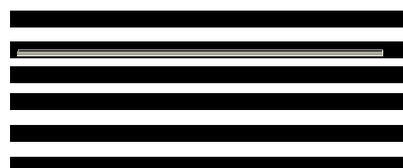




**US Army Corps
of Engineers®**

Pamphlet #3

ALTERNATIVE DISPUTE
RESOLUTION SERIES

A decorative graphic consisting of seven horizontal black bars of varying lengths, stacked vertically. The bars are of different lengths, with the top and bottom bars being the longest and the middle bars being shorter, creating a stepped effect.

MEDIATION

Issued September 1991
Revised May 2010

IWR Pamphlet 91-ADR-P-3

The Corps Commitment to Conflict Resolution and Public Participation:

This pamphlet is one in a series of pamphlets describing techniques for conflict resolution and public participation processes. The series is part of a Corps program to encourage its managers to improve water resources decision making by developing and utilizing new ways of resolving disputes. These techniques may be used to prevent disputes, resolve them at earlier stages, or settle them prior to formal litigation. These pamphlets are a means of providing Corps managers with information on various conflict resolution and public participation techniques used in the Corps, as well as a means to stimulate innovation.

The first edition of the Mediation Pamphlet was written in 1991 by Christopher W. Moore, Ph.D., a Partner with CDR Associates. The Army's Dispute Resolution Program Office has contributed significantly to providing the requisite revisions necessary to ensure that the most current ADR information is provided in this revised Pamphlet. Special thanks to Gail Bingham, Richard Darden, Stacy Langsdale, John Micik, and Maria Placht for their contributions.

For further information on the Conflict Resolution and Public Participation Program and Pamphlets please visit: <http://www.iwr.usace.army.mil/cpc/refADR.cfm>

ALTERNATIVE DISPUTE RESOLUTION SERIES

MEDIATION

U.S. Army Alternative Dispute Resolution Program

Issued September 1991
Revised May 2010

IWR Pamphlet 91-ADR-P-3

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OVERVIEW

This pamphlet describes mediation, one of a number of conflict resolution and public participation techniques that the U.S. Army Corps of Engineers uses in an effort to improve water resources decision making and reduce the number of disputes requiring litigation. This pamphlet describes what the technique is and how it is used, and provides guidance on how to participate in the mediation process.

MEDIATION

What is Mediation?

Mediation is a dispute resolution process in which a neutral and impartial third party assists people in conflict to negotiate an acceptable settlement of contested issues. Mediation is frequently used to avoid or overcome an impasse when parties have been unable to negotiate an agreement on their own.

Most disputes are resolved by informal conversations, some form of cooperative problem solving, or negotiation. Involved parties reach an acceptable settlement of their differences through direct unassisted interaction. But not all conflicts can be resolved in this manner.

Some decision making processes result in impasse, particularly those which involve polarized relationships, strong emotions, multiple agency partners, large numbers of interested parties, scientific uncertainty, significant differences in the ways that data is interpreted, complex risk management questions, cultural differences, perceived or actual conflicts of interest, and extreme bargaining positions. The parties are deadlocked, either unable to start negotiations, or initiated and then stalled, and no further progress is possible. In conflicts characterized by the above conditions, the parties need assistance to reach an acceptable negotiated settlement. Mediation is a common procedure which can be used to aid parties in the resolution of intractable disputes.

Mediation is familiar to most people as a means of resolving labor-management and international disputes, but it also has been used to settle conflicts over contracts, interpersonal relationships, personnel or equal employment opportunity (EEO) complaints, operational decisions, site specific projects or plans and policy decisions. Congress recognized the value of mediation and other forms of alternative dispute resolution processes by enacting the Administrative Dispute Resolution Act (ADRA) in 1996, 5 USC 571, *et seq.*, which requires all federal agencies to establish policies regarding the use of alternative dispute resolution (ADR) in their administrative activities. The ADRA provides the legal basis for the use of mediation and other ADR techniques to resolve disputes, whether in the workplace, acquisition, environmental or

other fields. The Act provides criteria for determining whether a particular dispute is appropriate for ADR, confidentiality protection for certain communications made during an ADR proceeding, and other aspects of the use of ADR.

Although the mediation process may vary due to the style of the neutral, the parties, and the context of the dispute, there are common elements to most mediations. Mediation involves the intervention of someone outside the conflict (the mediator) into a dispute or negotiation to assist the parties to voluntarily negotiate a jointly acceptable resolution of issues in conflict. The mediator is neutral in that he or she does not stand to personally benefit from the terms of the settlement, and impartial in that he or she does not have a preconceived bias about how the conflict should be resolved.

The mediator is asked by the disputing parties to assist them to voluntarily reach an agreement. The mediator has no decision-making authority and cannot impose a decision. The parties maintain all control over the substantive outcome of the dispute. However, the mediator does have influence in that he or she may provide procedural assistance or possible settlement options to the parties that can assist them in reaching agreement. Mediation assistance involves working with the parties to improve their bargaining relationship and communications, clarifying or interpreting data, identifying key issues to be discussed, uncovering hidden interests, designing an effective negotiation process, generating possible settlement options and helping to identify and formulate areas of agreement.

The Mediation Process

Mediation can be used at various stages in the disputing process: to create the conditions for successful collaboration before a dispute has emerged, after the dispute exists but before the parties have attempted unassisted negotiations, or after the parties have tried to reach an agreement on their own and reached an impasse. Mediation can also be used in combination with a number of other alternative dispute resolution procedures, such as disputes panels, arbitration, or mini-trials. The following scenario elaborates the traditional role mediation plays in resolving a dispute or negotiation:

Two (or more) individuals or organizations are involved in a dispute. Negotiations have not been initiated, or they started and the parties reached an impasse. Each party may believe that the other is badly motivated, is hiding information, is not communicating, or is making unreasonable demands. They are stuck without good settlement options “on the table.” The parties see their positions on the issues as being far apart and perceive little chance of reaching an agreement.

One or more parties assesses its procedural and substantive alternatives to reaching a negotiated agreement - ignoring the conflict and maintaining the status quo, seeking assistance in pursuing a voluntary settlement, or escalating the conflict - and decides that a negotiated settlement may be more acceptable than its best alternative procedure or outcome, such as avoidance and stalemate, or a legal action and judicial decision. The

party decides to explore whether mediation assistance might promote successful negotiations.

