ADR/ECR Process Definitions

Arbitration

Arbitration is a conflict resolution process in which the disputing parties present their case privately to an impartial third party (a neutral or arbitrator). The neutral, experienced in the industry within which the dispute exists, listens to each party's position, and renders a final decision. Arbitration differs from mediation in which the third party simply helps the disputing parties develop a solution. Most private arbitration systems provide joint selection and payment of the arbitrator (or neutral); objective standards on which the arbitrator's decision is to be based; and rules of procedure to be applied by the arbitrator. The arbitrator rules on discovery requests and disputes; determines whether to apply rules of evidence and to what degree; hears witnesses including experts; reviews briefs, documents, and other exhibits; and entertains argument by counsel before rendering a decision. The arbitration process may differ from court proceedings by offering less formal procedures, abbreviated presentations, lower costs, and speed. There is little room for appeal, and the process generally ensures a final adjudication of the claim. Arbitration is generally a legally binding process but can also be non-binding (see Non-binding Arbitration below). When binding, the arbitrator's award can be entered as an order of the court. Arbitration is often considered when the application of legal issues to the factual circumstances of the case is being contested.

> **Non-binding Arbitration.** Prior to filing a case or prior to trial, the parties may agree to participate in non-binding arbitration, where the arbitrator's decision is only advisory. The hearing process looks and feels like arbitration. The neutral sets up and presides over the process, may hear witnesses, reviews the factual and legal positions either through briefs or oral arguments and evaluates what the likely arbitration outcome might be.

Alternative Dispute Resolution

Alternative Dispute Resolution is a broad term that encompasses all forms of dispute resolution, other than court-based adjudication, that use neutral third parties to help disputants resolve conflicts. The processes emphasize creativity and cooperation in place of adjudicative or adversarial means of problem solving. They include consensual decision-making techniques such as mediation, arbitration, and many other related processes such as mini-trials, mediation-arbitration, private judging, ombudsmanship, neutral expert fact-finding, and summary jury trials.

Case Evaluation

This is a form of conflict resolution in which the disputing parties meet informally with an experienced, neutral evaluator. Each party is afforded the opportunity to meet with the evaluator who assesses the strengths and weaknesses of each side's case and explores prospects for settlement. If the parties are unable to reach agreement during the evaluation session, the neutral evaluator may offer an impartial non-binding opinion as to the settlement value of the case and/or a non-binding prediction of the likely outcome if the case were to go to trial. If both parties agree, the evaluator's opinion may become binding.

Caucus

A private meeting or series of meetings that take place between a neutral third party and each of the interested parties to a dispute. The caucus gives parties a chance to work with the neutral to create new alternatives, clarify their proposals and interests, and gather information.

Conflict Resolution

Often termed dispute resolution, conflict resolution includes all possible processes for resolving a conflict or dispute in a peaceful way. It differs from alternative dispute resolution in that conflict resolution includes not only alternative dispute resolution techniques such as mediation and arbitration, but also judicial processes, negotiating consensus building, diplomacy, analytical problem solving, and peacemaking. The consensual nature of most conflict resolution methods (other than litigation) requires that all parties participate jointly in the process of selecting which process best fits their dispute.

Conflict Assessment

Conflict assessment (also known as "*convening*") helps to identify the issues in controversy in a given situation, the affected interests, and the appropriate form(s) of conflict resolution. The assessment process typically involves conferring with potentially interested persons regarding a situation involving conflict in order to: assess the causes of the conflict; identify the entities and individuals who would be substantively affected by the conflict's outcome; assess those persons' interests and identify a preliminary set of issues that they believe relevant; evaluate the feasibility of using a consensus-building or other collaborative process to address these issues; educate interested persons on consensus and collaborative processes so as to help them think through whether they would wish to participate; and design the structure and membership of a negotiating committee or other collaborative process (if any) to address the conflict.

Conflict assessment has proven valuable as a first step in consensus-building processes such as negotiated rulemaking and in finding constructive approaches to resolving environmental conflicts.

Consensus Building

Consensus building describes a number of collaborative decision-making techniques in which a facilitator or mediator is used to assist diverse or competing interest groups to reach agreement on policy matters, environmental conflicts, or other issues in controversy affecting a large number of people. Consensus building processes are typically used to foster dialogue, clarify areas of agreement and disagreement, improve the information on which a decision may be based, and resolve controversial issues in ways that all interests find acceptable. Consensus building typically involves structured (yet relatively informal), face-to-face interaction among representatives of stakeholder groups with a goal of gaining early participation from affected interests with differing viewpoints, producing sound policies with a wide range of support, and reducing the likelihood of subsequent disagreements or legal challenges.

Dispute Systems Design

Dispute systems design assists an organization in developing a structure for handling a series of recurring or similar disputes (e.g., environmental enforcement cases or EEO complaints within a federal agency) more effectively. A dispute systems designer typically proceeds by interviewing representatives of interested or affected groups (including people in the agency) about their perceptions and interests; analyzing the organization's existing system for handling these conflicts; designing and implementing conflict management or dispute resolution procedures that encourage early, informal resolution of conflicts; and perhaps evaluating the impact of these new dispute resolution procedures to assure their effectiveness.

Facilitation

Facilitation is a collaborative process in which a neutral seeks to assist a group of individuals or other parties to discuss constructively a number of complex, potentially controversial issues. The facilitator typically works with participants before and during these discussions to assure that appropriate persons are at the table, help the parties set and enforce ground rules and agendas, assist parties to communicate effectively, and help the participants keep on track in working toward their goals. While facilitation bears many similarities to mediation, the neutral in a facilitation process (the "facilitator") usually plays a less active role than a mediator and, unlike a mediator, often does not see "resolution" as a goal of his or her work. Facilitation may be used in any number of situations where parties of diverse interests or experience are in discussion, ranging from scientific seminars to management meetings to public forums.

