

Administrative Conference of the United States
Office of the Chairman

**Resource Papers
in Administrative Law**



**Mediation:
A Primer for
Federal Agencies**

Introduction

The Administrative Conference of the United States was established by statute as an independent agency of the federal government in 1964. Its purpose is to promote improvements in the efficiency, adequacy, and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions.

To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished by direct action on the part of the affected agencies or through legislative changes.

As part of the Conference's series of "Resource Papers in Administrative Law," *Mediation: A Primer for Federal Agencies* is intended to help agency managers and attorneys make better use of a key method for resolving conflicts consensually. It is part of the Conference's ongoing program to help agencies implement the Administrative Dispute Resolution Act (Pub. L. No. 101-552). Publication was made possible by a generous grant from the William and Flora Hewlett Foundation.

The Conference is indebted to Thomas R. Colosi, Vice President for National Affairs, American Arbitration Association, and Christopher B. Colosi, former Intern, Administrative Conference, for preparing this primer.

Mediation: A Primer for Federal Agencies

by

Thomas R. Colosi and Christopher B. Colosi*

Managing Conflict with Mediation

A government contract is in dispute . . . An employee files a sex discrimination complaint against her supervisor . . . A disagreement arises with a grantee over grant expenditures or compliance with statutory mandates . . . Parties to an agency enforcement proceeding fail to agree on a mutually acceptable settlement . . .

Frustration, distrust, and anger are rising . . . Antagonistic positions are taken and summarily rejected . . . Negotiations break down or, worse, do not even begin due to internal confusion or dissension . . . Time and energy are diverted from agency priorities, and productivity is lost . . .

“Beyond cutting costs, . . . for many disputes various alternatives offer the possibility of producing better results than do trials . . . [S]ome managers are recognizing that they can apply their own business knowledge and creativity to developing solutions better suited to their needs than courts and lawyers alone could devise.”

Linda R. Singer, *Settling Disputes:
Conflict Resolution in Business,
Families, and the Legal System.*

These problems are familiar to federal managers. One alternative to continued conflict is mediated negotiation, or mediation. In mediation the parties resolve the dispute, instead of turning it over to formal court or agency proceedings with the concomitant cost, delay, and loss of control over the result.

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What Is Mediation?

In mediation, a trained, impartial third party helps two or more parties negotiate to resolve their dispute. Mediation emphasizes problem solving, rather than gearing up for protracted adversary proceedings. The mediator works to gain the trust of the disputing parties, has no stake in the outcome, is not a judge (unlike in arbitration or court proceedings), and has no power to make decisions. Mediators often use their knowledge of negotiation and consensus-building processes and their persuasion skills to help the parties see negotiating strategies that will allow them to reach their respective objectives.

Unless mandated by a court, mediation is a voluntary, informal process. Rules of evidence do not apply. Testimony is not taken. Witnesses are neither sworn nor used to support or defend positions. Interrogatories, depositions, and transcripts are not required. Even in court-mandated mediation, parties cannot be forced to reach agreement.

Mediation is one of several nonbinding alternative dispute resolution options. (See "Mediation and 'ADR'," page 4.)

"A host of new cases have flooded the courts. A large part of all the litigation in the courts is an exercise in futility and frustration. These protracted cases not only deny parties the benefits of a speedy resolution of their conflicts, but also enlarge the cases, tensions and delays facing all other litigants waiting in line. The anomaly is that there are better ways of doing it."

Warren E. Burger, Former Chief
Justice, United States Supreme Court

How Can Mediation Help?

Managers benefit from mediation in several ways: they save money, they make more efficient use of their resources, and they preserve the integrity of ongoing work relationships. Because managers who reach agreement through mediation retain control of the dispute's outcome, the result is more likely to meet their needs than would be a decision imposed from the outside. Mediation gives managers the

opportunity to craft more creative solutions than might be available from an administrative law judge or other outside decisionmaker, or even than the parties might develop on their own. Because those closest to the substance of the problem have designed their own settlement, the parties are far more likely to abide by it.