Having decided to offer mediation to the other party and with all sides mutually agreeing to proceed, a mediator or mediation organization is contacted to set up a mediation session. If an organization is contacted, the parties may have a choice in the selection of the mediator who will work with them. In other cases, mediation may be offered as part of an established complaint process, such as the Equal Employment Opportunity (EEO) process or a negotiated grievance process. The Equal Employment Opportunity Commission (EEOC) requires federal agencies to have ADR programs available as a way of resolving EEO disputes early in the process. In cases determined appropriate for mediation, the parties may be offered an opportunity to participate. Mediation may also be incorporated into grievances filed pursuant to a collective bargaining agreement. In acquisition disputes, mediation may be offered to the parties in proceedings before the Armed Services Board of Contract Appeals (ASBCA).

At the beginning of mediation, the mediator usually meets with each of the disputing parties, either jointly or separately, to explain the mediation process. He or she clarifies the voluntary nature of mediation and describes how the mediator will assist the parties to negotiate more effectively. The mediator may also establish some procedural and behavioral guidelines which foster more productive negotiations. These include guidelines on who talks, limits of confidentiality, how relevant data will be exchanged, a description of the mediation process, whether meetings are open or closed to the public, how any agreements will be implemented, and what the parties' options are if there is no agreement.

At the first joint meeting, the parties may be asked to make an opening statement about the key issues which they wish to discuss and to identify some of the interests which they must have addressed to reach an acceptable agreement. This educational process assures that all of the parties and the mediator understand the issues and some of the underlying interests.

The mediator may propose or develop with the parties an acceptable negotiation agenda and the sequence of issues and procedures to be used to address each item, including options for expert technical presentations or joint fact-finding.

The mediator assists the parties to handle strong emotions, misperceptions, stereotypes, or miscommunication by listening and legitimizing (but not necessarily agreeing with) feelings, clarifying communications, summarizing statements, and proposing more effective communication structures.

The mediator asks the parties to discuss the issues and to identify the various interests to be satisfied. Mediators usually reframe or define issues to be addressed in terms of meeting all the parties' interests.

Many disputes are more difficult to resolve because of the inability of a team or organization to reach internal agreements on a negotiation strategy or acceptable settlement options. Mediators often assist a team or spokesperson to build an internal consensus or approach to negotiations.

The mediator discourages the parties from engaging in adversarial positional negotiations, where predetermined, “win/lose” solutions are advocated by each of the parties. Rather, the mediator encourages the parties to engage in interest-based negotiations, where both parties seek “win/win” solutions that satisfy as many concerns as possible. Mediators have different styles, e.g. combining joint and separate sessions with the parties in different ways. Many raise questions intended to open the conversation in new directions that might result in new ideas or solutions to the issues being discussed.

The mediator helps prepare the parties to make proposals that will be more acceptable or readily agreed to by the other parties. They do this by assisting parties to make offers which meet each party’s interests, and by improving the form or manner in which offers are communicated. Mediators also help parties to evaluate the merits of proposals in comparison with the parties’ interests and against what is likely to occur if no agreement is reached. This can help avoid impasse in some situations where parties dismiss options based on unrealistic assessments of what they will achieve.

As parties make offers, the mediator may translate or interpret them to the other side. He or she may do this by “shuttle mediation,” where the mediator travels between private meetings with the parties, or directly in a joint session.

The mediator assists parties in identifying and defining areas of agreement by “testing” for consensus. The mediator listens for and restates common or overlapping views. Since parties in dispute often talk past an agreement, the mediators’ assistance is often invaluable in identifying areas of agreement.

As the parties reach agreements, the mediator may act as a scribe who captures the settlement in a written document, such as a contract, statement of principles, recommendations to agency decision makers, or a Memorandum of Understanding (MOU). This MOU, where appropriate, may later be drafted in the form of a contract or other legal document. Mediators often encourage parties to discuss implementation of their agreement and to include specific steps for contacting one another or obtaining mediation or arbitration assistance in the event of difficulties during implementation. Complex water resources decisions may include joint implementation actions by the parties.

Characteristics of Mediation

Voluntary

No party is forced to negotiate or use a mediator nor are they forced to agree to a particular settlement. The agreement to use the process and any settlement which results

is voluntary. The mediator does not decide for the parties; she or he helps them to make their own decision.

Enhanced Negotiation

Mediation involves negotiation plus the assistance of a neutral and impartial person who is dedicated to helping the parties reach a fair, just, and mutually acceptable settlement. The mediator provides specialized relationship building and procedural assistance which enables the parties to negotiate their own agreements more efficiently and effectively.

Non-Judicial

Decisions are made by the parties themselves. No judges are present in this process. The mediator provides relationship-building and procedural assistance, may raise questions in new ways, and may also help to develop new substantive options, but he or she never decides for the parties.

Informal

The parties, in cooperation with the mediator, have direct control over the proceedings. They can utilize a variety of procedures to identify issues, explore interests and generate creative settlement options. They can also address a wider range of issues than is possible under normal legal proceedings.

Confidential

The ADRA (5 USC 574) provides legal protection for the confidentiality of certain dispute resolution communications (oral or written). There are a few statutory exceptions, but generally, any communication made for the purpose of an ADR proceeding (including mediation), made while the proceeding is pending (not just in session), and made with the intent that it be treated as confidential, is entitled to protection. This means that the neutral and the parties cannot disclose the communication outside the proceeding unless one or more statutory exceptions apply. Accordingly, mediated negotiations can be treated as settlement conferences where information revealed or settlement options explored cannot be used in any later administrative or court action. This level of confidentiality allows parties to openly explore possible areas of agreement while protecting future procedural options. The parties may establish further confidentiality through a confidentiality agreement.

Expedited

Mediated negotiations, because of their informal nature and flexible process, are often a more rapid means of reaching agreement. Mediation conferences may be scheduled in a matter of days or weeks depending upon the needs of the parties.

Why Use Mediation?

What are the advantages of using mediation over other means of resolving disputes, such as litigation or formal administrative procedures? There are a number of advantages:

Protection of the Relationship

In a significant number of conflicts, the parties must maintain an ongoing relationship. Adversarial or win/lose forms of dispute resolution often damage relationships, which may preclude the parties from working together in the future. Mediation generally results in a settlement that both parties can accept and support, promotes better communications between them, and encourages a respectful and cooperative relationship.

Time Savings

Mediation assistance is generally available on short notice. The speed and schedule of settlement is entirely dependent on the parties' willingness to address and reach agreement on the issues.

Cost Savings

Mediation involves direct negotiations between the parties. While legal advisors may be present and offer assistance, the decision makers are usually the main actors. This means that legal costs are generally lower in the mediation process. Also, parties can share the cost of hiring the mediator. In ADR sessions conducted under the auspices of an established dispute resolution process or program such as the EEOC or the ASBCA, there is no cost to the parties for the services of a mediator. In collaborative modeling of water resources decisions or mediation of complex policy matters, parties may spend significant time and resources in the process. This investment may pay off, however, in outcomes that better satisfy their interests.

