

ADR Newsletter

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Pre-mediation is key

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Preparation before a mediation session can be the key to success. The ADR Coordinator should make sure the parties are well-prepared and know what to expect. The following steps can be used to ensure the process goes well.

1. Prepare the parties by briefing them on the mediation process; provide the mediation brochure and recommend watching the Mediation Zone on the Workplace ADR Program website at: <http://vaww1.va.gov/adr/page.cfm?pg=90>.

2. When employees whose positions are covered by a collective bargaining unit are involved, notify and invite the union to participate.

3. Obtain the parties preference of mediator, such as VA certified mediators, shared neutrals from other agencies, or contract mediators.

4. When using contract mediators, first obtain the assigned mediator's dates of availability; present the dates to the parties, and schedule the session based on the mediator's availability.

5. Brief the assigned mediator on the case and provide appropriate paperwork such as, agreement to mediate and confidentiality form; mediator/neutral assessment form; participant/representative assessment form, and the appropriate settlement agreement template.

6. Ensure all parties know in advance who will be present at the session; the date and time of the mediation, and that there is access to settlement authority, reviewers, and technical assistance.

7. The room reserved for the mediation should be a neutral location, if possible, not in a party's office. There should be a place where parties may adjourn for caucus, if needed.

8. Any agreement reached should be monitored for compliance including any timeframes and deadlines.

For additional information visit the Workplace ADR Program website at <http://www.va.gov/adr>.

Memphis Honors Mediation Team

**Awardees
(from left to
right) Sharon
McHellen, Ella
Jones, Alfred
Pratt, Rose
Kirkwood,
Marsharee
Austin, and
Melverdine
Young-Smith**



Congratulations to the Memphis VA Medical Center mediators who were nominated for an honorary award in the form of ADR shirts. As members of the Memphis Mediation team, this group successfully completed its third year of providing shared mediation services to the Tennessee Valley Healthcare System. During Fiscal Year 2008, Memphis completed approximately 18 facilitations/mediations at the Nashville campus and supported other VISN 9 medical centers and other Federal agencies. The team worked hard to keep conflict to a minimum at the Memphis facility by providing facilitation and team building to various departments and staff. Keep up the good work!

Personal Notes and Mediation

**By Gregory A. Burke
ORM Ombudsman**

One issue arising in mediation is the disposition of notes taken during the mediation by the mediator or one of the parties to the mediation. The mediator can assure the parties that he/she will destroy the notes after the mediation or will preserve the notes solely for his/her use. A party's use of, or failure to destroy, notes may be more complicated.

Disclosure and Federal Mediation

The Administrative Dispute Resolution Act (ADRA) applies to Federal mediations. ADRA bars disclosure of confidential communications received in mediation. Disclosure would be sharing information communicated during the mediation with parties outside of the mediation. But ADRA does not require that a participant surrender or destroy notes taken during a mediation.

Thus, a party who keeps personal notes made during mediation would not violate ADRA: Keeping notes is not disclosing them. The notes constitute written memory. ADRA does not bar memory of the mediation, only sharing that memory, i.e., oral or written confidential communications.

Note Disposition in Mediation

If a participant in mediation agrees orally or in writing to destroy notes, then a contract

may exist to destroy the notes. However, unless the agreement specifically describes the manner of note destruction, not surrendering or destroying the notes in the other party's presence at the end of the mediation does not violate the agreement.

If the parties' agreement does require specific methods or procedures for note destruction, a party may make an issue of any subsequent refusal to comply with the agreement. ADRA allows parties to agree to greater protections than found in the law and those greater protections may be enforceable in court or before an administrative body.

In the typical workplace case, however, the mediator or other party may have few practical means to enforce an agreement to surrender or destroy notes. If the parties sign a settlement agreement that is not contingent on note destruction, the settlement agreement would still be enforceable.

If the settlement agreement does reference destruction of notes as a condition of agreement, either party could forego the settlement over a refusal to destroy personal notes. However, it would not necessarily be practical for either party to take that option if a settlement agreement is reached

and in the interests of both parties.

Best Practice on Note Disposition

Of course, mediators lack the authority to force a participant to surrender notes. The mediator can only suggest that the parties agree to destroy or surrender their notes; ask for agreement, and ask parties to comply with any such agreement. Mediators would not likely decline to mediate if the parties could not reach agreement on note destruction.

Rather, where note taking or destruction becomes an issue, mediators may discuss the issue with the parties and seek to resolve the issue. If the parties do agree on note destruction, the parties may add an appropriate paragraph to the agreement to mediate or any settlement. If the parties cannot reach agreement, the mediator should ask the parties whether they wish to continue and, if so, under what conditions. The mediator may advise that his/her notes will be destroyed as a "best practice."

Mediators should be mindful, however, that participants may have valid reasons to maintain notes of mediation (e.g., to refresh recollection on the meaning of a settlement agreement; to remind of options considered and rejected; to keep personal business records; or to maintain accountability internally).

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Dear Mediator:

Q. Can a supervisor instruct an employee to either go to mediation or receive adverse or disciplinary action and if the employee wants to refuse to participate in mediation, he/she must do so at the table with all parties present?

A. We would not advise forcing someone to show up and then refuse to participate in mediation. At VA, participation in mediation is voluntary and if there is resistance from either the employee or management, understand and attempt to work through concerns.

Q. Will the Workplace ADR Program fund a VA certified neutral’s travel to conduct mediation similar to the non-VA neutral under the national contract?