The government manager who uses mediation can take charge of the process of resolving disputes. By planning and carrying out a settlement strategy, he or she can avoid having a dispute get swept up in costly, time-consuming adjudication. An executive can employ mediation's flexible structure to manage, negotiate, weigh technical data, and make decisions—rather than see a conflict fester into something worse or call in the lawyers to take over. This can improve both the quality and the efficiency of agency activities.

True, some managers tend to do the opposite. Invoking formal processes for sticky problems may sometimes appear to be the simplest or safest course for managers in some large organizations. It is, however, seldom the most cost-effective way to reach program decisions or resolve specific conflicts once and for all, especially from the perspective of the agency as a whole.

Also, it may be tempting to pass a dispute on to the next manager. It is true that agency managers cannot always effect binding settlements wholly on their own authority. However, a manager can often generate an internal consensus for workable solutions before entering negotiations (perhaps using his or her own mediation skills), and then keep superiors apprised as discussions proceed. Sometimes it may even be preferable for the manager to delegate the negotiating task, while retaining ratification authority. In any case, a manager can, and should, address these kinds of issues as a matter of course in deciding how to deal with any problem.

“Litigation paralyzes people. It makes them enemies. It pits them not only against each other, but against the other’s employed combatant. Often disputants lose control of the situation, finding themselves virtually powerless. They attach allegiance to their lawyer rather than to the fading recollection of a perhaps once worthwhile relationship.”

Jack Etheridge, “Mending Fences,”
Trial, 1985.

Mediation and “ADR”

Alternative means of dispute resolution include a variety of processes that emphasize creativity and cooperation in lieu of adjudicative or adversarial means of solving problems. Included within the context of ADR are a variety of forms, ranging from consensual decision-making techniques, like mediation, to binding arbitration. Many of these processes involve some form of assisted negotiation relying in large part on mediation skills. Other common ADR processes include:

- ❑ **Minitrial.** In a structured negotiation procedure, disputants make their cases in informal, highly abbreviated presentations to key decisionmakers from each party with authority to settle.
- ❑ **Early Neutral Evaluation.** A neutral factfinder, often with substantive expertise, hears informal presentations and offers the parties a nonbinding evaluation of their cases' strengths and weaknesses.
- ❑ **Settlement Judge.** A judge—other than the presiding judge—meets with the parties jointly and separately, acting as a mediator or neutral evaluator.
- ❑ **Negotiated Rulemaking.** In a multi-party process, an agency and representatives of affected interests come together with the aid of a mediator to negotiate the text of a proposed regulation.
- ❑ **Ombudsman.** An individual is authorized to investigate grievances and recommend resolutions.
- ❑ **Arbitration.** A neutral third party, often selected by the disputants, decides the submitted issues after hearing evidence and argument.

When to Use Mediation

By recognizing those disputes that are appropriate for mediation, a manager can better achieve program goals. Mediation is an option in any dispute where a negotiated solution is an acceptable outcome. This includes conflicts within or between agencies, as well as with regulated parties, states, contractors, and other private persons. In deciding whether to mediate, managers should first consider their options (e.g., an uncomfortable open conflict, a decision imposed from the outside, continuing antagonism that distracts agency personnel from their priority assignments) and assess the risks associated with each alternative.

Mediation is potentially useful in those situations where:

- Multiple issues have to be resolved
- There is no need to establish precedent and there is no single "right" solution that is required
- Tensions, emotions, or transaction costs are running high
- Communication between the parties has broken down
- Time is a major factor
- Failure to agree does not clearly benefit one or more parties
- Issues are complex and individual parties have an interest in maintaining confidentiality with respect to key issues
- The parties want or need to maintain some ongoing relationship.

Conversely, the need to focus public attention or set an example may mean that occasionally an agency must resort to public hearing, formal opinions, and even judicial review.

