BASIC OVERVIEW OF ADR

WORKPLACE DISPUTE RESOLUTION SECTION
Sponsored by FDIC
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AGENDA FOR ADR WORKPLACE DISPUTES SECTION MEETING
February 2, 1999

TITLE: Basic Overview of Alternative Dispute Resolution

PROGRAM:

9:00 - 9:10	Introduction and Overview of Session Martha McClellan Counsel, FDIC
9:10 - 10:30	Introduction to ADR Dorethea Taylor-Kennedy ADR Specialist National Institutes of Health Office of Resource Services Charlotte Kaplow Counsel FDIC
10:30 - 10:40	Break
10:40 - 11:50	Choosing and Using an ADR Method Panel Members: Dorethea Taylor-Kennedy ADR Specialist National Institutes of Health Office of Resource Services Delores Crawford Manager Mediation Program Civil Rights Office General Accounting Office Linda Washington Alternative Dispute Resolution Specialist Bureau of Engraving and Printing
11:50 - 12:00	Wrap Up

WPDS
February 2, 1999

Basic Overview of ADR

Course Outline

I. Definition of ADR

- A. What ADR is
- B. What ADR is not
- C. Two basic kinds of ADR
- D. Advantages of ADR
- E. Primary dispute resolution process – adjudication

II. ADR Models

- A. Three Primary ADR Processes
  1. Negotiation
  2. Mediation
  3. Arbitration
- B. Eight hybrid processes
- C. Spectrum of ADR procedures

III. Choosing an ADR Method

- A. Is ADR Appropriate?
  1. General presumption that it is
  2. Circumstances when it may not be
- B. If ADR is appropriate, how do you choose an ADR method?
  1. Issues to consider
  2. Using the spectrum approach
  3. What type of ADR is appropriate?
  4. Client objectives – overcoming impediments

Basic Overview of ADR—Course Outline

I. Definition of Alternative Dispute Resolution

A. What ADR is.

1. ADR includes all forms of dispute resolution other than court adjudication.

2. ADR is really "Appropriate Dispute Resolution."

3. What ADR is not.

   a. ADR is not adjudication.

   b. ADR is not appropriate to every dispute.

   c. ADR is not the solution to all dispute problems.

4. There are basically two kinds of ADR.

   a. Interest-based.

   b. Rights-based.

B. Advantages of Alternative Dispute Resolution

1. Reduces cost of dispute resolution.

2. Reduces length of time for dispute resolution.

3. Reduces court congestion; cases settle earlier.

4. Increases involvement of participants.

5. Increases level of compliance.

C. Primary Dispute Resolution Process: Adjudication.

1. Involuntary.

2. Binding, subject to appeal.

3. Imposed by a third party decisionmaker (judge) who has expertise in judicial process and may or may not have subject matter expertise in judicial process and may or may not have subject matter expertise.

4. Formalized and structured by roles and procedures.

5. Opportunity for each party to present proof and argument.

6. Principled decision, supported by reasoned opinion, articulates and develops the law, establishes precedent.

7. Public

II. ADR Models

A. Three primary Alternative Dispute Resolution Processes.

1. Negotiation.

a. Negotiation is a voluntary process in which parties work to reach a mutually acceptable resolution of the issues without the assistance of a third party.

b. Characteristics of negotiation:

1) Most common and familiar form of dispute resolution.

2) Voluntary, private.

3) If agreement, enforceable as a contract

4) No third-party facilitator

5) Usually informal, unstructured

6) No limits on presentation of arguments or evidence.

7) Seeks mutually acceptable agreement.

2. Mediation.

   a. Mediation is a process by which a neutral third party assists the disputants to reach a voluntary negotiated settlement.

      - *Mediators have no power to render a decision.*

      - *Outcome is controlled and determined by disputatnts.*

      - *No such things as "binding mediation." Can be required to mediate (court-ordered,) but not required to settle.*

   b. Characteristics of mediation:

      1) Voluntary.

      2) If agreement, enforceable as a contract.

      3) Party-selected neutral, often with subject-matter expertise (except for some court-ordered mediation).

      4) Unbounded presentation of evidence, arguments and interests.

      5) Mutually acceptable agreement sought.

      6) Private.

      7) Can be used to narrow issues for trial.

   c. Two types of mediation:

      1) Rights-based mediation (outcome prediction).

      2) Interests-based mediation (facilitated negotiation).

3. Arbitration.

   a. Arbitration is a process in which each party presents its case, usually at a hearing conducted by a neutral or panel of neutrals who hear the facts and arguments presented by each side and render a non-binding opinion or binding decision light of relevant laws and procedures.

   b. Characteristics of arbitration:

      1) Voluntary (unless court ordered).

      2) If binding, only subject to review or limited grounds (usually enforcement of award or fraud in the process).

      3) Party-selected third party decisionmaker, who usually has subject matter expertise.

      4) May be procedurally less formal than court; procedural rules may be set by parties.

      5) Opportunity for each party to present proofs and arguments.

      6) Sometimes principled decision, supported by reasoned opinion.