Greater Flexibility in Possible Settlements

Traditional litigation or administrative procedures are generally constrained as to the range of possible settlement options by the law or contract limitations. This means that the types of issues which can be raised or addressed by the parties are often rather narrow. It is very difficult to address "relationship" or "personality" issues, or issues not covered under the contract, through litigation. Often when these types of critical issues are not addressed they continue to negatively affect the parties. Mediation, because of its more flexible format and lack of structural constraints, allows the parties to address relationship, procedural and substantive issues. It allows people to get to the "root of the problem" without having to "force-fit" a problem into an inappropriate process. Mediation also allows parties to develop customized creative solutions which are tailored to meet specific concerns or interests. Mediation allows the to solve problems, rather than simply win or lose a legal case.

Keeps the Decision-Making Authority in the Hands of the Parties

Procedures such as litigation, administrative hearings and binding arbitration, rely on third party decision makers to break deadlocks and render a decision. These procedures remove decision-making authority and responsibility from the parties who often are the most informed about the issues and options. Mediation keeps the decision-making authority with the people who best know the problems and it preserves both individual and organizational authority.

Are there Different Types of Mediation?

The availability of specific procedural models may depend on the type of dispute. For example, in EEO mediation, the traditional mediation process (outlined above) is the model used in the vast majority of complaints. In labor-management arbitration cases, “med-arb” or other models may be used. Contract disputes may involve more complex mediation models, including advisory mediation, med-arb, and mediation-then-arbitration.

Advisory arbitration - This process is similar to the mediation process described above except that the parties can contract (or otherwise arrange) with the mediator to give them an advisory non-binding opinion if they fail to reach a settlement. The parties usually contract for the mediator’s opinion at the beginning of the mediation process, but only hear the advice in the event of impasse. This procedure has been highly successful in a variety of types of disputes. In a high percentage of cases, the parties have accepted the mediator’s opinion as the basis for settlement.

Med-arb - In a blend of mediation and arbitration, participants in med-arb agree prior to the beginning of mediation that if they reach an impasse, they will ask the third party who had been mediating the dispute to make a binding decision on the contested issue. This assures that a settlement will be reached, even though it may not be a negotiated one. Strengths of this procedure are the assurance of a settlement and avoidance of time and costs to re-present the case to a third party decision maker. Risks or costs to the procedure are that parties may be reluctant to reveal information about their basic interests or the strengths or weaknesses of their case to a third party who may later be a decision maker. This limits the flexibility of the mediator and limits his or her means of influence. Often if parties believe that a third party will ultimately decide their case, they will not work as hard to achieve a negotiated settlement. In the federal sector, med-arb is generally unavailable unless the agency has an approved policy authorizing the use of binding arbitration.

Mediation-then-arbitration - Mediation-then-arbitration combines mediation and arbitration procedures and strengths. It assumes that some issues may be mediated while others may require the decision of a third party decision maker. It is usually part of a three-step dispute resolution procedure that includes unassisted negotiations, mediation, and then arbitration. Mediation-then-arbitration avoids some of the weaknesses of med-arb in that the mediator and arbitrator are separate people. Parties can reveal to the mediator as much about their interests, or the strengths and weaknesses of their cases as they choose, without fear that the information will be used by the third party at a later time to form an opinion that may not be in their favor. The parties are also assured that they can present their arguments in their most positive light before an independent arbitrator, who has not been privy to confidential or unfavorable information during the mediation process. Naturally, the down-side of this procedure is the additional cost of presenting the case twice, once for the mediator and again for the third party decision maker.

Concerns Expressed About Using Mediation

People who are considering using mediation often have concerns about the impact of the process and the appropriateness of using it in certain cases. This section provides responses to some of the most frequently raised questions.

Doesn't the manager lose control and have his or her authority undermined by using mediation?

On the contrary, mediation keeps decision-making authority in the hands of the key parties. Litigation, administrative processes and arbitration remove the authority to decide. In mediation, the parties evaluate whether settlement options developed through negotiations meet their needs, and can reject them if they are unacceptable. Agreement is voluntary and authority is preserved.

Doesn't mediation just result in compromise?

Occasionally settlements arrived at through mediation are compromises, but often they are more creative and customized agreements which meet the specific needs of the involved parties. Mediated settlements are generally more creative solutions to problems than would be developed through the use of other more adversarial procedures. Mediation helps parties to “expand the pie,” negotiate over a broader range of issues, create more comprehensive settlements, increase value by formulating options that are valued differently, and develop elegant “win/win” solutions.

Where can a manager find a competent and experienced mediator?

Mediators practice in all 50 states and in many foreign countries. Many of them specialize in resolving particular kinds of disputes, including contracts, personnel, EEO, organizational, environmental, and public policy.

The Conflict Resolution Public Participation Center of Expertise at the Institute for Water Resources of the U.S. Army Corps of Engineers is currently establishing a roster of professional mediators familiar with Corps-related issues. They will assist managers in finding an appropriate third party. Information is available at:
<http://www.iwr.usace.army.mil/cpc/>

The US Army ADR Program Office, located in the Army Office of the General Counsel, was established in 2008 to promote and support the use of ADR in disputes across the Army. The ADR Program Office provides ADR and mediation training and third party neutral support in workplace and acquisition disputes in the Army. Information is available at: <http://www.hqda.army.mil/ogc/>

The Department of Defense Shared Neutrals Program provides mediators for federal workplace disputes free of charge to participating agencies. Information is available at: www.dod.mil/dodgc/doha/adr/roster.html

The U.S. Institute for Environmental Conflict Resolution manages a roster of mediators and facilitators. Information is available at:

<http://www.ecr.gov/Resources/Roster/Roster.aspx>

The Federal Mediation and Conciliation Service (FMCS) provides mediation assistance in labor-management disputes as well as ADR and negotiation training. Information is available at: www.fmcs.gov.

How can a manager be assured that a mediator will remain impartial?

Professional mediators are trained not to take sides. Standard practice and the Model Standards of Conduct (2005) (a joint issuance of the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution) provide guidance for mediators to assure impartial behavior. The Guide for Federal Employee Mediators (2006), published by the Federal Interagency ADR Working Group, available at: http://www.adr.gov/pdf/final_manual.pdf, provides additional guidance for federal employee mediators. Many Agency ADR Programs also provide ethical standards for Agency neutrals. If any of the parties are not satisfied with the mediator's performance or feel that the intervener is acting in a partial manner, they should contact the appropriate ADR Program manager or provider or may dismiss him or her without question. The mediator serves at the pleasure of the parties.

Won't a request for mediation be perceived as an indication of a weak case?

