

# **Mediating Enforcement Disputes: A Primer for Regulators**

**Presentation  
to the**

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**by**

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**Description:** Regulatory agencies and courts have begun to take advantage of alternative means of dispute resolution--especially mediation--to resolve enforcement disputes. These "ADR" processes offer agency managers, lawyers, and respondents a framework in which to discuss their differences and produce thoughtful outcomes with reduced formality, contentiousness, and expense.

## **Today's Session:**

Overview: ADR and agencies' experiences mediating enforcement cases

How mediation works

Assessing a case's potential for mediation

Some issues a mediator considers when entering a case

Identifying and finding a skilled, acceptable mediator

Participating effectively in a mediation session

## ***OVERVIEW: ADR AND AGENCIES' EXPERIENCES MEDIATING ENFORCEMENT CASES***

### **LEGITIMATE SOURCES OF CONFLICT**

Data

Relationships

Values

Structure

Interests

### **MANAGING CONFLICT CONSTRUCTIVELY AND COLLABORATIVELY**

Conflict is natural

Conflict can be a resource

Respect people; Attack problems

Positions: the iceberg's tip

Discover underlying interests

Invent options for mutual gain

Seek objective standards

## **KINDS OF SATISFACTION**

Substantive: Did we get what we needed?

Procedural: Was the process fair?

Psychological: Were my concerns respected?

## **POTENTIAL BENEFITS OF COLLABORATIVE APPROACHES TO CONFLICT**

Can be quicker, cheaper

Parties retain greater control

Creative, Technically superior outcomes

Improves information flow

Creates better relationships

Preserves long-term relationships

Can clear up misunderstandings

Offers opportunities to “vent”

Provides “reality check”

Can build trust and understanding

Reduces adversarial behavior

Less disruptive to organizations

Improved compliance

## **POTENTIAL CONCERNS OVER USING COLLABORATIVE APPROACHES**

Sign of weakness

Bad faith participants may abuse the process

Power imbalances

There may be a “right” answer

Some issues are distributive

Inadequate time

## **SELECTED ENFORCEMENT AGENCIES’ EXPERIENCES**

U.S. Administrative Dispute Resolution Act: Enacted in 1990, permanently reauthorized in 1996, strongly encourages federal agencies to employ mediation and ADR processes  
Over 15 State Offices of Dispute Resolution now exist to help agencies use ADR (e.g., OR, MA, FL, CA, NM)

U.S. DOJ’s use of mediation has grown five-fold over the past decade

U.S. EPA, Labor, and NRC – Have established programs to mediate compliance disputes over environmental protection, workplace safety, and wage and hour violations

Canada’s Department of Justice and Treasury Board created a DR Fund that has made several million dollars available to assist federal organizations in the design and implementation of innovative DR programs, such as:

- Canadian Food Inspection Agency – Implementation of DR by the agency to resolve disputes in its role as regulator of the food industry.
- Sports Canada - Implementation of dispute resolution programs to reduce costs of litigation on issues related to doping in sport and enforcement of other Sport Canada policies.
- Canadian Human Rights Commission – Promotes mediation in investigating and resolving complaints of employment discrimination

U.S. Equal Employment Opportunity Commission now uses mediation in several thousand cases annually. U.S. EEOC and the Canadian Human Rights Commission have created ADR services branches to promote and support mediation of anti-discrimination enforcement cases

IRS now offers mediation to taxpayers to resolve claims

The FDIC has used of mediation in scores of lawsuits over liability stemming from bank failures and accounting disputes

## ***HOW MEDIATION WORKS***

### **STAGES IN A TYPICAL MEDIATION**

#### **Preparing to negotiate**

Pre-mediation contacts

Initial joint sessions

Explaining the process (e.g., voluntary, confidential), managing expectations

Obtaining basic information

Developing trust

#### **Defining the issues**

Using separate caucuses

Obtaining sensitive information

Exploring parties' interests

#### **Exploring possible solutions**

Reviewing interests, information

Generating new options

Assessing options and consequences

#### **Resolving issues**

Assessing and prioritizing options

Breaking impasses

Brainstorming

Creating doubt

Agent of reality

Modifying options

Consensus on outline of agreement

Seek to produce single text

#### **Finishing negotiations**

Drafting the agreement

Dealing with implementation, enforcement

Ratifying agreement

### **ROLES A MEDIATOR MAY PLAY**

**Note:** Depending on their styles and the case and parties involved, mediators will employ a variety of tools and methods in assisting disputants to deal with impediments to resolution (these impediments include poor communication, need to express emotions, different view of facts or law, important principles, constituent pressure, linkages, multiple parties, divergent lawyer-client interests, a "Jackpot" syndrome)

