

Alternate Dispute Resolution Handbook

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History

The first uses of alternative dispute resolution (ADR) processes began experimentally in the 1970s as a potential remedy for disabling court backlogs, and as resolution techniques for environmental and natural resource disputes. In 1985, the Attorney General issued an order recognizing the need for ADR to reduce the time and expense of civil litigation. A few years later the Department of Justice again recognized the benefits of ADR in the Congressional testimony of its Assistant Attorney General, Office of Legal Counsel, who supported the first ADR legislation enacted by Congress in 1990.

A number of initiatives by Congress and the Government have encouraged the use of alternative methods of workplace dispute resolution throughout the Executive Branch. In the 1990s, Congress passed three statutes (the Administrative Dispute Resolution Acts of 1990 and 1996, and the Alternative Dispute Resolution Act of 1998) which, collectively, required each agency to adopt a policy encouraging use of ADR in a broad range of decision making, and required the federal trial courts to make ADR programs available to litigants. These initiatives also include the *Civil Rights Act of 1991*; the *National Performance Review*; Executive Order 12871, *Labor Management Partnerships*; and the Equal Employment Opportunity Commission's regulations.

Overview

Alternative dispute resolution (ADR) consists of a variety of approaches to early intervention and dispute resolution. Many of these approaches include the use of a neutral individual such as a mediator who can assist disputing parties in resolving their disagreements. ADR increases the parties' opportunities to resolve disputes prior to or during the use of formal administrative procedures and litigation (which can be very costly and time-consuming). It typically is not intended to replace the more traditional approaches and it can provide long term solutions to employee-employer conflicts through stakeholders' participation and buy-in. In contrast, traditional dispute resolution procedures often impose a "solution" handed down by a third party (e.g., a judge), where neither party walks away satisfied, and the disputing parties' conflict continues or increases.

In employee and labor relations and equal employment opportunity disputes, ADR has most commonly taken the form of mediation. However, there are many other options available including conciliation, cooperative problem-solving, dispute panels, facilitation, fact finding, interest-based problem solving and bargaining, settlement conferences, ombudsing, peer review, and alternative discipline. Alternative discipline as an ADR technique involves taking some type of action in lieu of traditional discipline to correct misconduct without resorting to more costly formal procedures and litigation. Parties can use any of these ADR techniques, combinations of them, or others. In short, parties can design and implement virtually any form of ADR which suits their needs.

Benefits

There are many benefits to alternative dispute resolution (ADR), including:

- Complaints are processed more quickly and resolved earlier
- The process leads to more creative solutions
- Savings in time of attorneys, staff, and parties who are federal employees
- Quicker resolution than a hearing would offer and less time that the parties have spent under the cloud of pending litigation
- Creative resolutions acceptable to the parties, but which a third-party reviewer could not impose
- A durable and voluntary agreement.

Moreover, even in the cases which do not result in resolution, other distinct advantages to the ADR process include:

- Laying the groundwork for a subsequent settlement
- Increasing clarification of the issues for third-party review.

Glossary and Terms

There are several terms that describe the various alternative dispute resolution (ADR) techniques and methods. Those approaches that are most common in the Federal government are described here.

Alternative discipline can be characterized as a form of alternative dispute resolution (ADR) that, like more traditional ADR techniques such as mediation, facilitation, etc., can be used effectively to resolve, reduce, or even eliminate workplace disputes that might come from a circumstance where disciplinary action is appropriate. As the term suggests, AD is an alternative to traditional discipline--usually when the traditional penalty would be less than removal.

Binding arbitration involves the presentation of a dispute to an impartial or neutral individual (arbitrator) or panel (arbitration panel) for issuance of a binding decision. Unless arranged otherwise, the parties usually have the ability to decide who the individuals are that serve as arbitrators. In some cases, the parties may retain a particular arbitrator (often from a list of arbitrators) to decide a number of cases or to serve the parties for a specified length of time (this is common when a panel is involved). Parties often select a different arbitrator for

each new dispute. A common understanding by the parties in all cases, however, is that they will be bound by the opinion of the decision maker rather than simply be obligated to "consider" an opinion or recommendation. Under this method, the third party's decision generally has the force of law but does not set a legal precedent. It is usually not reviewable by the courts.