      7) Private, unless judicial review sought for fraud or enforcement.

   c . Three types of arbitration are:

      1) Voluntary, binding.

      2) Voluntary, non-binding.

      3) Compulsory, non-binding (court-annexed arbitration, usually on damage or monetary issues).

B. Eight Hybrid ADR Models

1. Mediation-Arbitration ("Mediation-Arb").

   a. A mediator assists the parties in resolving as many issues as possible and the remaining issues are then decided through arbitration.

   b. Characteristics of Med-Arb:

      1) Parties mediate all issues that they can.

      2) Remaining issues are then given to an arbitrator.

      3) Problems:

         a) If you use same person as mediator and arbitrator, the mediator loses neutrality and parties tend to see mediator as a decision-maker.

         b) If you use different people, you lose the economy.

2. Private Judging (Rent-a-Judge).

   a. The parties choose a third-party decision maker (usually a former judge or lawyer), the participants present proofs and arguments, and they receive a principled, binding decision.

   b. Characteristics of Private Judging (Rent-a-Judge).

      1) Voluntary.

      2) Binding, subject to appeal.

      3) Party-selected third-party decisionmaker; may have former judge or lawyer.

      4) May be statutory procedures, but highly flexible as to timing, place, and procedures.

5) Opportunity for each party to present proofs and arguments.

6) Principled decision, sometimes supported by written findings of fact and conclusions of law.

7) No right to appeal (except in California).

3. Neutral Expert Fact-Finding.

a. This process can be voluntary or court ordered and, while the results are non-binding, they may be admissible in court. In neutral expert fact-finding the parties to a dispute select a third party neutral with specialized subject matter expertise to investigate and evaluate the facts and render an opinion, generally in the form of a report. This process is particularly helpful in cases that turn on a technical issue where an expert such as an accountant or an appraiser can render an opinion.

b. Characteristics of Neutral Expert Fact- Finding:

1) May be voluntary or involuntary under FRE 706.

2) Non-binding, but results may be admissible.

3) Third-party neutral with specialized subject matter expertisc; may be selected by parties or by the court.

4) Informal.

5) Invesitgatory, usually factual issues.

6) Report or testimony.

7) Private, unless disclosed in court.

4. Early Neutral Evaluation (ENE).

   a. The parties select a neutral by agreement who will evaluate a presentation from each party and make a non-binding determination on the outcome of the case. The neutral selected usually has expertise in the subject matter of the dispute. The presentations to the neutral can be oral, written, or a combination of both. Once the neutral has given the evaluation, the parties may attempt to negotiate a settlement based on that evaluation or may ask the neutral to serve as a mediator to assist them in reaching settlement. Often used on legal or evaluation issues in dispute.

   b. Characteristics of Early Neutral Evaluation:

      1) May be voluntary or involuntary if court ordered.

      2) Gives non-binding prediction of outcome.

      3) Most useful in disputes involving specific legal issue(s).

      4) Most useful if neutral is a recognized expert in the particular subject area or law.

      5) Each side presents case, generally in writing, but evaluator may request oral presentation.

      6) Private, unless disclosed by the court.

5. Mini-Trial.

   a. Mini-Trials are information exchanges conducted by a neutral, third party at which the decisionmakers for each side hear a summary of the best case for litigation presented by attorneys for each side. The neutral may make an outcome prediction, then work with the parties to facilitate a settlement.

b. Characteristics of the Mini-Trial:

1) Voluntary.

2) May include some witnesses and testimony.

3) If agreement is reached, it is enforceable as a contract.

4) After presentation of the case, neutral may meet with parties to facilitate settlement.

5) Less formal than adjudication; procedural rules are set by the parties.

6) Mutually acceptable agreement is sought.

7) Private.

6. Summary Jury Trial.

a. Summary Jury Trial is an ADR process developed by the courts to induce settlement. It is usually involuntary, ordered by the court. Summary jury trials are generally conducted in a courtroom by a magistrate or judge. A jury is selected and an abbreviated version of each party's case is presented by the lawyers. At the conclusion of the presentation, the jury Deliberates and returns an advisory verdict. The parties are then able to talk to the jurors to understand why the verdict was reached. The disputants then attempt to reach settlement Through negotiation.

b. Characteristics of Summary Jury Trial:

1) Involuntary (often ordered by the judge).

2) Non-binding.

3) Procedural rules are fixed, less formal than adjudication.

4) Advisory verdict.

5) Usually public, but may be limited access.

6) Jurors usually do not know that it is a mock trial.

7. Ombudsman.

a. Ombudsmen are fact-finders, troubleshooters, and facilitators. They conduct an investigation, the proceedings are private, the results are non-binding and participation is voluntary.

b. Characteristics of Ombudsman:

1) Voluntary.

2) Non-binding.

3) Third-party selected by the institution.

4) Informal

5) Investigatory.

6) Results in a report or referral to appropriate officials who can settle the dispute.

7) Private.