Managers can obtain maximum results from mediation when it is used early in the dispute, before the positions of the parties have hardened. When used in a formal proceeding, mediation may occur before, during, or after discovery. In some federal courts, mediation may be required for certain cases. More often, it is employed at the suggestion of a party or the presiding judge.

ADR Principles for Managers

“Dispute resolution is management These general guidelines provide a framework within which to choose ADR procedures:

1. Strive to keep decisions as close to the hands of the manager, decisionmaker and substantive expert as possible.
2. Seek not only the rational but the reasonable.
3. Seek to “offload,” not replace, the legal system.
4. Anticipate and act to prevent.
5. Explicitly assess the alternatives to using ADR and negotiation forums.
6. Think of dispute resolution as a creative process.
7. Rather than ignore them, visibly isolate extremes.
8. Negotiate and solve problems by satisfying interests, rather than capitulating to positions.
9. Seek psychological and procedural, as well as substantive, satisfaction from solutions.
10. Design ADR procedures to address the causes of disputes.
11. Try to separate personal egos from the issues in dispute.
12. Consider both short- and long-term goals and objectives in deciding on dispute resolution procedures and desired outcomes.”

Christopher Moore and Jerome Delli Priscoli. *The Executive Seminar on Alternative Dispute Resolution (ADR) Procedures: The U.S. Corps of Engineers.*

How Mediation Works

Usually mediation is a flexible process, with the role of the mediator varying depending on the stage of the process, the issues involved, and the needs and expectations of the parties. Managers should generally expect a mediator to guide the negotiations and to further

communication between the parties by seeking to create sufficient understanding and trust to permit successful negotiation. In cases where issues are clearly defined and the parties are eager to settle the dispute, the mediator may only need to help them communicate. Where anger and distrust exist, issues are complex, communication is impaired, or conflicts are longstanding, the mediator may take a more active role in helping the parties negotiate.

An effective mediator will try to ensure that the relevant parties to the dispute are all represented at the table. To help the parties reach an acceptable agreement, the mediator must understand the expectations of those parties and of bosses, constituents, clients, reviewers, or others who must ratify decisions.

Often, the mediator will meet separately with each party. This generally affords a better understanding of the parties' situations, since they are likely to speak more freely in private with confidentiality protected. (See "Is Mediation Confidential?," page 12.) As the parties' trust in the process grows, the mediator can ask questions, that will help the parties assess the merits of their positions, probe to learn participants' realistic alternatives to settling, suggest potential settlement options, float trial balloons, and converse in an atmosphere free of name calling and posturing.

In talking to the parties separately, the mediator is more than merely a messenger shuttling between disputants. The mediator operates much like an interpreter, easing communication between people who do not speak a common language. By listening carefully and shaping messages in order to transmit the views of persons with vastly different views and styles of persuasion, a mediator helps parties make their cases in the most convincing way. For example, a good mediator will listen to a message that is not being "heard" by the other party and, without changing the intent, communicate it in a manner that the other party understands as a positive suggestion and perceives to be more acceptable—in other words, reducing "heat" while increasing "light".

A key role of the mediator is demonstrating to the parties that the critical issue is less who is right or wrong than how they can work together to reach agreements that meet their needs without necessarily conforming slavishly to their original positions. The mediator often helps the parties agree on realistic, objective standards (appraisals, precedents, or methodologies) by which to judge the merits of their claims. He or she can help the parties devise structures for reaching closure in the instant dispute, or future ones. If asked to do so, the mediator can even preview how an ALJ or other judge might view the strengths and weaknesses of their positions. Such a well-timed dose of objectivity by an "agent of reality" may be just what the parties need to bridge the gap.

Depending on the nature of the dispute, the number of parties involved, their expectations, and the complexity of the issues, mediation might be completed in one meeting, or might involve several extending over weeks or even months. In-person meetings often are supplemented by telephone conference calls.

“Outside mediators enter disputes for a very specific reason: to fill a trust vacuum that exists when an impasse is reached among and within the parties. The mediator helps the negotiators create an environment where it is safe to trust the other party.”