Binding arbitration is a statutorily-mandated feature of Federal labor management agreements. Consistent with statute, the parties to such agreements are free to negotiate the terms and conditions under which arbitrators are used to resolve disputes, including the procedures for their selection. Some agreements may provide for "permanent" arbitrators and some may provide for arbitration panels.

Conciliation involves building a positive relationship between the parties to a dispute. A third party or conciliator (who may or may not be totally neutral to the interests of the parties) may be used by the parties to help build such relationships.

A conciliator may assist parties by helping to establish communication, clarifying misperceptions, dealing with strong emotions, and building the trust necessary for cooperative problem-solving. Some of the techniques used by conciliators include providing for a neutral meeting place, carrying initial messages between/among the parties, reality testing regarding perceptions or misperceptions, and affirming the parties' abilities to work together. Since a general objective of conciliation is often to promote openness by the parties (to take the risk to begin negotiations), this method allows parties to begin dialogues, get to know each other better, build positive perceptions, and enhance trust. The conciliation method is often used in conjunction with other methods such as facilitation or mediation.

Cooperative problem-solving is one of the most basic methods of dispute resolution. This informal process usually does not use the services of a third party and typically takes place when the concerned parties agree to resolve a question or issue of mutual concern. It is a positive effort by the parties to collaborate rather than compete to resolve a dispute.

Cooperative problem-solving may be the procedure of first resort when the parties recognize that a problem or dispute exists and that they may be affected negatively if the matter is not resolved. It is most commonly used when a conflict is not highly polarized and prior to the parties forming "hard line" positions. This method is a key element of labor-management cooperation programs.

Dispute panels use one or more neutral or impartial individuals who are available to the parties as a means to clarify misperceptions, fill in information gaps, or resolve differences over data or facts. The panel reviews conflicting data or facts and suggests ways for the parties to reconcile their differences. These recommendations may be procedural in nature or they may involve specific substantive recommendations, depending on the authority of the panel and the needs or desires of the parties. Information analyses and suggestions made by the panel may be used by the parties in other processes such as negotiations.

This method is generally an informal process and the parties have considerable latitude about how the panel is used. It is particularly useful in those organizations where the panel is non-threatening and has established a reputation for helping parties work through and resolve their own disputes short of using some formal dispute resolution process.

Early neutral evaluation uses a neutral or impartial third party to provide a non-binding evaluation, sometimes in writing, which gives the parties to a dispute an objective perspective on the strengths and weaknesses of their cases. Under this method, the parties will usually make informal presentations to the neutral to highlight the parties' cases or positions. The process is used in a number of courts across the country, including U.S. District Courts.

Early neutral evaluation is appropriate when the dispute involves technical or factual issues that lend themselves to expert evaluation. It is also used when the parties disagree significantly about the value of their cases and when the top decision makers of one or more of the parties could be better informed about the real strengths and weaknesses of their cases. Finally, it is used when the parties are seeking an alternative to the expensive and time-consuming process of following discovery procedures.

Facilitation involves the use of techniques to improve the flow of information in a meeting between parties to a dispute. The techniques may also be applied to decision-making meetings where a specific outcome is desired (e.g., resolution of a conflict or dispute). The term "facilitator" is often used interchangeably with the term "mediator," but a facilitator does not typically become as involved in the substantive issues as does a mediator. The facilitator focuses more on the process involved in resolving a matter.

The facilitator generally works with all of the meeting's participants at once and provides procedural directions as to how the group can move efficiently through the problem-solving steps of the meeting and arrive at the jointly agreed upon goal. The facilitator may be a member of one of the parties to the dispute or may be an external consultant. Facilitators focus on procedural assistance and remain impartial to the topics or issues under discussion.

The method of facilitating is most appropriate when: (1) the intensity of the parties' emotions about the issues in dispute are low to moderate; (2) the parties or issues are not extremely polarized; (3) the parties have enough trust in each other that they can work together to develop a mutually acceptable solution; or (4) the parties are in a common predicament and they need or will benefit from a jointly-acceptable outcome.

Fact-finding is the use of an impartial expert (or group) selected by the parties, an agency, or by an individual with the authority to appoint a fact-finder in order to determine what the "facts" are in a dispute. The rationale behind the efficacy of fact-finding is the expectation that the opinion of a trusted and impartial neutral will carry weight with the parties. Fact-finding was originally used in the attempt to resolve labor disputes, but variations of the procedure have been applied to a wide variety of problems in other areas as well.