A request for mediation indicates a desire to create a better solution which does not result in a win/lose outcome. Rather than a sign of weakness, initiation of mediation may be an indicator of the strength of all parties' recourse and desire to ensure all parties' interests are considered. Also by making the use of assisted negotiations a common practice, the parties can remove any suggestion that mediation indicates weakness on any particular case.

Doesn't mediation imply a sacrifice of principles?

If the goal of settling a dispute is to establish a principle or create a legal precedent, mediation may not be the best process to use. However, most cases involve applying existing principles to the issues in a specific situation, and contain the flexibility to satisfy all parties' interests. Parties do well to focus on meeting all interests and to avoid issues of who was right and who was wrong.

MEDIATION IN PRACTICE

Mediation has a long history in all cultures and among all peoples. Mediation has been used extensively in U.S. history to resolve domestic, organizational, commercial and international disputes. Both the private sector and a number of governmental agencies have used mediation to resolve difficult issues.

In the last decade, the arenas where mediation has been practiced have grown tremendously. Mediation has been successfully applied to family, community, personnel, EEO, commercial, contractual, organizational, environmental, and public policy disputes. Building on that experience, the Office of Management and Budget and the Council on Environmental Quality issued guidance to federal agencies in 2005, encouraging the use of conflict resolution and public participation processes to resolve environmental conflicts and providing principles to guide the use of these approaches. This document, [Memorandum on Environmental Conflict Resolution by the Office of Management and Budget and President's Council on Environmental Quality](http://www.ecr.gov/pdf/OMB_CEQ_Joint_Statement.pdf), can be found at: http://www.ecr.gov/pdf/OMB_CEQ_Joint_Statement.pdf.

The Corps' Experience with Mediation

The Corps of Engineers has used mediation to resolve a variety of public policy, operations and contract disputes. Examples can be found in the US Army Civil Works Annual Environmental Conflict Resolution reports. http://www.iwr.usace.army.mil/cpc/docs_cpc/2nd_Annual_ECR_Rpt_to_CEQ.pdf

The following four examples highlight the Corps' use of mediation in different contexts where conflict often arises – water supply, permit violations, reservoir operation and contract claims.

J. Percy Priest Reservoir – Resolving a Conflict over Water Withdrawals in the Absence of a Water Supply Storage Agreement

In 1997, the U.S. Army Corps of Engineers agreed to grant the Town of Smyrna, Tennessee, a 20-year easement for a water line and intake related to water withdrawals from J. Percy Priest Reservoir. This easement was contingent on the Town signing a water supply storage agreement under the provisions of the Water Supply Act of 1958. The Corps sent an agreement to the Town on February 6, 2003 for signature. The Town never signed the agreement and continued to withdraw up to 12 million gallons of water per day through its two intakes on the reservoir without sending the Corps payment for the use of this storage space.

On June 8, 2006, the Corps sent a letter to the Town requesting payment for the storage space in the amount of \$3,509,158. On July 7, 2006, the day by which the Town was to respond to the letter, the Town filed suit in the Federal District Court for the Middle District of Tennessee, claiming that the Corps had acted beyond its authority in requiring payment of costs associated with construction of the reservoir. The Corps, through the Department of Justice, filed a counterclaim, seeking a declaratory judgment that the Town must enter into and comply with the terms and conditions of a water supply storage agreement with the Corps or it must cease and desist in its withdrawals from the reservoir. On September 26, 2007, the Court granted the Town's motion for partial summary judgment by ruling that the Corps cannot charge the Town for construction costs in the absence of a pre-construction cost-sharing agreement. The Court acknowledged, however, that the Town has no inherent legal right to free storage and ordered the parties to meet and resolve their differences, preferably through an impartial mediator.

The Corps and the Town jointly selected a mediator with experience in mediating other disputes involving Corps of Engineers projects and a reputation as an effective and impartial mediator. The costs of the mediator were evenly shared by the Town of Smyrna and the Federal Government - Department of Justice. The parties, consisting of the government team led by the Corps Chief Counsel and representatives of the Town, met with the mediator for an all-day mediation session at the Pentagon to attempt to resolve the dispute.

The parties came to the table with a willingness to discuss the issues and compromise where necessary. The mediator was very effective in facilitating the discussions in an efficient, professional and impartial manner and quickly earned the trust of both sides. The mediator understood what each side wanted to achieve and organized a clear process that kept everyone focused on the issues that were key to a compromise. These issues included the amount of storage space in the reservoir that the Town had been using for its withdrawals, the various methods to determine the fair market value of the storage space consistent with the District Court's ruling, the prices other water users in the region pay for storage in Corps reservoirs, and the District Court's opinion that the Town was not entitled to free storage space in the reservoir. The mediator used the caucusing technique where he met privately with each side to review the key elements of the other party's position and identify common ground where compromise was possible. With each iteration, the differences between the parties became smaller and smaller until an agreement was reached at the end of the day. The parties decided the Town would pay for water supply storage in the reservoir and the Corps would grant the Town a permanent easement for the Town's water line and intake.

The Town and the Corps agreed to execute the water supply storage agreement under which the Town would pay in lump sum \$2,350,000 for the right to make use of approximately 5,002 acre-feet of permanent storage space estimated to provide a dependable yield of about 18.3 million gallons per day. The parties also agreed to file with the District Court a Motion to Vacate the Court's opinion and order and a Notice of

Dismissal of their claims in the litigation, both of which were accepted by the District Court Judge.

Atlantic Intracoastal Waterway - Mediation Helps Quickly Resolve a Dredging Violation

In 2006, dockowners on the Atlantic Intracoastal Waterway in Charleston County, SC reported that a neighboring dockowner and tugboat contractor were routinely stirring up sediment with tugboat propellers in order to deepen the area surrounding a private dock. Agitating sediment for the purpose of dredging is illegal because dredged sediments cannot be disposed of properly, can release unknown buried pollutants, and can result in the unwanted re-deposition of the sediments into areas where navigation could be affected. In this case, the activity resulted in re-deposition of sediments beneath adjacent docks, raising bottom elevations and making the adjacent docks unusable during low tides and for deeper draft vessels.

South Atlantic Division – Charleston sent a cease and desist letter to the property owner and tugboat contractor to halt the activity and initiate a resolution to the issue. The attorneys for the property owner and tugboat contractor responded with a letter stating that they were not engaged in illegal activities and that the reports the Corps had received were false. SAC investigated the sites around the docks in question and found biological evidence that sediment had recently been moved. SAC continued to try and resolve the violation locally but the property owner and tugboat contractor refused to meet on the matter.