Dennis J.D. Sandole and Ingrid Sandole-Staroste, eds., *Conflict Management and Problem Solving: Interpersonal to International Applications.*

Phases of the Mediation Process

The mediation process includes several different phases. According to one model, there are three: an introductory one, a problem solving phase, and closure. These may be clear and distinct, but more often they overlap.

□ **Introductory Phase.** During this phase the mediator tries to develop an atmosphere of reasonableness and to engender the parties' trust in the mediator and in their ability to work together. While the mediator may suggest ground rules for parties' participation and behavior, they must be agreed to by the parties themselves. These rules may range from simple matters of etiquette (e.g., ensuring that only one person speaks at a time) to, in some cases, detailed protocols about such matters as the scope, agenda, and order of the negotiation, the use and timing of private meetings, and the way in which the negotiating group will respond to media or other inquiries. This phase often begins with the parties agreeing to a general timetable for the mediation, and it includes a joint session in which the parties explain their views of the case and how they would like to see it resolved. A skilled mediator may use these (and later) sessions to allow parties to “let off steam” before moving on to more productive talks.

□ **Problem Solving.** The primary goals of this phase are to continue building trust, educate each participant about the dispute from the other party's perspective, and generate and evaluate possible solu-

tions. During this phase, the mediator often explores hypothetical solutions separately with each side, helping the parties generate alternatives without revealing confidential information. He or she will seek to stimulate momentum to settle, build on areas of agreement, narrow differences, and help parties explore in detail the most promising options.

□ **Closure.** This phase's primary objective, as the name implies, is to conclude the mediated negotiation. If all parties reach agreement, the mediator may help them draft a document spelling out its terms. The agreement might include paragraphs on its enforcement or on settling future related disputes. As needed, these agreements are then reviewed by appropriate ratifiers before being signed.

“Mediation is the best dispute resolution technique that we know . . . Mediation is done by the parties themselves . . . Mediators should not arrive at what they think is right, but at what they think the parties will accept.”

Anthony Sinicropi, President, National Academy of Arbitrators, 1991-92

Even when mediation does not end in a written agreement resolving all of the issues, the process still can be useful. Mediation can help to eliminate points in dispute, and parties generally come away with a better understanding of the issues and options for resolving them.

Federal Government Mediation

Federal district courts, and even some appellate courts, have begun to take advantage of mediation's capacity to resolve disputes less formally and less expensively than litigation. The U.S. District Court for the District of Columbia began a mediation program in 1989 that has handled scores of agency cases. Many other federal courts—encouraged by the recent Civil Justice Reform Act—have begun similar programs. The Administrative Dispute Resolution Act, a 1991 Executive Order (No. 12778), and subsequent Department of Justice guidelines encouraging government litigators to employ mediation and similar ADR methods have reinforced this trend.

These mandates have also begun to have a significant effect at the federal administrative level, where agencies and other parties to hundreds of contentious cases have employed mediation successfully.

The Administrative Dispute Resolution Act

Pub. L. No. 101-552 encourages the use of alternative means of resolving disputes involving government agencies. Pursuant to this Act, each agency has designated a senior official—the dispute resolution specialist—who is responsible for implementing appropriate consensual dispute resolution procedures to enhance government operations and better serve the public. A list of these specialists is available from the Administrative Conference.

The Act is based on Congress' finding that alternative processes, including mediation, often yield "decisions that are faster, less expensive and less contentious . . . [and] can lead to more creative, efficient and sensible outcomes."

The Administrative Conference is charged under the Administrative Dispute Resolution Act with responsibility for assisting federal agencies to develop alternative dispute resolution processes. Among other things, it provides advice and assistance to agencies implementing ADR programs and serves as an information clearinghouse. The Act also enlarges the Federal Mediation and Conciliation Service's authority—which for the past half century has run primarily to settling labor-management disputes—to allow it to offer mediation, training, and related services to agencies in resolving controversies arising under any federal administrative program.