Fact finders generally are not permitted to resolve or decide policy issues. The fact-finder may be authorized only to investigate or evaluate the matter presented and file a report establishing the facts in the matter. In some cases, he or she may be authorized to issue either a situation assessment or a specific non-binding procedural or substantive recommendation as to how a dispute might be resolved. In cases where such recommendations are not accepted, the data (or facts) will have been collected and organized in a fashion that will facilitate further negotiations or be available for use in later adversarial procedures.

Interest-based problem-solving is a technique that creates effective solutions while improving the relationship between the parties. The process separates the person from the problem, explores all interests to define issues clearly, brainstorms possibilities and opportunities, and uses some mutually agreed upon standard to reach a solution. Trust in the process is a common theme in successful interest-based problem-solving.

Interest-based problem-solving is often used in collective bargaining between labor and management in place of traditional, position-based bargaining. However, as a technique, it can be effectively applied in many contexts where two or more parties are seeking to reach agreement.

Mediated arbitration, commonly known as "med-arb," is a variation of the arbitration procedure in which an impartial or neutral third party is authorized by the disputing parties to mediate their dispute until such time as they reach an impasse. As part of the process, when impasse is reached, the third party is authorized by the parties to issue a binding opinion on the cause of the impasse or the remaining issue(s) in dispute.

In some cases, med-arb utilizes two outside parties--one to mediate the dispute and another to arbitrate any remaining issues after the mediation process is completed. This is done to address some parties' concerns that the process, if handled by one third party, mixes and confuses procedural assistance (a characteristic of mediation) with binding decision making (a characteristic of arbitration). The concern is that parties might be less likely to disclose necessary information for a settlement or are more likely to present extreme arguments during the mediation stage if they know that the same third party will ultimately make a decision on the dispute.

Mediated arbitration is useful in narrowing issues more quickly than under arbitration alone and helps parties focus their resources on the truly difficult issues involved in a dispute in a more efficient and effective manner.

Mediation is the intervention into a dispute or negotiation of an acceptable, impartial and neutral third party who has no decision-making authority. The objective of this intervention is to assist the parties in voluntarily reaching an acceptable resolution of issues in dispute. Mediation is useful in highly-polarized disputes where the parties have either been unable to initiate a productive dialogue, or where the parties have been talking and have reached a seemingly insurmountable impasse.

A mediator, like a facilitator, makes primarily procedural suggestions regarding how parties can reach agreement. Occasionally, a mediator may suggest some substantive options as a means of encouraging the parties to expand the range of possible resolutions under consideration. A mediator often works with the parties individually, in caucuses, to explore acceptable resolution options or to develop proposals that might move the parties closer to resolution.

Mediators differ in their degree of directiveness or control while assisting disputing parties. Some mediators set the stage for bargaining, make minimal procedural suggestions, and intervene in the negotiations only to avoid or overcome a deadlock. Other mediators are much more involved in forging the details of a resolution. Regardless of how directive the

mediator is, the mediator performs the role of catalyst that enables the parties to initiate progress toward their own resolution of issues in dispute.

Minitrials involve a structured settlement process in which each side to a dispute presents abbreviated summaries of its cases before the major decision makers for the parties who have authority to settle the dispute. The summaries contain explicit data about the legal basis and the merits of a case. The rationale behind a minitrial is that if the decision makers are fully informed as to the merits of their cases and that of the opposing parties, they will be better prepared to successfully engage in settlement discussions. The process generally follows more relaxed rules for discovery and case presentation than might be found in the court or other proceeding and usually the parties agree on specific limited periods of time for presentations and arguments.

A third party who is often a former judge or individual versed in the relevant law is the individual who oversees a minitrial. That individual is responsible for explaining and maintaining an orderly process of case presentation and usually makes an advisory ruling regarding a settlement range, rather than offering a specific solution for the parties to consider. The parties can use such an advisory opinion to narrow the range of their discussions and to focus in on acceptable settlement options--settlement being the ultimate objective of a minitrial.

The minitrial method is a particularly efficient and cost effective means for settling contract disputes and can be used in other cases where some or all of the following characteristics are present: (1) it is important to get facts and positions before high-level decision makers; (2) the parties are looking for a substantial level of control over the resolution of the dispute; (3) some or all of the issues are of a technical nature; and (4) a trial on the merits of the case would be very long and/or complex.