After six months, SAC contacted the United States Attorney for the South Carolina District (Department of Justice), which filed a motion in court to prosecute the case. The dockowner and tugboat contractor (the defendants) hired experts to convince the Corps that the sediment had moved through natural processes. The Corps did not believe the evidence was credible and refused to change their position that the sediment was moved purposefully and knowingly. The dockowner and tugboat contractor were left with the option to either admit they had committed a violation or appear in court to argue their case. Appearing in court was not appealing as court imposed fines are often very high. Likewise, the Corps was against legal proceedings as SAC wanted to resolve the case quickly and restore the area around the docks. Thus, when SAC and DOJ proposed mediation, all parties agreed it was more likely to reduce the possibility of lengthy and costly litigation.

The judge assigned to the case recommended an attorney in Charleston to mediate the case. Given the attorney's expertise in environmental law and extensive experience in mediation, all parties agreed that he was an acceptable choice. DOJ and the defendants agreed in advance to the mediator's hourly rate and then each side paid half the total fee.

The parties met for the mediation on neutral ground in the mediator's office. The mediation began with the government in one room and the property owner, tugboat

contractor and their attorneys in a different room. The mediator established ground rules and explained the process to each side, and then reviewed each side's position and interests. The mediator sought to identify key issues, search for commonalities, and identify areas for compromise and agreement. A key breakthrough occurred when the mediator invited the attorneys for the dockowner and tugboat operator to explain their case directly to the Corps. The attorneys presented photographic evidence that the Corps recognized as actually supporting the Corps case more effectively than the defendant's case. After this, the mediator undertook the role of negotiating an acceptable settlement that would incorporate the two main issues of financial penalty and restoration. By enforcing the groundrules and carefully structuring and facilitating the discussion, the mediator helped the parties reach agreement.

The agreement consisted of a fine of \$15,000 and a restoration plan for restoring the neighbors' affected dock areas to proper elevations. The defendants developed a restoration plan for Corps approval that outlined how they would remove the sediment from neighboring docks and where they would dispose of it. The implementation of the agreement took several months. The defendants were pleased with the low fine and came away with a significantly improved impression of the Corps. While the Corps thought that the fine was quite low, it was more important to facilitate justice, recognize the authority of the federal government to regulate, and quickly restore the impacted area. The Corps considers the outcome particularly beneficial to the affected dockowners because their dock areas were restored more quickly than might have been the case with a courtroom trial scenario.

Truman Dam and Reservoir – A resolution of hydropower generation and natural resource conservation conflicts

In March of 1990, the Corps of Engineers, with mediation assistance, settled a long-term intractable dispute over the operation of Harry S. Truman Dam and Reservoir. The reservoir, located on the Osage River, is the largest flood control lake in Missouri with a storage capacity of more than 5 million acre-feet of water. Immediately downstream is the Lake of the Ozarks, one of the premier recreation areas in the mid-west.

Truman Dam and Reservoir, originally named the Kaysinger Bluff Dam and Reservoir, had been the subject of controversy ever since it was authorized by the Flood Control Act of 1954. The design of the facility was controversial due to the number of generation units which were authorized (six), the proposed use of a pumpback feature (which pumps water already released for power generation back into the reservoir for re-use at a future time), and impacts on downstream property owners. The conflict escalated in 1982, when testing of the pumpback feature killed an estimated 2,000 pounds of fish which had been drawn into the pumps. The State of Missouri took action to limit the use of pumpback and power production, and the power marketer, Southwestern Power Administration, took measures to assure that the authorized level of power generation could be guaranteed. A lengthy public relations battle ensued. Ultimately the Congressional delegations of Missouri and adjoining states became involved because of concerns over

environmental and electrical rate issues, and disagreements over the right of one state to take actions which would impose unacceptable financial impacts on the citizens of other states. Several unsuccessful attempts were made to settle the dispute through unassisted negotiations and a public involvement process.

In 1988, the parties still were deadlocked. At this point the Corps decided to initiate mediation as a way to build some trust and take a new look at the options. The Corps contracted with a mediation firm to act as the impartial intervener. With the assistance of the mediator, the parties identified the outstanding issues and interests to be addressed and designed a jointly acceptable negotiation process. Keys to the success of the early phases of the process were narrowing the number of parties to be involved in the negotiations (State of Missouri Departments of Natural Resources and Conservation, Southwestern Power Administration, Associated Electric Cooperatives, Inc., and the Corps); the designation of lead negotiators who had the authority to settle; and the opportunity to build trust and establish a positive working relationship through informal social time prior to formal negotiations. The mediator provided a structure for the parties to informally identify and discuss the key interests to be addressed, and where relevant information could be exchanged. This process led to an early breakthrough on issues related to the timing of releases for hydropower generation and during fish spawning.

Subsequent meetings and the use of a “single-text” negotiating document (a draft text prepared by the mediator to be modified by the parties) led to a final agreement on the number of units to be used for power generation and the procedure to be used to test the pumpback feature. After four negotiation sessions, the parties were able to arrive at an agreement on all issues in the dispute. Congressional briefings on the settlement, and a public meeting which was attended by a surprisingly small number of citizens, confirmed the general acceptability of the resolution. The final agreement was approved by the Assistant Secretary of the Army on March 8, 1990.

Brutoco - A Construction Contract Claims Settlement

In 1990, Brutoco Engineering and Construction Inc. sued the Corps of Engineers over quantity calculations, a variety of outstanding claims and interest payments related to the Construction of Phase II of the San Ramon Bypass in California. The total claim amounted to approximately \$3 million.

The Sacramento District counsel determined that while the District could initially deny all liability, it was probable that the claim would eventually have to be settled by negotiations or go to litigation. They also projected that the case would be difficult and drawn out if it followed the standard litigation process (i.e., submission to the Contracting Officer and trial before a Board of Contract Appeals). As an alternative method of resolving the dispute, the District chose to pursue a structured mediation process with an advisory component. In essence, this was a mediated “mini-trial” in which the third party would be expected to provide both procedural and substantive expertise.

In this mediation, the government was represented by the Contracting Officer, the Chief of Construction Operations Branch, an auditor and an attorney. Brutoco was represented by private council.

Before the date of the mediation conference, both parties submitted a short brief outlining their case to each other and the mediator. On the day of the mediation, each party was given one-hour to present their case to the mediator and the opposing party. The mediator then met separately with each of the parties to explore whether there was a positive settlement range and to act as a “devil’s advocate” in the assessment of each party’s case. At the conclusion of the private meetings, the mediator met with the parties in joint session and discussed with them the strengths and weaknesses of each of the parties’ positions. He also talked about a reasonable settlement figure, based upon his experience in similar cases. The parties subsequently used the information presented by the mediator to negotiate an acceptable settlement. During the final phase of negotiations the mediator shuttled from room to room, relaying offers and counter offers and helping the parties to assess what their best and most likely alternatives to a negotiated settlement might be. The final resolution, a payment by the Corps of \$1,155,700, settled all outstanding issues. A post mediation poll of all Corps participants indicated a high degree of satisfaction with the process and the settlement.