The Department of Labor has established a pilot program for mediating disputes stemming from its varied responsibilities to enforce workplace safety, wage and hour standards, and other worker protection laws. The Department of Health and Human Services Departmental Appeals Board offers staff mediators to help resolve enforcement and cost disallowance cases pending before it. The Department of Education's Office of Administrative Law Judges also offers mediation for grant disputes. The Federal Deposit Insurance Corporation and the Resolution Trust Corporation use outside mediators and their own trained in-house

mediators to resolve claims against and among failed financial institutions. The Farmers Home Administration routinely participates in mediation of farmer-lender disputes in many states in an effort to head off foreclosures. Recent regulations promulgated by the Equal Employment Opportunity Commission for resolving federal agency EEO complaints offer incentives for using mediation and similar processes. The Environmental Protection Agency has used mediation to settle enforcement disputes under Superfund and other programs. These are some, but by no means all, of the rapidly increasing examples of ADR use by the government.

Preparing for Mediation

Parties entering into mediation should prepare in advance. Each party should assess its own interests, wants, needs, and expectations before sitting down at the table. This will help them better to understand their own cases and communicate with the mediator and other parties. It is also useful to assess opponents' interests and expectations in some detail.

In mediation, as in any negotiation, the people at the table will not always have final decisional authority. Especially in public disputes, they may represent others who must ratify any agreement. To ease the ratification process and maintain an atmosphere of good faith, it is important that parties to a mediation apprise other parties of any limits on their decisionmaking authority and keep their ratifiers informed about the status of negotiations. Good communication with one's ratifiers during the mediation process reduces the risk of their rejecting (or dragging their heels in carrying out) a sound agreement negotiated in good faith. Adequate time for consultation should be factored into any timetable for mediation.

Finding a Mediator

A manager using mediation needs to be able to locate and select a mediator who will be acceptable to all parties. Several agencies employ trained mediators on their own staffs and may make them available to other agencies. Others contract for these services, often with highly skilled professionals who have considerable training and experience that can prove invaluable in difficult cases. In many instances—especially in court-annexed and community-based programs involving more routine cases—mediators may be volunteers. Among factors a manager may wish to take into account in evaluating a potential neutral are experience

in the mediation process, subject expertise, geographic service area, training, occupation, degrees, references, fees, and the views of parties in other proceedings concerning the mediator's performance.

The Administrative Conference maintains a roster of neutrals, including mediators, available to assist in resolving agency disputes. FMCS and a few other agencies have in-house mediators who can be made available to federal managers. An increasing number of federal personnel are trained to mediate, and some may be available to managers in their own or another agency. There are numerous private sources. Federal statutes have given some of these sources, such as the American Arbitration Association, roles in aiding specific agency uses of ADR methods.

Is Mediation Confidential?

Mediation can make it safe for parties to raise sensitive issues and creative ideas, but many of its benefits can be achieved only if communications are confidential. The Administrative Dispute Resolution Act seeks to ensure appropriate protection of parties' and mediators' communications and to balance the openness required for legitimacy with the security that is necessary if some sensitive negotiations are to yield agreement. Unless the parties and the mediator agree otherwise, the Act generally prohibits disclosure or introduction into evidence of settlement communications. There are a few narrow exceptions for extraordinary cases. Dispute resolution communications are confidential and may not be disclosed either by the parties or by a neutral unless:

- All parties to the dispute resolution proceeding and the neutral agree in writing
- The communication has already been made public
- The communication is required by statute to be made public, or
- A court determines that such testimony or disclosure is necessary to -
 - Prevent a manifest injustice,
 - Help establish a violation of the law, or
 - Prevent harm to the public health or safety.The harm or injustice must be of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

In addition, parties may disclose such a communication if:

- The communication was prepared by the party seeking disclosure,
- The communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award, or
- The communication was provided to or was available to all parties to the dispute resolution proceeding.

Although the Act does not specifically exempt settlement communications from disclosure under the Freedom of Information Act, the Department of Justice has stated its position that any document protected under the Administrative Dispute Resolution Act is protected from disclosure under FOIA. The Act's confidentiality provisions do not affect the level of documentation that would ordinarily be prepared to justify a negotiated agreement.