Negotiated rulemaking, commonly known as "reg-neg," brings together representatives of various interest groups and a Federal agency to negotiate the text of a proposed rule. The method is used before a proposed rule is published in the *Federal Register* under the *Administrative Procedures Act* (APA). The first step is to set up a well-balanced group representing the regulated public, public interest groups, and state and local governments, and join them with a representative of the Federal agency in a Federally chartered advisory committee to negotiate the text of the rule. If the committee reaches consensus on the rule, then the Federal agency can use this consensus as a basis for its proposed rule.

While reg-neg may result in agreement on composition of a particular rule an agency may wish to propose, when the rule is proposed it is still subject to public review under the APA. This is the last step in the process. Federal agency experience is that the process shortens considerably the amount of time and reduces the resources needed to promulgate sensitive, complex, and far-reaching regulations--often regulations mandated by statute.

Settlement conferences involve a pre-trial conference conducted by a settlement judge or referee and attended by representatives for the opposing parties (and sometimes attended by the parties themselves) in order to reach a mutually acceptable settlement of the matter in dispute. The method is used in the judicial system and is a common practice in some jurisdictions. Courts that use this method may mandate settlement conferences in certain circumstances.

The role of a settlement judge is similar to that of a mediator in that he or she assists the parties procedurally in negotiating an agreement. Such judges play much stronger authoritative roles than mediators, since they also provide the parties with specific substantive and legal information about what the disposition of the case might be if it were to go to court. They also provide the parties with possible settlement ranges that could be considered.

Non-binding arbitration involves presenting a dispute to an impartial or neutral individual (arbitrator) or panel (arbitration panel) for issuance of an advisory or non-binding decision. This method is generally one of the most common quasi-judicial means for resolving disputes and has been used for a long period of time to resolve labor/management and commercial disputes. Under the process, the parties have input into the selection process, giving them the ability to select an individual or panel with some expertise and knowledge of the disputed issues, although this is not a prerequisite for an individual to function as an arbitrator. Generally, the individuals chosen are those known to be impartial, objective, fair, and to have the ability to evaluate and make judgments about data or facts. The opinions issued by the third party in such cases are non-binding; however, parties do have the flexibility to determine, by mutual agreement that an opinion will be binding in a particular case.

Non-binding arbitration is appropriate for use when some or all of the following characteristics are present in a dispute: (1) the parties are looking for a quick resolution to the dispute; (2) the parties prefer a third party decision maker, but want to ensure they have a role in selecting the decision maker; and (3) the parties would like more control over the decision making process than might be possible under more formal adjudication of the dispute.

Ombudsmen are individuals who rely on a number of techniques to resolve disputes. These techniques include counseling, mediating, conciliating, and fact-finding. Usually, when an ombudsman receives a complaint, he or she interviews parties, reviews files, and makes recommendations to the disputants. Typically, ombudsmen do not impose solutions. The power of the ombudsman lies in his or her ability to persuade the parties involved to accept his or her recommendations. Generally, an individual not accepting the proposed solution of the ombudsman is free to pursue a remedy in other forums for dispute resolution.

Ombudsmen may be used to handle employee workplace complaints and disputes or complaints and disputes from outside of the place of employment, such as those from customers or clients. Ombudsmen are often able to identify and track systemic problems and suggest ways of dealing with those problems.

Partnering is used to improve a variety of working relationships, primarily between the Federal Government and contractors, by seeking to prevent disputes before they occur. The method relies on an agreement in principle to share the risks involved in completing a project and to establish and promote a nurturing environment. This is done through the use of team-building activities to help define common goals, improve communication, and foster a problem-solving attitude among the group of individuals who must work together throughout a contract's term.

Partnering in the contract setting typically involves an initial partnering workshop after the contract award and before the work begins. This is a facilitated workshop involving the key stakeholders in the project. The purpose of the workshop is to develop a team approach to the

project. This generally results in a partnership agreement that includes dispute prevention and resolution procedures.

Peer review is a problem-solving process where an employee takes a dispute to a group or panel of fellow employees and managers for a decision. The decision may or may not be binding on the employee and/or the employer, depending on the conditions of the particular process. If it is not binding on the employee, he or she would be able to seek relief in traditional forums for dispute resolution if dissatisfied with the decision under peer review. The principle objective of the method is to resolve disputes early before they become formal complaints or grievances.

