

OFFICE OF SPECIAL MASTERS

GENERAL ORDER #11

ALTERNATIVE DISPUTE RESOLUTION (“ADR”) TECHNIQUES AVAILABLE IN VACCINE CASES

I. INTRODUCTION

The National Vaccine Injury Compensation Program was specifically designed to resolve vaccine-related injury claims in a fashion that is speedier, less costly, and less adversarial than ordinary tort litigation. The Program has been largely successful in that regard, but in recent years the Office of Special Masters has utilized certain techniques of Alternative Dispute Resolution (“ADR”) that have resolved many cases *even more speedily and efficiently*.

When a Vaccine Act case is in dispute and the parties are unable to settle that dispute on their own, the special master considers the evidence and argument advanced by both parties, usually after one or more evidentiary hearings, and determines whether the petitioner is entitled to Program compensation, and, if appropriate, the proper amount of compensation. This process, while quicker and more efficient than ordinary tort litigation, can entail considerable time and expense. As an alternative to this decision-making process, the special masters provide ADR services which can often greatly reduce the time and expense of litigation.

ADR is a term widely used to describe methods and techniques of facilitating settlement of disputes without resort to formal court proceedings. Generally, ADR methods assist the parties in understanding the strengths and weaknesses of their case as well as their opponent’s, in assessing their chances of prevailing in formal litigation, and in viewing their case objectively from different perspectives. ADR techniques rely upon collaborative discussion rather than adversarial proceedings. When ADR is successful, a voluntary settlement is reached quickly and efficiently. Even where a settlement is not achieved, the parties’ understanding of the case is greatly enhanced, resulting in a more focused presentation to the decision-maker and ultimately a quicker resolution.

The use of ADR techniques has proven highly successful in resolving cases under the Program. While utilized primarily in the past to facilitate settling damages issues, ADR is now being used successfully to foster resolution of entitlement issues, litigative risk settlements, and many attorney fee issues. While mediation is the ADR method of choice, mini-trials and early neutral evaluations have also been used with great success. The essential ingredients are the parties’ willing and creative involvement. The ADR process has proven flexible and capable of handling virtually any fact pattern and legal issue, since the technique is tailored to the issues and the parties’ recommendations for a given case. ADR should be viewed as an important tool for resolving a dispute without sacrificing the quality of justice or the right to trial in the event that a voluntary settlement is not achieved.

In every Program case, the parties should carefully consider, ideally at an early point in the case, whether use of one of the ADR techniques described below might lead to a resolution that is not only speedy and efficient, but also provides for satisfaction to both parties.

II. TYPES OF ADR PROCEDURES AVAILABLE

A. *Terms defined*

Before discussing the types of ADR procedures that have been used in Vaccine Act cases, it may be helpful to define two terms. “**Mediation**” means that a third party meets and works with the parties to facilitate their settlement negotiations. The mediator attempts to help the parties improve their communication with one another, identify the key interests of each side, and determine areas of each party’s position in which there is enough flexibility to allow for compromise. The mediator ordinarily meets with both parties and both counsel together (note that the *petitioners themselves* are ordinarily included, not just their counsel), and then often will meet with each side separately, alternating between parties. Mediation can consist of a single session lasting from a couple of hours to a full day, or can consist of more than one session, with time periods in between the sessions. “**Neutral evaluation**,” on the other hand, means that a neutral third party spends time evaluating the *substance* of the case and the parties’ respective positions, and then gives each side a frank assessment of the strengths and weaknesses of that party’s case. This can often break a logjam in settlement negotiations where a party has an overly optimistic assessment of the strength of that party’s case.

B. *Types of procedures*

It should be emphasized that the **parties themselves**, subject to the special master’s approval, will choose an ADR procedure in any individual case. The parties should choose a format with which they are fully comfortable. The following are some of the available options.

1. **Mediation/neutral evaluation by “settlement master”**

The ADR technique that has been most commonly used in Program cases, with an extremely high rate of success, has been the appointment of a “settlement master.” The settlement master is a special master of the United States Court of Federal Claims *other* than the presiding special master. (The “presiding special master,” of course, is the special master who is already assigned the case and who would resolve the case by decision if no settlement is reached.) The settlement master can engage in mediation, neutral evaluation, or a combination of the two, as dictated by the preferences of the parties, to help the parties reach a settlement. But there are several particular points to consider when weighing the use of a “settlement master” as opposed to ADR by the *presiding* special master (option #3 below) or by a “professional mediator” (option #2 below).

As compared to mediation/evaluation by the presiding special master, use of a settlement master has the benefit that if the ADR fails to produce a full settlement, the settlement master will *not* be the one to decide the case. Therefore, the settlement master will feel freer to give the parties a candid assessment of their respective cases, and also it may be more acceptable to the parties for the settlement master to engage in *separate* meetings with each side to the case.

Moreover, use of a settlement master may also have some advantages, in some cases, over use of ADR by a “professional mediator” (option #2 below). Obviously, as a judicial officer extensively experienced in hearing and deciding *Vaccine Act cases*, the settlement master is extremely well qualified to give each party an experienced assessment of the strengths and weaknesses of that party’s case. For example, if the dispute concerns the proper *amount* of compensation, the settlement master will likely have a thorough working knowledge of what amounts special masters have awarded in similar cases, information that could greatly help the parties reach a compromise.