Conclusion

Government agencies should make decisions and conduct their business in ways that achieve their missions in an efficient, timely manner. Mediation is a tool that can help agency managers expedite negotiation, narrow issues in dispute, resolve disputes at an early stage, promote "measured" advocacy, preserve relationships, and produce satisfying resolutions by expanding the range of possible solutions. By providing managers and other parties a structured, more positive environment in which to discuss their differences, mediation helps increase mutual understanding of each other's concerns, interests, misconceptions, emotions, and unsatisfied expectations.

The Administrative Dispute Resolution Act provides authority and encouragement for federal agencies to join the private sector and the courts in using mediation to improve operations and better serve the public. If agencies respond, all will benefit.

"There is one thing stronger than all the armies in the world: and that is an idea whose time has come."

Victor Hugo

Further Readings on Mediation

Administrative Conference of the United States (Millhauser, Marguerite S. and Charles Pou, Jr., eds.). *Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution*. Washington, DC: 1987.

A collection of articles on ADR, especially mediation; it includes experience of agencies, specific processes, model ADR procedures, and implementation considerations. Available from the Government Printing Office.

Administrative Conference of the United States (Pritzker, David M. and Deborah S. Dalton, eds.). *Negotiated Rulemaking Sourcebook*. Washington, DC: 1990.

A how-to manual for federal agencies and others needing information about the conduct of negotiated rulemaking, supplemented with sample documents, collected articles, and sources of assistance. Available from GPO.

American Arbitration Association. "Federal Legislation Naming the American Arbitration Association." *Lawyers Arbitration Letter* 15, 2 (June 1991).

Addresses United States Code provisions that name American Arbitration Association to assist in resolving disputes.

Bingham, Gail. *Resolving Environmental Disputes: A Decade of Experience*. Washington, DC: The Conservation Foundation, 1986.

A review of the growth of environmental mediation. Factors that can enhance or hinder mediation are addressed, as are the relative costs and efficiencies of litigation and mediation.

Colosi, Thomas R. "Negotiation in the Public and Private Sectors." *American Behavioral Scientist* 229 (November-December 1983).

Offers a perspective on negotiation that takes into account conflicting goals and interests within bargaining teams, including their effect on the process and the role of the mediator.

Coulson, Robert. *Business Mediation--What You Need to Know*. New York: American Arbitration Association, 1987.

A basic introduction to issues for parties in a commercial dispute to consider before participating in mediation.

Fisher, Roger and William Ury. *Getting to Yes: Negotiating Agreement without Giving In*. New York: Penguin Books, 1991 (second edition).

A concise primer on effective negotiation. The emphasis is on interest-based collaboration, also the underpinning of much of the practice of mediation. Offers a concise, step-by-step strategy for reaching mutually acceptable agreements.

Folberg, Jay and Alison Taylor. *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation*. San Francisco: Jossey-Bass Publishers, 1984.

Presents a framework for effective mediation for professionals and others who desire to integrate mediation into existing roles. This work presents the various stages of mediation and approaches to skill-building.

Laue, James H., ed. "Using Mediation to Shape Public Policy." *Mediation Quarterly* 20 (Summer 1988).

This issue, devoted wholly to mediating public disputes, includes a bibliography and chapters on negotiated rulemaking, getting parties to the table, and other aspects of mediating governmental disputes.

Lax, David and James K. Sebenius. *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain*. New York: The Free Press, 1986.

Makes the connection between negotiation and management in accepting negotiation as a way of life. Written from the perspective of the manager in the middle, it encompasses dispute resolution from negotiations to systems change.

Miller, Jeffrey G. and Thomas R. Colosi. *Fundamentals of Negotiation: A Guide for Environmental Professionals*. Washington, DC: The Environmental Law Institute, 1989.

Uses examples of environmental issues to illustrate the resolution of disputes between organizations. Gives specific guidelines for "managed negotiation."

