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# Voluntary Civil Dispute Resolution Policy



Issued March 1999

# **Elements of Voluntary Civil Dispute Resolution**

**T**here are four principal issues to be covered in this brochure:

**⌘ CRT Voluntary Civil Dispute Resolution Policy and ADR Criteria**

**⌘ Authority for use of ADR**

**⌘ CRT use of mediation**

**⌘ How does ADR work**

- ❖ Requesting ADR
- ❖ Selecting a neutral
- ❖ Who pays for the cost
- ❖ Elements of a mediation agreement

## **CRT Voluntary Civil Dispute Resolution Policy and ADR Criteria**

The long-standing policy of the Civil Rights Division to seek a voluntary resolution of our cases and investigations has served us well and will continue to do so. While there are settlement variations among our Sections that are defined by statute and administrative procedures, as a general rule the Division seeks to resolve cases and matters through party-to-party negotiations. The timing of such negotiations is also influenced in large measure by Executive Order 12988 and the Division's ability to gather relevant information, thereby placing significant responsibility on Division personnel to determine when voluntary negotiations should begin. Operating in concert with this long-standing settlement policy of the Division is the narrower concept of alternative dispute resolution (ADR). Over the last several years ADR has emerged within both the Department of Justice and the

federal district courts as an important and effective settlement tool.

The Division provides this pamphlet to disseminate information regarding Division policy with respect to ADR, a process that involves the use of third-party neutrals to resolve disputes. As each federal district court begins to implement the requirements of the recently-enacted Alternative Dispute Resolution Act of 1998, requiring each federal district court to adopt local rules regarding the use of ADR, information regarding Division policy in this area can serve to enhance the willingness of parties to explore the use of this settlement vehicle with Division personnel. While the Division will continue to emphasize traditional party to party negotiations for resolving our disputes, successful application of ADR should complement our efforts to achieve statutory objectives with a minimal use of resources.

## **What is the Settlement Policy of the Civil Rights Division?**

The Civil Rights Division resolves most of its civil matters on a voluntary basis through the use of bilateral negotiations, e.g., party-to-party settlement discussions. Nothing contained herein is intended to diminish our reliance on this successful method of case and matter resolution. What is outlined in this brochure is an additional tool the Division will utilize to seek an amicable resolution of cases and matters when bilateral negotiations have been unsuccessful.

## **What is the ADR Policy of the Civil Rights Division?**

The Attorney General has committed the Department of Justice civil litigating Divisions to make greater use of alternative dispute resolution. Consistent with this commitment, the Civil Rights Division will explore alternative dispute

resolution in all appropriate cases. As with any settlement technique, the Civil Rights Division places initial responsibility with our line level representatives to evaluate alternative dispute resolution on a case-by-case basis. Civil Rights Division criteria for ADR case selection are published at 61 Fed. Reg. 36,906-36,908 (1996).

*Factors evaluated by the Division when considering the use of ADR include:*

- ❖ The parties and their relationships
- ❖ Nature of the case
- ❖ Timing
- ❖ Necessity of public sanction
- ❖ Imbalance of power or ability
- ❖ Requirement of judicial decision
- ❖ Selection process for ADR neutral
- ❖ Degree to which successful summary judgment would resolve case conclusively
- ❖ Likelihood that case will settle through unassisted negotiations in near future

## **What Forms of ADR are Used by the Civil Rights Division?**

Most of the Civil Rights Division's experience with alternative dispute resolution has been with mediation. In such a proceeding the discussions among the parties are confidential and non-binding.

Normally, the mediator assists the parties in reaching a resolution. The success or failure of a mediation often rests on the skill of the mediator. In a constructive mediation the parties are focused on the areas of consensus, the emotional component of the negotiation has been defused, each party has a chance to give its version of events, and each party has the opportunity to hear the other side's case, unfiltered by its own counsel.

Unless controlled by local federal court rules, the parties jointly select and retain a mediator,

determine the process that will be followed in the mediation and set the time frame within which agreement should be reached. In mediation, the mediator focuses not only on the rights of the parties, but also the interests of the parties and what each party believes it needs in order to agree to a resolution of the dispute. The ultimate objective of a well conducted mediation is to allow each party to recognize that its interests and goals can be achieved through a voluntary resolution and to reach that resolution.