Of course, if ADR by the settlement master fails to produce a settlement satisfactory to both parties, the case will be returned to the presiding special master for hearing and decision.

2. Mediation/neutral evaluation by professional mediator

A second ADR option is to utilize mediation and/or neutral evaluation by someone who is not a special master--*i.e.*, a *professional mediator/evaluator*. Courts nationwide are now employing private, professional neutrals in court-sponsored ADR programs with a high rate of success, often in complex cases involving serious medical injuries.

The chief advantage of this form of ADR is that professional neutrals with practices devoted solely to mediation often have excellent specialized skills in resolving difficult conflicts. They have skills in building trust by remaining neutral at all times, and in improving the communications among the parties and counsel. Professional mediators are often particularly skilled in dealing with emotionally-charged cases, and in reaching out to the parties in the case. While counsel usually drive legal negotiations, professional neutrals are trained to encourage the *parties’ direct involvement* in settlement discussions to meet the needs and interests of the parties. Further, professional mediators can bring “a fresh face and look” to a dispute, from someone without preconceived notions about the case.

3. Mediation/neutral evaluation by presiding special master

A third available ADR procedure is to utilize mediation and/or neutral evaluation by the *presiding special master*, meaning the same special master who is already assigned the case. This process has been used successfully in a number of Program cases. The presiding master would, of course, engage in the above-described techniques of mediation, neutral evaluation, or a combination thereof, to help the parties to achieve settlement. The master might restrict the sessions to meeting

with both sides together, or might also engage in separate sessions with each side individually, whichever the parties prefer.

One advantage of this procedure is that the presiding special master already knows much about the substance of the case, and can prepare very quickly for the ADR session. Further, to the extent that the master gives the parties an evaluation of the case, the evaluation will be of considerable weight, since that same master would be the one to decide the case if settlement efforts fail.

On the other hand, a great many parties may not wish, understandably, to discuss their settlement negotiations with the same special master who would decide the case if settlement is not reached. If so, they may elect instead to try one of the other ADR procedures described above or below. Or, with the presiding special master's approval, the parties could proceed to ADR with the *presiding special master*, with the agreement that if settlement is not achieved, then the case will be formally transferred to *another* special master for decision. That option would combine the key feature of the "settlement master" option (*i.e.*, mediation by a master who will not decide the case if a settlement is not reached) with the advantage of having mediation by a master who is already familiar with the case.

4. Mini-trials

This is a procedure in which the parties present an abbreviated form of their case to either the presiding special master, another special master, or a third-party neutral. This procedure may be particularly useful when the record as it stands does not yet contain enough information for either side to appreciate fully the strengths of each side's case. The parties ordinarily agree to a time limit for each side's presentation. The mini-trial can be conducted as informally (or formally) as the parties prefer. The parties may choose who would be the best person to preside at the mini-trial--*i.e.*, the presiding special master, another special master, or someone else--and to what extent (if any) they wish the presiding official to offer an evaluation of the evidence after the presentation. The basic theory of the mini-trial is that it will give the parties in a short period of time a great deal of insight as to the strengths of each side's case, thus facilitating settlement. Typically, no ruling results from the mini-trial, and the parties retain their right to put on their *entire* case before the presiding special master at a later date, if settlement fails.

5. Other ADR procedures

The techniques discussed above are not necessarily the only ADR options available. Other procedures have been utilized, including, in cases where the parties agree, *binding* arbitration by either the presiding special master or another arbitrator. The special master and the parties can design other types of processes tailored to the particular case. The parties should feel free to discuss other ideas with each other, and to suggest them to the presiding special master.

III. ADDITIONAL POINTS

A. Confidentiality

All ADR proceedings, including documents generated solely for the ADR and communications within the scope of the proceedings, are confidential. If the ADR proceedings are conducted by a settlement master or third-party neutral, no description of the proceedings, any communications involved therein, or any documents generated solely for the ADR, will be divulged by the settlement master or neutral to the presiding special master (or to anyone else). Moreover, the parties ordinarily agree that if the ADR fails to result in settlement, *the parties, too*, and any other participants in the ADR, will be bound by this rule of confidentiality. (The presiding special master will provide a form for a confidentiality agreement that the parties may wish to execute before beginning the ADR proceedings.)

B. Preparation for ADR procedure

Counsel may or may not have experience in ADR proceedings. To select the appropriate ADR procedure and to prepare for the ADR proceeding, counsel are encouraged to familiarize themselves with ADR experiences under the Act. Counsel should discuss these matters among themselves, with the court, or with attorneys experienced in ADR matters under the Act. The court can furnish resources to familiarize parties with ADR under the Act.

C. Parties are strongly encouraged to consider ADR

Entry into any type of ADR proceeding is always purely voluntary on the parties' part. However, the special masters wish to emphasize that they believe that ADR is an excellent way to resolve Vaccine Act cases. They strongly encourage the parties to consider ADR as an option at any point in the proceeding. The presiding special master may well suggest ADR at some point in the proceeding if the master deems it appropriate, but the parties should *always* feel free to suggest it on their own. The Office of Special Masters will strive to ensure that any ADR proceeding is conducted *promptly and speedily* once the parties request it. Thus, ADR can not only offer a substantial likelihood of prompt resolution if the ADR is successful, but will also *not* substantially delay the ultimate resolution of the case even if the ADR is unsuccessful.

IT IS SO ORDERED.

Gary J. Golkiewicz
Chief Special Master