Moore, Christopher and Jerome Delli Priscoli. *The Executive Seminar on Alternative Dispute Resolution (ADR) Procedures: The U.S. Corps of Engineers*. Boulder, CO: CDR Associates, 1989.

Designed as part of an intensive training course for agency executives, this material presents the spectrum of ADR processes, theoretical concepts, and skills as adjuncts to general management techniques.

Moore, Christopher W. *The Mediation Process: Practical Strategies for Resolving Conflict*. San Francisco: Jossey-Bass, Inc., 1986.

Written to assist lawyers and managers in understanding and implementing the stages of mediation. For professionals who wish to use collaborative problem-solving techniques.

Rogers, Nancy H. and Craig A. McEwen. *Mediation: Law, Policy, Practice*. Deerfield, Illinois: Clark Boardman Callaghan, 1989.

Addresses many legal and practical issues arising in mediation, including laws affecting its use, confidentiality, mediation standards, and evaluation of mediation programs.

Singer, Linda R. *Settling Disputes: Conflict Resolution in Business, Families, and the Legal System*. San Francisco: Westview Press, 1990.

An effective overview of ADR in a variety of settings, this work discusses the advantages and disadvantages of ADR, especially mediation, from the perspective of potential participants and others affected.

Ury, W.L., J.M. Brett, and S.B. Goldberg. *Getting Disputes Resolved: Designing Systems to Control the Cost of Conflict*. San Francisco: Jossey-Bass, 1988.

Presents a basic conceptual framework for designing systems to use mediation and other ADR methods to allow organizations to handle conflicts on a systematic basis.

For Information on Federal Mediation

Administrative Conference—Charles Pou, Director, Dispute Resolution Program; Nancy G. Miller, David M. Pritzker, Senior Attorneys (202) 254-7020

Defense Logistics Agency--David Drabkin, Associate General Counsel for Contracts (703) 274-6311

Environmental Protection Agency—David Batson, ADR Liaison (202) 260-8173; Debbie Dalton, Office of Policy, Planning and Evaluation (202) 260-5495

FDIC—Cathy A. Costantino, Director, ADR Unit (202) 736-0249

Federal Mediation and Conciliation Service—John A. Wagner or Peter Swanson, Field Services and Training (202) 653-2055

Department of Health and Human Services—John Settle, Chair, or Neil Kaufman, Executive Secretary, Departmental Appeals Board (202) 690-7707

Department of Labor—Peter Galvin, Co-Counsel for Administrative Law, Office of the Solicitor (202) 219-8065; Jim Jones, ADR Coordinator, Office of Policy (202) 219-6026

Resolution Trust Corporation—Martha McClellan, Director, ADR Unit (202) 736-0512

What a Mediator Considers When Entering a Negotiation

- The issues
- The parties' wants and needs
- The parties' proposals, positions, and interests
- The parties' assumptions
- The parties' alternatives to negotiation
- 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 specific 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 “facts” as agreed to by the parties (not as determined by the mediator)
- The “politics” of the situation (inside and outside)
- Outside factors affecting the negotiation
- The negotiation ground rules
- The relevant law or standards
- The power relationships and the criteria used by the parties to establish power
- Resources of the parties: legal, technical, political, financial
- The history of the relationship: is this a “one-shot” negotiation or part of a long-term relationship
- The objectives, strategy, and tactics of the parties
- The purpose: to resolve a dispute? avoid a dispute? solve a problem? harmonize a relationship? improve a relationship?
- The sophistication and drafting skills of the parties
- The amount of discretion negotiators/advocates have from closers/ratifiers
- 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 (e.g., idealists, realists, pragmatists, synthesizers, analysts)
- Whether participation in mediation is compulsory or voluntary
- Other possible processes for a negotiated settlement: hearing, court, med-arb, fact-finding, etc.
- Effects of passage of time on the interests and expectations of the parties
- What is “just,” “fair,” “equitable,” and “true” according to the parties

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