Typically, the panel is made up of employees and managers who volunteer for this duty and who are trained in listening, questioning, and problem-solving skills as well as the specific policies and guidelines of the panel. Peer review panels may be standing groups of individuals who are available to address whatever disputes employees might bring to the panel at any given time. Other panels may be formed on an ad hoc basis through some selection process initiated by the employee, e.g., blind selection of a certain number of names from a pool of qualified employees and managers.

Conflict Coaching: In its simplest terms, a coach is a thinking partner, someone who can assist others in identifying and exploring options, support risk taking, and, if necessary, develop the skills necessary to move forward.

Consultation: A process wherein a neutral third party explores the issues, positions, and interests of the parties in an effort to help diagnose the issues and assess the situation. It is a tool for framing and clarifying issues in dispute.

Team Building: Team building is a type of facilitation process in which a third party neutral assists a team or a group of individuals with interrelated roles and responsibilities. The team members operate within a set of norms and rules and define the goals and guidelines for a group to effectively achieve stated goals.

Alternative Discipline Practices

In a case where traditional discipline might call for a penalty of suspension without pay, under alternative discipline (AD) the employee and the agency might agree that a letter in lieu of the suspension is appropriate. Typical features of such an agreement between the employee and agency are: (1) an accurate and full description of the employee's offense; (2) employee admission of wrongdoing; (3) employee promise to modify his or her behavior; (4) notation of the specific traditional disciplinary penalty and the specific alternative discipline; (5) acknowledgment that the agreement will be kept to support possible future disciplinary action based on new offenses and/or acknowledgment of the disposition of the agreement at the end of a specified reckoning period; (6) notification of the possible penalty for a subsequent offense; (7) usually a waiver of appeal and/or grievance rights; (8) a statement that the agreement was voluntarily entered into by the employee and the agency; and (9) signatures of the employee, the supervisor, and any representative. A key aspect of AD is that the employee has a stake in AD in that he or she is actively involved in determining how the workplace problem is resolved.

Benefits of AD include avoidance of the high costs of litigating appeals, grievances, or complaints that often follow traditional discipline--under AD, all issues are resolved at the time the action is taken. The agency retains the services of the employee instead of losing productivity because the employee is under suspension as may be the case under traditional discipline. If the employee is suspended, there may be replacement coverage expenses which might include overtime payments for other employees to do the work of the suspended employee. AD helps avoid lost time and productivity of supervisors, deciding officials, witnesses, and others who may be preparing for and attending hearings or other dispute resolution proceedings if traditional discipline is used. AD also reduces the negative impact on the relationship between a supervisor and a disciplined employee that can occur following traditional discipline. Finally, AD can be a tool to help cope with reductions in agency funding by keeping employees on the job and productive.

In the Federal dispute resolution process, four key agencies adjudicate appeals arising from workplace disputes. These administrative appeals agencies are the Federal Labor Relations Authority (FLRA), the Equal Employment Opportunity Commission (EEOC), the Merit Systems Protection Board (MSPB), and the Office of Special Counsel (OSC). Each has its own statutorily-based areas over which it has authority to adjudicate. MSPB also has appellate jurisdiction over additional matters as authorized by the U.S. Office of Personnel Management (OPM). In addition, the Federal Mediation and Conciliation Service (FMCS), while not an "administrative appeals agency," offers dispute resolution that cross-cuts the entire Government, including the four agencies above.

In general, each agency has consistently been faced over the years with demands for quicker resolution of disputes, often at times when they are faced with limited resources to meet those demands. As a result, the administrative appeals agencies experimented with various techniques to carry out their missions. MSPB's settlement initiative was one of the earliest and most concerted efforts to streamline its adjudication process and has led to the present-day statistic that over one half of its appeals are resolved through the settlement process. EEOC has been a leader in encouraging agencies to use ADR techniques to resolve workplace discrimination disputes. FLRA has been instrumental in streamlining the formal adjudicatory process for considering labor-management relations issues and FMCS has been the Government's long-time "go-to" agency for obtaining the services of mediators. Each of the administrative appeals agencies is now using ADR techniques to adjudicate matters over which it has jurisdiction, and each is engaged in substantial outreach efforts to encourage potential litigants to use their respective ADR processes.