INITIATING AND PARTICIPATING IN MEDIATION

Mediation typically consists of three phases: preparation, negotiation, and implementation of agreements. Preparation includes determining if mediation is appropriate. If so, parties then determine who will participate, select a mediator, and agree on a process. Commitment from management should be also obtained at this stage. The negotiation phase includes one or more face to face mediation sessions. Problem solving steps should include all parties. These steps include learning, developing criteria for a sound outcome, generating options, and evaluating the options and documenting the agreement reached. The third phase is implementation of agreements, which may or may not involve a mediator. This section provides further detail about these phases of negotiation.

Preparing for Mediation

How to Determine if Mediation is Appropriate

Most disputes are amenable to the use of ADR. The key criterion for the appropriateness of mediation is the parties' willingness to participate in the process. Generally, prior to the initiation of mediation, one or more parties will evaluate internally or with the other party or parties to determine if mediation is the appropriate means for resolving a conflict. In complex project, planning or policy matters, it may be useful to ask a mediator to conduct an informal or formal "situation assessment" to be sure all parties are identified and their agreement to participate is an informed one. Mediation may be appropriate when:

- Parties have tried to initiate negotiations but have been unable to reach agreement on how to begin discussions.
- Parties are having difficulties negotiating because of lack of process, poor process, the wrong process or the right process being used in an inefficient manner.
- Parties are interested in seeking settlement of the dispute, but personality conflicts and/or poor communication between the parties or their representatives adversely affect negotiations.
- The problem is complex with multiple parties and/or multiple issues.
- Parties have reached an impasse.
- There are strong psychological or relationship barriers in the negotiations themselves.
- The parties' demands or views of the case are unrealistic.

- Parties will not, or are reluctant to meet face-to-face.
- Each of the parties believes that it has some flexibility in its position.
- Parties disagree about the facts or significant scientific uncertainty exists.
- The preservation of a working relationship is important.

The Administrative Dispute Resolution Act (5 USC 572) describes several scenarios in which ADR may not be appropriate, including when: (1) the matter involves a question of first impression and a definitive, authoritative decision is required for precedential value; (2) the matter in controversy significantly affects persons or organizations who are not parties to the proceeding; (3) the matter involves development of or consistent compliance with an established government policy and a dispute resolution proceeding would undermine that need; and (4) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record.

Additional conditions that may make ADR or mediation inappropriate are when one or more of the parties may be acting in bad faith, or when there are allegations of criminal conduct, fraud, waste or abuse of authority. The 2005 OMB/CEQ memorandum also provides useful guidance on discerning when mediation is appropriate. Each case's unique circumstances warrant careful consideration as to the most appropriate approach.

Who Proposes Mediation?

Any party involved in a dispute may propose mediation as a means to reach a settlement. One party may contact another and propose the process, or a party may contact a mediator or mediation firm and request that the intermediary act in their behalf and contact the other parties.

In USACE workplace disputes, such as EEO complaints, mediation may be offered to the employee and management by the EEO Program as an option for early resolution. ADR may also be offered as part of a negotiated grievance procedure.

When considering the use of mediation to resolve a dispute, parties should consider more than just the legal merits (or lack thereof) of a dispute. Mediation provides the parties an opportunity to craft creative solutions to problems, and should in many cases be viewed as a sound business decision. A mediated outcome typically avoids time and resources spent on lengthy, unnecessary litigation, improves working relationships, and thus allows for more time to spend on primary agency mission activities.

Earlier a question was raised about how parties can propose mediation without being perceived as weak or having a case lacking in merit. Several approaches can be used to avoid this perception. First, the initiating party can inform the other side, either directly or through an intermediary, that they would like to attempt one last good-faith effort at negotiating a settlement prior to moving to a more adversarial process. The initiating party should also inform the other party that they are preparing to go to an administrative

hearing or trial at the same time that they are mediating, so that if mediation fails, no time or advantage for legal action will be lost. This approach clarifies willingness to use adversarial means and be tough, while keeping the door open to a negotiated settlement.

A second approach is for an individual or agency that normally processes a number of disputes to announce *before* a particular dispute arises, that they will use mediation as a routine step, after unassisted negotiations, in an institutionalized dispute resolution process. By indicating that these two steps will routinely be used prior to moving to more adversarial means, a party can avoid any appearance of weakness on any single case.

Who Participates in Mediation?

Generally the participants in mediation are people who are affected by or have a “stake” in the contested issues and have the authority to make a decision. In most cases these are key individuals or decision makers in an organization. Frequently decision makers are advised by legal counsel other technical experts, and occasionally a party is represented by a lawyer or negotiating team. Mediated negotiations of public policy disputes may be conducted in public meetings or with invited observers from constituencies affected.

Mediation is a forum where key decision makers can talk directly with each other, without the encumbrance of having to talk through representatives. Face-to-face talks by decision makers often result in productive exchanges and settlements.

A threshold issue in preparing for mediation is deciding who will attend the session. The answer depends on the facts and circumstances of each case. In some large, multi-party disputes, there may be teams of negotiators, including attorneys. In others, such as workplace disputes, there may only be two participants - the employee and the management official. Agencies must carefully discern the most appropriate official(s) to serve as the management representative. Each party who attends should have sufficient authority to resolve the dispute, or have ready access (by phone or in person) to the official with authority. All technical experts (e.g. legal, human resources) should also be available for assistance during the mediation.

How Should a Mediator Be Selected?

There are four major considerations in selecting a mediator: 1) the kinds of process assistance that are needed, 2) the degree of substantive assistance which is desirable, 3) the mediator’s prior experience in cases of similar complexity or content, and 4) the relationship or personal chemistry between the mediator and the parties. There are different types of mediators in practice that can meet different needs. Parties selecting a mediator should clarify in their own minds and with the third party which kind of assistance is desired.

One way that mediators vary is in how directive they are in providing procedural assistance to parties. Some mediators are “orchestrators” in that they make general

process suggestions, “chair” meetings and basically back-up competent and skilled negotiators who need a structured forum to negotiate a settlement. These *facilitative mediators* provide more process than substantive assistance. They help the parties communicate more productively, manage emotions about the dispute, make process suggestions, and clarify the issues to be resolved. This approach is particularly effective when the parties need or want a continuing relationship. The mediator does not have to possess specific substantive knowledge of the issues in dispute; he or she will learn from the parties any substantive expertise that may be required to settle a case.