A. No. The funds under the contract are reserved for contract neutrals only. Facilities may pay travel for VA certified neutrals to conduct mediation at their facility or the VA certified neutral’s facility may pay their travel.

Personal Notes and Mediation Continued

Single Party Disclosure under ADRA

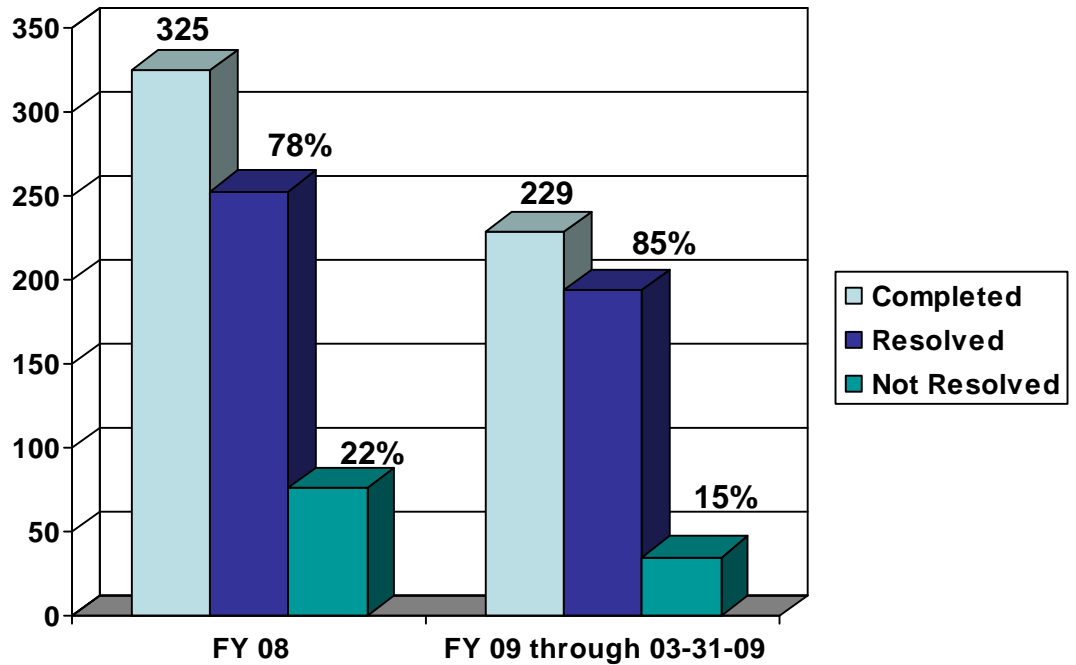
If a party does disclose notes with or without an agreement for their disposition in or after the mediation, the disclosure must meet ADRA requirements for disclosure of confidential communications. For example, if the disclosing party prepared the notes, all parties consented in writing to disclosure, or the information was already public, ADRA does not bar disclosure.

In contrast, ADRA could bar disclosure of information in the disclosed notes if: the information was not prepared by the disclosing party, all parties had not agreed to disclosure, or the information was not public. ADRA’s remedy for unauthorized disclosure is a bar to use of the disclosed information in a subsequent administrative or judicial proceeding if the disclosure concerns the same issues disputed in the mediation. However, the legality of each disclosure would require a case-by-case analysis.



VA ADR Outcomes – Non EEO

Data consistently shows that disputes are resolved at a higher rate when ADR is used prior to an informal complaint being filed.



"Master Your Fears"

By Mary Rau-Foster

One emotion that we all have in common is that of fear. It is this emotion that can hold us back from our own happiness and can thwart our success.

I met fear in numerous situations in my life and chose to turn away rather than face it. At other times I have faced fear believing it to be giant monster only to find when I shed the light on it that it was but a tiny harmless bug.

Throughout my life experiences I have come to learn that it requires only a decision to face and master my dark companion (fear) to free myself from the hold that it has on me. I still find myself in fearful states at times, but they occur far less often. Plus, they are less intense and not as long lasting that they were in my earlier experiences.

I would like to share with you some quotations that offer comfort to an open heart and mind.

"Grab the broom of anger and drive off the beast of fear."
 ~ Zora Neale Hurston ~

"Fear is that little darkroom where negatives are developed."
 ~ Michael Pritchard ~



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Mediation:

A Solution to Workplace Disputes

The Workplace ADR Program solicits articles for VA's quarterly ADR newsletter. The purpose of the newsletter is to communicate information relating to the use of ADR in workplace disputes and serve as a resource for those interested in learning more about ADR and its application within VA. We invite you to submit ideas and articles for the newsletter through your respective administrations: VHA to Rita Reese (10A2E), VBA to Johnny Logan (20M42), NCA to Nicole Maldon (40A), VACO staff offices to your VACO ADR Liaison, and labor organizations to your ADR Council Representative. We are looking for ideas and articles on ADR-related topics, noteworthy activities, initiatives, accomplishments, best practices, or other items designed to educate and inform VA employees and managers on ADR and its benefits in addressing workplace disputes. We hope the VA community will find the newsletters a useful resource for obtaining interesting and helpful information representing ADR activity throughout VA. For more information, visit our website at:

<http://vaww1.va.gov/adr/page.cfm?pg=86>

New Program Publication: ADR Brochure

The Workplace ADR Program recently published a new ADR brochure to provide facilities additional ADR marketing information to help promote their programs. To request copies call the Workplace ADR Program at 202-501-2800 or send an email request to:

WorkplaceADR@va.gov.