8) Negotiated Rulemaking.

a. This is a process where prior to promulgating a regulation, the agency convenes a meeting (s) with a large group of parties that will be affected by the regulation to get their input and "negotiate" a rulemaking that is acceptable to all parties and facilitated by a third-party neutral.

b. Characteristics of Negotiated Rulemaking.

1) Voluntary.

2) Non-binding.

3) Facilitated by neutral.

4) Informal.

5) Public.

C. Spectrum of ADR Procedures.

1. Preventive ADR -- Prevent disputes, determine in advance how disputes will be resolved.

2. Negotiated ADR--negotiation.

3. Facilitated ADR--assisted negotiation.

4. Fact-finding ADR--findings/conclusions.

5. Advisory ADR--non-binding

6. Binding ADR--binding.

III. Choosing an ADR Method

A. Is ADR Appropriate?

1. There is a general presumption in the federal government that ADR is appropriate.

2. However, ADR may not be appropriate when there is . . .

a. A need for precedent.

b. A significant issue of government policy.

c. A need to establish uniform policy.

d. An absent third party who may be adversely affected.

e. A need for a full public record which cannot be provided by the dispute resolution proceeding.

f. A need for continuing jurisdiction (oversight by a court, e.g., bussing).

g. Another disputant who is not committed to the good faith use of ADR.

h. Tax cases; judicial foreclosure, defense by insurance company.

B. If ADR is Appropriate, How Do You Choose an ADR Method?

1. Issues to Consider--questions to ask

   a. What is the disputant's goal?

   b. How much involvement does the disputant want?

   c. How much control does the disputant want?

   d. How much invasiveness does the disputant want?

   e. Does the disputant want an interest-based or rights-based approach?

   f. It is a factual question or legal question?

   g. If the dispute is an EEO or other workplace complaint, where is the dispute in the process?

2. Using the spectrum approach to ADR selection.

   a. Left side--Least invasive, most control.

   b. Right side--Most invasive, least control.

3. What type of ADR is appropriate?

   a. Tailor the process to the problem

   b. Possible use of hybrid method:

1) Tiered structure--Negotiation followed by Mediation followed by Arbitration.

- Start at one level then move to another.

2) Biffucate issues--Use one method for one issue and another method for another issue.

- Example: give facts to fact--finder; leave law for judge or give to neutral evaluation.

c. Enforcement mechanisms--make sure there is a way to ensure compliance wit the result.

d. The Principle of Subsidiarity drives this process: Resolve the matter at the lowest possible level of the organization and start with the most interest-based procedure possible (i.e., negotiation, mediation, or facilitation).

4. Client Objectives/Overcoming Impediments.

Another way to select an ADR procedure is to Determine the client's goals and to use the Sander-Goldberg matrix.

a. Determine the extent to which dispute resolution procedures satisfy client objectives.

Table 1 assigns values in each of the ADR categories listed on the left side. The values represent levels of priority or whether or not the method will satisfy the disputant's objectives. 0= unlikel to satisfy, 3=satisfies objectives very substantially.

b. Determine the likelihood that the ADR procedure will overcome impediments to settlement.

Table II assigns values to whether or not an ADR method overcomes certain impediment to resolution.

The results of the two tables combined should help you select an ADR method.

TABLE 1:

EXTENT TO WHICH DISPUTE RESOLUTION PROCEDURES SATISFY CLIENT OBJECTIVES

Objectives	Nonbinding				Binding	
	Mediation	Mini-Trial	Summary Jury Trial	Early Neutral Evaluation	Arbitration Private Judging	Court
Minimize Costs	3	2	2	3	1	0
Speed	3	2	2	3	1	0
Privacy	3	3	2	2	3	0
Maintain/ Improve Relationship	3	2	2	1	1	0
Vindicator	0	1	1	1	2	3
Neutral Opinion	0	3	3	3	3	3
Precedent	0	0	0	0	2	3
Maximizing/ Minimizing Recovery	0	1	1	1	2	3

Values assigned should be added by column. Column with highest total value indicates nonbinding/binding approach.

0=Unlikely to satisfy objective
1=Satisfies objective somewhat
2=Satisfies objective substantially
3=Satisfies objective very substantially

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-SANDER/GOLDBERG

TABLE 2:

LIKELIHOOD THAT THE ADR PROCEDURE WILL OVERCOME IMPEDIMENTS TO SETTLEMENT

Impediment	Procedures			
	Mediation	Mini-Trial	Summary Jury Trial	Early Neutral Evaluation
Poor Communication	3	1	1	1
Need to Express Emotions	3	1	1	1
Different View of Facts	2	2	2	2
Different View of Law	2	3	3	3
Important Principle	1	0	0	0
Constituent Pressure	3	2	2	2
Linkage	2	1	1	1
Multiple Parties	2	1	1	1
Different Lawyer-Client Interests	2	1	1	1
Jackpot Syndrome	0	1	1	1

Values assigned should be added by column. Column with highest total value indicates method.

0=Unlikely to overcome impediment
1=Sometimes useful in overcoming impediment
2=Often useful in overcoming impediment
3=Most likely to be useful in overcoming impediment

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