Mediators who have extensive substantive or subject matter expertise on the issues are often referred to as *evaluative mediators*. They are much more directive regarding the negotiating approaches or procedures parties should use, may control the agendas of the meetings, may do extensive work in caucuses or private meetings between the mediator and each of the parties, and may provide substantive advice. They often advise parties on the feasibility of possible settlement options or packages.

If a mediator has significant substantive knowledge of contested issues, he or she may also have a strong opinion about how the issue should be settled. This knowledge may influence the mediator to lead the parties to his or her preferred settlement rather than facilitate the parties’ development of their own solutions. Substantive knowledge and strong opinions on the part of the mediator may also compromise the parties’ perception of the mediator’s neutrality and thus make the intervener ineffective in providing future assistance. Both the mediator and the parties must be vigilant to avoid such an outcome.

While facilitative and evaluative mediation are resolution-oriented processes that focus on assisting the parties to find a mutually satisfying resolution to the issues at hand, *transformative mediators* focus on empowering the parties to identify and understand their own needs and recognize those of the other party, regardless of whether the actual dispute is resolved.

Prior experience is also a factor to consider when selecting a mediator. Parties should investigate the mediator’s track record, range of experiences and references before contracting for services. Seek out a mediator with experience handling issues of similar complexity as the ones to be negotiated. For example, some mediators have experience with electronic media, which may be particularly useful for large multi-party disputes.

Mediators should be carefully screened for any potential conflicts of interests (personal or professional) before entering a dispute. The ADRA requires that any potential conflicts, relationships or connections that the neutral has with a party be disclosed to the parties in writing and both parties must agree to have the mediator assist in the dispute. If one or both of the parties questions the mediator’s impartiality, then an alternate mediator should be selected.

Relationship, rapport and “personal chemistry” are rather intangible criteria for the selection of a mediator, but they are often key factors in how effective the mediator will be. Parties have to trust the mediator, be able to talk freely with him or her, and believe

that the third party is working in good faith to help them develop the best settlement possible, if the third party is to be most effective.

How Can A Party Prepare for Mediation?

The first step in preparing for a mediation is for each party to clearly identify what interests must be addressed or met for a satisfactory agreement to be reached. This approach follows the *interest-based* negotiation model that many now advocate in place of traditional negotiation, often called horse trading or positional bargaining. Horse trading or positional bargaining is characterized by the assertion of opposing positions by the parties and often produces less than optimal solutions and is more likely to result in impasse. In such “position-based” or “rights-based” negotiations, the assumption frequently is that there is a “fixed pie” to be distributed, and decisions are usually made based on the relative power of the parties or the relative strength of their positions. These “win/lose” decisions tend to have a negative effect on the relationship of the parties and can produce a lack of commitment to the outcome by the “losing” party. This can be especially corrosive where the parties must maintain a continuing relationship with each other, such as employment disputes between labor and management, contract disputes between the government and its suppliers, or environmental disputes.

An *interest-based* approach to negotiation and mediation entails mediators helping parties to understand and apply their rights in a context in which the focus of the negotiation shifts from the parties’ positions to their underlying interests (or what they are trying to accomplish with their positions) and the goal is to craft a solution that satisfies those interests. When used properly, an interest-based approach is very effective at producing satisfactory outcomes that preserve continuing relationships and generate commitment to see the deal through because it emphasizes communication and collaboration between the parties.¹

During the first preparation step, parties attempt to identify the *substantive, procedural* and *relationship interests* for each of the involved parties. Substantive interests are objective needs such as flood control, ecosystem protection, cost, equal consideration for a promotion, or other results that a party wants to have satisfied. Procedural interests are about the way that a dispute is resolved, and include efficiency, timeliness, an opportunity to present one’s case, or preference for cooperative rather than adversarial proceedings. Relationship or psychological interests are needs related to trust and respect, and expectations for how one is treated in the dispute resolution process itself, or in a future relationship.

Once a party has identified their own interests, they should identify the needs of the other party or parties who are involved. If others have been explicit about their interests, this will be an easy task. Often a party’s interests can be decoded from a ‘position statement,’ which is a preferred solution that a party has advocated to meet its needs. By examining a

¹ For more information on this subject see *Getting to Yes* (Fisher and Ury, 1981) and *The Art and Science of Negotiation* (Raiffa, 1994).

position, it may be possible to identify the underlying interests or needs that the party wants to have satisfied. However, always ask questions to check these assumptions during the early stages of a negotiation. In some cases, it may not be possible to discern what another party's interests are. If so, the mediation session may have to be used to discover them. Sometimes discovering a counterpart's interest is as simple as asking "why" when confronted with a demand or position statement.

Once the interests for each of the parties have been identified, it is always advisable to generate some potential settlement options. In some negotiations, options may have been publicly announced or put on the table in the form of positions. In other cases, where the parties have not begun negotiating, each will have to generate a range of options which would be acceptable to them. A skilled mediator can help the parties generate options that may not have occurred to them. This range of options will be used by the mediator and negotiators to craft an agreement which is mutually acceptable to all parties.

It also is wise for parties to assess their best alternative to a negotiated agreement, or *BATNA*. Negotiators always have alternatives they can pursue on their own outside the negotiation. The challenge is to determine which options are available, and which of these is the best. This best alternative, achievable irrespective of the outcome of negotiations, serves as an "anchor" or set-point for the negotiator to know when further negotiation is worthwhile, or a waste of time. Obviously, if a party can get a better deal on his or her own than through continued negotiation, it is time to walk away. This is true no matter what type of negotiation is being employed.

A party fully prepared for negotiation or mediation will not only know what his or her own *BATNA* is, but will strive to discern the other party's *BATNA* as well. A skilled mediator will also want to understand each party's *BATNA* in order to establish a range of negotiated options that are better than the outside alternatives.

Each party should think about what his/her relationship expectations are both during and after the negotiations. Some of the questions to consider are:

- Do the parties want an adversarial relationship or would they prefer a more cooperative one?
- Will the parties have to work together?
- Will there be future contacts?
- What impact will a win/lose settlement have on the relationship?

If it is important that the parties settle and maintain some kind of amicable relationship, each party should consider what measures need to be taken to "clear the air" and minimize any unnecessary damage to the relationship in the process of resolving the dispute. The negotiators should decide individually or as a team what they can do to ensure a positive negotiation climate. This does not mean side-stepping strong emotions, but it does mean thinking about how feelings of anger or frustration can be expressed without further damaging the relationship.

Finally, each party should meet with the mediator, either in pre-mediation information exchange sessions, or at the beginning of the first joint session, to clarify the role of the mediator and to gain a thorough understanding of the mediation process which will be used. Mediators typically make process suggestions, such as behavioral ground rules or ways to approach a particular issue. Also mediators may work with each party to help develop settlement options, evaluate a proposal, or do feasibility testing.

What Happens During a Mediation Session?