#### **Mediators do not:**

Issue a decision or have any independent authority to impose a decision

Act as a legal advisor to any party

**Mediators may:**

Organize a structure and atmosphere that increases parties' comfort level for negotiating

Seek to ensure that relevant parties are represented

Operate as an interpreter, promoting communication

Meet jointly and separately with parties

Obtain clearer view of parties' interests and flexibility

Reduce participants' posturing and adversarial behavior

Help parties understand their interests, priorities, and realistic alternatives to negotiating

Help parties generate creative solutions and/or realistic, objective standards to judge merits

Serve as an agent of reality by

    Helping parties assess strengths and weaknesses

    Floating "trial balloons"

    Previewing how a third party might assess party's position

    Helping parties assess alternatives and their consequences

Encourage, persuade, offer plausible deniability

Serve as a scapegoat or salesperson

Help to put agreements in principle into a workable form

## ***ASSESSING A CASE'S POTENTIAL FOR MEDIATION***

### **QUESTIONS IN ASSESSING POTENTIAL FOR MEDIATING**

Priority issues needing attention?

Other significant parties?

Parties' basic interests?

Reasons to negotiate, or not?

Realistic objectives, outcomes of negotiation?

What barriers to success?

If no agreement, what would you do?

Who would implement agreement

Who should participate?

Would you participate? Others?

If negotiation is inappropriate, why?

### **A MEDIATION PROCESS IS MORE LIKELY TO BE APPROPRIATE WHERE**

Limited number of affected interests

Communication is not effective

Appropriate, willing representatives exist

No compromise of fundamental values

Outcome in doubt

Key parties see value in negotiating

Agency will support process

There is a deadline

### **A MEDIATION PROCESS IS LESS LIKELY TO BE APPROPRIATE WHERE**

Agency Needs a Judicial Precedent

Negotiations Will Have Major Impact on Persons Not Present

Absentees Can't Be Represented  
Agency Needs to Make an Example of a "Bad Actor"  
Transaction Costs Exceed Traditional Methods  
An Emergency: No Time to Negotiate

### ***SOME ISSUES A MEDIATOR CONSIDERS WHEN ENTERING A CASE***

The wants, needs, and proposals of the participants  
Positions, interests, assumptions, and strategies of the participants  
Expectations  
    What the advocates expect of themselves and their counterparts  
    What the closers/ratifiers expect of their advocates and counterparts  
    What the advocates expect of the negotiating process and the mediator  
Trust - the degree of trust that exists  
    Across the table  
    Within each negotiation team  
    Between the team and the closers  
    Among the closers/clients/ratifiers  
The issues and "facts" as seen by each participant  
The politics of the situation (inside & outside)  
Other outside factors impacting on the negotiation  
The negotiation ground rules  
The law of the sector  
The power relationship  
The relationship: is this a "one-shot" negotiation or some kind of long term relationship?  
The negotiators' purpose: to resolve a dispute? avoid one? solve a problem? harmonize a relationship?  
Intentions and perceptions of the participants  
The sophistication and legal and drafting skills of the parties  
Length of the "leash" between negotiator/advocate and close/ratifier  
Resources of the participants: legal, technical, political, financial  
Degree of desperation or paranoia of participants  
The parties' best and worst alternatives to a negotiated settlement  
Possible process alternatives to negotiating: e.g., hearing, fact-finding, arbitration  
Ability to prevail in an evidentiary process as perceived by the parties  
Perception of willingness to go to trial  
Personalities of the advocates, and their styles of convincing and being convinced (idealists, realists, pragmatists, synthesizers, analysts)  
Effects of passage of time on the interests and expectations of the participants

### ***IDENTIFYING AND FINDING A SKILLED, ACCEPTABLE MEDIATOR***

#### **Mediators' knowledge, skills, abilities, and other attributes ("KSAOs")**

Gathering background information  
Facilitating communication  
Communicating information to others

Analyzing information  
Facilitating agreement  
Managing cases  
Helping document any agreement by the parties