## **How Does the Division Handle a Request for ADR?**

A request to discuss alternative dispute resolution should be made of the Division representative with first line responsibility for the case or matter. The request will be reviewed pursuant to the Civil Rights Division's ADR Case Screening Factors, set out at 61 Fed. Reg. 36,906-36,908 (1996). There is no hard-and-fast rule that determines when a case is appropriate for ADR, but generally an ADR evaluation could occur in any case or matter that is at a juncture where the Division is prepared to discuss a voluntary resolution.

## **How is an ADR Neutral Selected?**

The selection of the neutral is considered one of the most critical steps in the ADR process. The neutral is selected by agreement among the parties. Sources for identifying or locating a list of neutrals are: the Senior Counsel for ADR at the Department of Justice (202-616-9471), a local bar association, a court-annexed ADR program, and professional ADR organizations.

## **Who Pays for the Neutral?**

In some areas court-appointed neutrals are available free of charge, but in most cases a mediator will require payment. In some cases, there may be costs for travel and for experts or consultants. The Civil Rights Division typically splits evenly the costs involved in the mediation. While mediation costs vary widely depending on the nature and complexity of the case, many mediations result in savings to the parties when these costs are measured against the expenses of litigation. Because costs are always of critical importance to the parties, the mediation agreement (see below) should be used as a vehicle to set out the extent of the costs the parties will commit to the mediation effort.

## **What is Typically Embodied in the Mediation Agreement?**

The nature of ADR and the commitment the parties make to the effort may require a written mediation agreement. The mediation agreement is designed to set out the responsibilities and expectations of the parties with regard to the mediation process. However, the mediation agreement is a separate and distinct document from the final agreement of the parties. Typically a written mediation agreement will contain provisions that address the following matters:

- ❖ Process is voluntary and may be terminated at any time
- ❖ Mediator has no authority to decide the case or matter
- ❖ Process and all its components are confidential
- ❖ The chronology of the mediation, e.g., mediator reviews written submissions, meets with all parties and counsel present, meets with each side individually, etc.

- ❖ A description of the settlement authority that each representative brings to each mediation session
- ❖ The dates the mediation is to begin and end
- ❖ The rate of pay of the mediator and how the cost will be shared among the parties
- ❖ An agreement that no party shall be bound by anything said or done at the mediation unless a settlement is reached, reduced to writing, and signed by all parties and counsel

## **What are Department of Justice Sources of Information Regarding ADR?**

Questions or inquiries about ADR should be directed to the Division representative who is responsible for the case or matter. An additional source of information regarding ADR and who is available for questions is the Office of the Senior Counsel for Alternative Dispute Resolution, United States Department of Justice, Room 5240 Main, Washington, DC, 20530 (202-616-9471). The Office of the Senior Counsel for Alternative Dispute Resolution is a Department wide office that was established by the Attorney General to encourage greater use of dispute resolution throughout the Department of Justice and all its offices, boards and divisions. General inquiries regarding ADR may also be directed to the Office of the Assistant Attorney General, Civil Rights Division, (202-514-2151). More information about the Civil Rights Division and ADR can be accessed on the Internet at [www.usdoj.gov/crt/](http://www.usdoj.gov/crt/).

Note: For persons with disabilities, this document will be available in large print, audio tape, computer disc, and braille.

## **What is the Authority for the Use of ADR?**

There are a variety of federal orders, statutes, regulations and guides that reference ADR and its use by the Department of Justice. While not all are applicable in all situations, examples of such reference materials are:

- ❖ Attorney General Order (April 6, 1995)
- ❖ Executive Order 12988, 61 Fed. Reg. 4729 (1996)
- ❖ Notice of Policy on the Use of Alternative Dispute Resolution, and Case Identification Criteria for Alternative Dispute Resolution, 61 Fed. Reg. 36,895 (1996)
- ❖ Administrative Dispute Resolution Act of 1996, 5 U.S.C.A. 571 et seq.
- ❖ ADR and Settlement in the Federal District Courts, a sourcebook for judges and lawyers (Federal Judicial Center 1996)
- ❖ Mediation and Conference Programs in the Federal Courts Of Appeals, a sourcebook for judges and lawyers (Federal Judicial Center 1997)
- ❖ Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (to be codified at 28 U.S.C. 651-658)

## **No Private Right of Action Created**

Nothing in this brochure or any other documents of the Department of Justice shall be construed to create any right or benefit, substantive or procedural, enforceable at law or in equity, by a party against the United States, its agencies, its officers, or any other person.