Mediation sessions begin with introductions if the participating parties have never met face-to-face. The mediator then outlines the issues that brought the parties to the session and gains agreement on the purpose of the meeting. If the parties have not previously signed an Agreement to Mediate, they may be required to do so at the mediation session. For mediations involving project, planning or policy decisions, the process may begin with approval of Operating Procedures or a charter. These documents describe terms of participation in the mediation, such as the scope of issues, who is to be involved, decision making, whether meetings will be open or closed, anticipated products and commitments as to how these products will be used, the role of the mediator, and confidentiality. Many mediators also suggest procedural ground rules such as a non-interruption agreement, clarification of the limits of confidentiality, disposition of personal notes, an agreement on time limits, and a commitment from the parties to participate in good faith. The mediator may also outline the process for the negotiations including a description of how issues and interests will be identified, the use of caucuses or private meetings, a description of how possible settlement options will be developed, and what happens when an agreement is reached (or not reached).

At the beginning of the process, the mediator usually asks parties to provide an opening statement that details the issues of importance to them, the interests to be met and possibly a preferred settlement option. In multi-party processes involving projects, plans or policy, the exchange of perspectives about the issues may evolve over time, as parties seek to understand each other's perspectives on the issues. At various points in time, the mediator may summarize what he or she has heard. If the parties' opening statements consist of positions and demands, the mediator may ask for clarification to discern the underlying interests.

The mediator then encourages the parties to jointly discuss the issues while facilitating the discussion to ensure conversations are productive. The mediator should allow the parties to vent their emotions and frustrations in joint session to the greatest extent possible, as this may be the first opportunity to speak honestly about their feelings on the issues. However, if the mediator feels that heated discussions are becoming counterproductive, he or she may choose to move the parties into caucus, or separate sessions.

In some mediations, particularly those in litigation, the mediator may work with each party in several separate caucus sessions, using "shuttle diplomacy" to make progress

towards resolution. By using probing, reality testing questions, the mediator can encourage a party to carefully consider what is entailed in alternatives to a negotiated agreement. For example, reminding the parties that litigation can be costly, time-consuming, mean a loss of control of the outcome, and negatively affect the relationship.

Often the mediator helps the parties to establish an agenda for addressing the issues. He or she can start with an easy item that the parties should be able to settle fairly quickly, or a fundamental issue on which the resolution of other issues depends. An early settlement of at least one issue creates momentum in the negotiations and demonstrates to the parties that agreements can be reached.

The mediator may assist the parties to work through the issues one at a time or help them to link and trade issues in a package arrangement. Settlement options may be generated by the parties through structured discussion in joint session, or developed through conversations with the mediator in caucuses.

How are the Results of the Meeting Documented?

Meeting documentation can be accomplished in several ways. The mediator may take notes and draft a memorandum of understanding (MOU) that summarizes the results of the meeting. For multi-party negotiations involving projects, plans or policy, the mediator may draft summaries of individual meetings and assist the parties toward the end of the process in drafting recommendations or other mechanisms for capturing agreements reached. Alternatively, the parties take their own notes and agree at the conclusion of the meeting as to who will draft the final settlement document. Regardless of the form chosen, the documentation details the agreements and any areas of disagreement which may remain. If appropriate, the documentation may be referred to each of the parties' legal advisors to be turned into a formal contract, joint motion, or other legally binding agreement.

Senior management or a parties' constituencies may need to be consulted before meeting to sign a formal document. If parties do not expect modifications, the final agreement may be circulated by mail for signatures.

What Does Mediation Cost and Who Pays for the Service?

The cost of mediation services depends on the provider, the complexity of the dispute, and the length of time that parties need negotiation assistance. There are a variety of mediation providers, both non-profit and for profit, which charge a range of fees. Services are billed by the hour, by the day, or as a single intervention fee.

Mediating a dispute can be less costly than litigation because only one external party is involved. For cases in litigation or for contract disputes, the cost of mediation services generally is born by all involved parties. In federal administrative dispute resolution proceedings, such as discrimination complaint procedures administered by the EEOC, or

contract disputes before the ASBCA, the ADR process may be virtually free of charge, as there are several sources of qualified neutrals at no cost to the parties, including in-house collateral duty neutrals, other agency neutrals obtained via a shared neutrals program, other board judges (in the case of the ASBCA), or private sector neutrals paid by a sponsoring ADR program. For issues involving decisions about projects, plans or policies, the costs of the mediation or facilitation services often are paid by the Corps.

How is Confidential Information Handled in Mediation?

Confidentiality of information disclosed in mediation is an important benefit as the parties and the neutral have an interest in ensuring that statements made in mediation remain private to the extent practicable. Under Standard V of the Model Standards of Conduct for Mediators issued by the ABA, AAA and ACR in 2005, a mediator must maintain confidentiality of all information obtained in mediation unless otherwise agreed by the parties or required by law. The Model Standards are not binding on mediators unless they have been adopted and made binding by the cognizant jurisdiction.

In federal agency mediations, confidentiality of “dispute resolution communications” is protected by the Administrative Dispute Resolution Act. Section 574(a) of Title 5, U.S. Code, prohibits a neutral in a federal ADR proceeding from disclosing or being compelled to disclose a “dispute resolution communication,” unless an exception applies. Those exceptions are: (1) the parties consent to disclosure in writing; (2) the information has already been made public; (3) disclosure is required by statute; or (4) a court orders disclosure under appropriate circumstances. Similar prohibitions are applicable to the parties to an ADR proceeding under 5 U.S.C. 574(b), except that parties are generally free to disclose their own communications made during the proceeding, plus any information that was available to all the parties, including statements made during joint discussions. The ADRA expressly excludes certain communications from protection, such as the terms of any settlement or award resulting from an ADR proceeding.

Even if a communication in a federal ADR proceeding does not qualify for confidentiality protection under the ADRA, it may nevertheless qualify as part of an offer of settlement that is made inadmissible in federal judicial proceedings by Federal Rule of Evidence 408. There also may be other protections available, such as the Privacy Act.

For those using mediation in project, planning or policy matters, it is important to think about where confidentiality is important and appropriate, where principles of transparency to the public apply, and how to integrate both in a thoughtful manner. When agreement on recommendations is desired and a case is not in litigation, the Federal Advisory Committee Act may be applicable. In other situations, consultation but not agreement may be sufficient. Where cases are in litigation, Rule 703 protections may apply.

CONCLUSION

Mediation is a very effective means for resolving a wide variety of disputes. The process is highly flexible and can be adapted to meet the needs of particular parties or situations. Corps managers are encouraged to explore the variety of situations and conflicts where mediation may be of assistance in developing fairer and more creative, efficient and cost effective settlements of disputes.

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