**Qualities likely to be needed to perform essential mediator tasks**

*Investigation* – Effectiveness in identifying and seeking out pertinent information  
*Empathy* – Conspicuous awareness and consideration of the needs of others  
*Impartiality* – Effectively maintaining a neutral stance between the parties and avoiding undisclosed conflicts of interest or bias  
*Generating options* – Pursuit of collaborative solutions and generation of ideas and proposals consistent with case facts and workable for opposing parties  
*Generating agreements* – Effectiveness in moving parties toward finality and in "closing" agreement  
*Managing the interaction* – Effectiveness in developing strategy, managing the process, and coping with conflicts between clients and representatives  
*Substantive knowledge* – Adequate competence in the issues and type of dispute to facilitate communication, help parties develop options, and alert parties to relevant legal information

**Some desirable personal attributes to look for in selecting a mediator**

Experience in mediation or facilitation  
Impartiality and trustworthiness  
Ability to maintain confidences  
Patience and persistence  
Ability to grasp complex interrelated issues  
People skills (empathetic, fair, non-judgmental, sensitive to non-verbal communications)  
Ability to engage in active listening  
Knowledgeable about negotiation process and tactics  
Insightful/creative thinker  
Adequately knowledgeable as to substance of the issues in dispute

**“Standards of Conduct” for mediators**

The Model Standards of Conduct for Mediators – created by the American Bar Association, American Arbitration Association, and Association for Conflict Resolution – mandate, among other things:

- Preserving party self-determination
- Maintaining mediator confidentiality
- Preserving mediator impartiality/handling mediator conflicts of interest
- Keeping mediators within the limits of competency
- Assuring a fair process for the parties
- Separating mediation from counseling and legal advice
- Avoiding party exposure to harm as a result of mediation
- Truthful advertising and solicitation

***PARTICIPATING EFFECTIVELY IN A MEDIATION SESSION***

Be prepared in advance regarding

Your interests (or your client's) – think about what you *need*

What you should discuss with the mediator before the mediation

What an agreement to mediate should cover

Who should attend the session

What you should do about settlement authority

How you prepare the client

What the client's role should be

How you advocate in mediation's less formal setting (esp. in private caucus)

Be prepared to understand and deal with

Laws affecting agency mediation (e.g., authority, confidentiality, open records)

Other issues affecting agencies' effective use of mediation

Representation issues

Organizing to negotiate in real time

Agency's "bottom line" calculus

Ratification and internal review

Parties' diverse experience, resources, and styles

Media and legislative interest

Political aspects

Assure representatives check with constituencies often

Provide information and data

Articulate issues, problems

Suggest solutions

Be flexible

Listen carefully

Don't reject proposals out-of-hand

Keep promises

## DEFINITIONS

### **Definition: Alternative dispute resolution**

Alternative dispute resolution, or “ADR”, refers to a collection of processes that allows parties to manage their conflicts constructively by employing approaches to negotiation and joint problem solving that make it safe for parties involved in disputes to engage in collaborative decision making. Except for binding arbitration, ADR processes seek to make the negotiation process more effective, usually by employing a neutral third party who can help create a structure or atmosphere conducive to agreement, or occasionally to provide substantive input, thus, permitting “interest-based” approaches to succeed.

### **Definition: Consensus Processes**

Consensus processes, or alternative dispute resolution, are a collective name for a series of joint problem-solving processes used in lieu of formal, adversarial means of resolving conflict. Most of these processes involve the use of a neutral third party who works with the parties to help them reach consensus on mutually acceptable solutions.

### **Definition: Mediation**

A process in which a trained, impartial third party assists two or more parties to negotiate an acceptable settlement of contested issues. The mediator has no independent authority to impose any decision, but employs his/her knowledge of negotiation to work with the parties to structure and apply a process to help them reach agreement. The mediator may meet separately with parties, suggest (or help parties find) realistic alternatives, operate as an interpreter between parties with different styles of persuasion, help parties assess strengths and weaknesses of their cases, and assist parties find objective standards for judging their cases.

### **Definition: Minitrial**

In a structured negotiation procedure, parties make their cases in informal, highly abbreviated presentations to senior representatives from each party with authority to settle the case. Following the presentations, the representatives attempt to negotiate a settlement.

### **Definition: Early Neutral Evaluation**

A neutral with substantive expertise hears informal presentations of the highlights of parties' cases and offers the parties a nonbinding, objective assessment of their cases' strengths and weaknesses.

### **Definition: Ombuds**

An individual is authorized to investigate complaints against an agency and recommend relief. Often employed by an organization, but has a degree of autonomy, often talks in confidence with interested parties in an effort to resolve an individual dispute or avoid future problems.