Fact-finding

Fact-finding is a process in which a neutral receives information and arguments from the parties to a controversy (and may conduct additional research to investigate the issues in dispute), and then submits a report with findings of fact and perhaps recommendations based on those findings. Typically, the fact-finding process is informal and the neutral's recommendations are non-binding.

Mini-trial

In a *mini-trail*, each party's best case is presented in summary form to the parties themselves or to party representatives with authority to settle the dispute. Following the presentations, the parties enter into negotiations, typically with a neutral acting as a facilitator. The facilitator may act as an evaluator of the case if the parties so designate.

Mediation

Mediation is facilitated negotiation in which a skilled, impartial third party seeks to enhance negotiations between parties to a conflict or their representatives by improving communication, identifying interests, and exploring possibilities for a mutually agreeable resolution. The disputants remain responsible for negotiating a settlement, and the mediator lacks power to impose any solution; the mediator's role is to assist the process in ways acceptable to the parties. Typically this involves supervising the bargaining, helping the disputants to find areas of common ground and to understand their alternatives, offering possible solutions, and helping

parties draft a final settlement agreement. While mediation typically occurs in the context of a specific dispute involving a limited number of parties, mediative procedures are also used to develop broad policies or regulatory mandates and may involve dozens of participants who represent a variety of interests. Mediation most often is a voluntary process, but in some jurisdictions may be mandated by court order or statute.

A variety of mediation styles have been identified; for instance, a mediator's style may be described as "evaluative" or "facilitative." Most "evaluative" mediators emphasize helping the parties understand the strength and weaknesses of their cases, and provide guidance as to the likely outcome in courts and appropriate grounds for settling. "Facilitative" mediators tend to be less likely to provide direct advice, propose solutions, or predict outcomes; they usually seek to establish a framework that makes it safe for parties to communicate more effectively as to their interests, options, and realistic alternatives.

Negotiation

In many aspects, *negotiation* is the fundamental form of dispute resolution. Negotiation is a process of discussion and give-and-take between two or more disputants who seek to find a solution to a common problem. It has been described as a bargaining and communication process and a psychological confrontation. When both sides seek a solution that is mutually beneficial (a win-win solution or cooperative bargaining) the process can be relatively cooperative. It can also be confrontational as when each side seeks to prevail over the other (win-lose or adversarial). The definition of the negotiation process and how the process occurs differs across cultures.

Negotiated Rulemaking

Negotiated rulemaking (also called *"regulatory negotiation"* or *"reg-neg"*) is a multi-party consensus process in which a balanced negotiating committee seeks to reach agreement on the substance of a proposed agency rule, policy, or standard. The negotiating committee is composed of representatives of those interests that will be affected by, or have an interest in, the rule, including the rulemaking agency itself. Affected interests that are represented in the negotiations are expected to abide by any resulting agreement and implement its terms. This agreement-seeking process usually occurs only after a thorough conflict assessment has been conducted, and is generally undertaken with the assistance of a skilled, neutral mediator or facilitator.

Neutral Evaluation

In *neutral evaluation* (sometimes called *"early neutral evaluation"*), a neutral – often someone with specifically relevant legal, substantive, or technical expertise – hears informal presentations by all sides in a conflict and then offers the parties a non-binding oral or written evaluation of their cases' strengths and weaknesses. The neutral evaluator typically reviews the parties' factual and legal positions through briefs, oral presentations, or both; evaluates the likely reaction of a judge or jury if settlement is not reached; provides his or her view of the likely or appropriate range of outcomes; and sometimes assists the parties to either narrow areas of disagreement or identify relevant information that may enhance their chances of reaching settlement.

Policy Dialogue

Often used to address complex environmental conflicts or public policy disputes constructively, *policy dialogues* are processes that bring together representatives of groups with divergent views or interests to tap the collective views of participants in the process. The goals include opening up discussion, improving communication and mutual understanding, exploring the issues in controversy to see if participants' different viewpoints can be distilled into general recommendations, and trying to reach agreement on a proposed policy standard or guidelines to be recommended by government.

Unlike processes that explicitly seek to obtain consensus (e.g., negotiated rulemaking, mediation), policy dialogues usually do not seek to achieve a full, specific agreement that would bind all participating interests. Rather, participants in a policy dialogue may seek to assess the potential for developing a full consensus resolution at some later time or may put forward general, non-binding recommendations or broad policy preferences for an agency (or other governmental entity) to consider in its subsequent decision making.

Process Design

In *process design*, a neutral helps an organization develop (or recommends to it) a process for addressing a particular controversy or a series of disputes. Typically a process designer interviews representatives of interested or affected groups (including people in the agency) about their perceptions, their interests regarding the conflict in question, and their suggestions as to useful ways to handle it. The designer will then report to the agency with recommendation, or a plan for handling the dispute(s).

Settlement Judging

In a *settlement judging* process, a judge – other than the presiding judge hearing the case – meets with the parties jointly and separately, acting as a mediator or neutral evaluator. If the settlement judge's efforts do not produce full agreement, the case returns to the presiding judge. A settlement judge often plays a more authoritative role than a private mediator, by sometimes providing parties with specific legal or substantive information and recommendations.

Superfund Allocation

In a *Superfund allocation* process, a neutral, third-party allocates or assists the parties to allocate shares of liability for site cleanup expenses among potentially responsible parties in a Superfund case.

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