this Plan are "made directly to the Attorney involved by or on the order of the Director."[102] The payment of withholding and payroll tax related to the benefit "shall be made directly to the applicable taxing authority in satisfaction of the tax withholding requirements with respect to the benefits provided."[103] Finally, the Plan asserts that the governing law that "shall apply to this Plan" includes "[t]he Federal Arbitration Act (9 U.S.C. § 1 et seq.) and the Employee Retirement Income Security Act (29 U.S.C. § 1001 et seq.), as they may be amended from time to time."[104]

The Brown & Root Legal Service Plan certainly does not represent the only legal service plan being offered as an employee benefit to resolve internal employment disputes in some fashion.[105] Nevertheless, it represents a very

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[95] *Id.* at 164.
[96] *Id.*
[97] *Id.*
[98] *Id.* at 136.
[99] *Id.*
[100] *Id.* at 164.
[101] *Id.*
[102] *Id.*
[103] *Id.* at 165.
[104] *Id.* at 166.
[105] *See* F. Peter Phillips, *Mediation Is Alternative to Adjudicating Disputes: Internal Employment Dispute Management Programs are New Trend*, 26 NAT'L L.J. No. 41, § 4, at 1

successful example that has now been in place for more than a decade. Other companies do have similar programs or variations. At a minimum, the Brown & Root experience demonstrates that employees may be able to find legal services. Given the focus of so many employers on developing comprehensive conflict resolution programs for their employees, employers are starting to recognize that offering legal service plans as an employee benefit will also operate "as a means of increasing employee trust, and therefore usage, of the program, resulting in resolution of conflicts before they ripen into disputes."[106] Each employer can reap these same benefits by designing a legal service plan that fits its particular culture.[107]

V. CONCLUSION

With little hope of successfully navigating a hostile court system, employees can find better opportunities for resolution of employment discrimination claims through ADR. Likewise, employers fearing the potential of a hostile jury verdict in the court system may find ADR to be a viable mechanism to resolve employment discrimination claims. Whether in court or through ADR, a fundamental problem continues to plague any form of dispute resolution system for employment discrimination claims – the inability of employees to obtain legal counsel. In addition to concerns about the overall dispute resolution system integrity, the unrepresented or pro se employee presents a host of ethical challenges for all parties to the dispute, especially the employer and the employer's counsel. Accordingly, employers and their repeat player legal counsel should explore the benefit of providing legal services to employees through a legal service plan.

(June 14, 2004) (describing how "a division of General Electric 'will reimburse the employee up to $2,500 for attorney's fees incurred for mediation, provided that a complete settlement is reached at mediation'" and noting how many employer sponsored dispute resolution programs call for the employer to pay all or almost all of the costs including legal costs). *See* Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 843, 875-912 (2004) (describing several thoughtfully-designed conflict management systems and their use in various companies).

[106] Phillips, *supra* note 105, at 1.

[107] *See* F. Peter Phillips, *Ten Ways to Sabotage Dispute Management: Read Between the Lines to Learn What it Takes to Run a Successful Program*, 49 HR MAG., Sept. 1, 2004, at 164 (asserting that companies should not just copy "excellent, cutting-edge employment dispute resolution systems" of other companies like "Halliburton, UBS, Johnson & Johnson or any other foresighted companies" and should instead focus on the "distinct corporate ethos and different management style" of the company involved).

Following the model of Brown & Root, employees and employers can capitalize on the value of legal service plans as a component of a comprehensive and well-designed employee conflict resolution program. Employers who provide their employees with a legal service plan will escape a number of ethical challenges that may arise with the unrepresented or pro se employee. These employers will also see the marketing value of providing a unique employee benefit and reap the reward from having better relations with their employees. Employees will know that their employer has designed a dispute resolution system intended to provide employees with fairness and voice through a win-win approach. Once employers start to help their own employees obtain legal services for resolving their employment disputes, the ethical incentives to adopt these legal service plans may end up being merely a nice complement to the overall human resource and conflict resolution benefit for all those involved.