

ARMY MEDIATION HANDBOOK



A PRACTICAL GUIDE FOR USING MEDIATION TO RESOLVE WORKPLACE DISPUTES

*Department of the Army
Office of the General Counsel
ADR Program Office*



Current for 2015

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FOREWORD

Welcome to the *U.S. Army Mediation Handbook*. In it you will find helpful guidance and practice pointers for using mediation to resolve Army workplace disputes, including Equal Employment Opportunity (EEO) complaints, civilian employee grievances and appeals, and other disputes that arise out of the employment relationships between the Army and its employees and applicants for employment.

Mediation is one of many informal dispute resolution processes collectively known as “alternative dispute resolution,” or ADR. When successful, mediation dramatically reduces the costs and delays of dispute resolution, while empowering the parties to resolve their differences through their own creative and innovative solutions. Of course, for mediation to fulfill this promise, adequate resources, including qualified, competent mediators, must be reasonably available to those who need them, when they need them. Successful mediation also requires that the disputants make a genuine effort to work together to resolve their differences voluntarily, even if they don’t always reach agreement. This *Handbook* provides useful guidance and advice to help mediators and those who participate in mediation meet these goals.

The *Handbook’s* focus is on traditional face-to-face mediation with mediator and all parties together at the table, but it also applies to less conventional mediations conducted by telephone, video conferencing, or online. Part One of the *Handbook* addresses issues, considerations, and suggestions for preparing and conducting mediation. Part Two contains Mediation Tools, a collection of useful and informative forms, templates, tips, examples, reference materials, and other guidance to help administer and conduct successful workplace mediations.

I want to acknowledge the *Air Force Mediation Compendium* for supplying much of the basic source material for the *Handbook*. However, the *Handbook* has been extensively revised and expanded specifically for Army audiences. It serves as an optional reference for mediation students, practitioners, program managers, and others involved in civilian workplace dispute resolution activities, to help provide mediation services effectively, efficiently, and professionally. Its use is entirely voluntary, but we hope you will find the *Handbook* to be a valuable resource, whether you’re a practicing mediator, a student, an EEO officer, personnel officer, or a labor and employment counselor.

The ADR Program Office in the Office of the General Counsel of the Army is responsible for this *Handbook*. If you have any suggestions for improving it, I welcome your comments. Email them to us at usarmy.pentagon.hqda-ogc.mbx.adr@mail.mil.

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PART ONE
CHAPTER 1
PREPARING FOR MEDIATION

Introduction

MEDIATION was once described as an “imperfect process that employs an imperfect third person to help imperfect people come to an imperfect agreement in an imperfect world.”¹ Though somewhat flippant, this description is also quite perceptive. Mediation is a people-based process, which means it’s as imperfect as the people who employ it. Yet for centuries it has succeeded in resolving differences between humans without violence, without bloodshed, and, more recently, without courtrooms. Today, mediation is the process of choice for resolving disputes and avoiding litigation. It’s faster, cheaper, more flexible, more creative in fashioning solutions that fix the problem, and it keeps the parties in control of the outcome. Mediation is now ubiquitous at all levels of government (not to mention the private sector). Anyone who deals with disputes in the Army workplace must be familiar with its features and the process.

Mediation is just one of many different informal dispute resolution processes under the umbrella of “Alternative Dispute Resolution,” or ADR. Like all ADR processes, mediation is designed to empower people to resolve their differences themselves, without the interference of courts and other adjudicative forums. Federal, DoD and Army policy favor the use of ADR whenever practicable.² For mediation, the benefits presume the dispute is appropriate for mediation; that the mediation process is conducted in a timely, efficient, and competent manner; that participants understand the benefits and limitations of the mediation process; that they participate in good faith, in a genuine attempt to find a mutually satisfactory outcome; and that the mediator has appropriate training, skill and experience to conduct the mediation in a competent manner. This *Handbook* offers practical guidance in all of these areas.

Further sources of information are listed in Appendix 24 at the end of Part Two. In addition, the Air Force and the Interagency ADR Working Group (IADRWG) have published excellent mediation resources for federal activities.³ Both are highly recommended.

¹ Attributed to divorce mediator and author Lenard Marlow, by Robert Benjamin in “On Being Too Fussy About Values in Mediation: Consider the Hedgehog and the Fox,” online at <http://www.mediate.com/articles/benjamin3.cfm>.

² Basic federal ADR policy in administrative matters is found in Public Law 104-320, the Administrative Dispute Resolution Act of 1996, 5 U.S. Code, §§ 571-584 and accompanying Notes. This statute reauthorized an earlier 1990 statute with the same name. The 1996 law is commonly referred to as the “ADRA.” ADR in federal courts is governed by the Alternative Dispute Resolution Act of 1998, Public Law 105-315 (Oct. 30, 1998), 28 U.S. Code, §§ 651-658. Both statutes are discussed further in “The Legal Framework for Federal Sector Mediation,” beginning on page 4, and a copy of the full ADRA (incorporating both the 1990 and 1996 statutes) is at Appendix 21. DoD ADR policy is in DoDD 5145.5, *Alternative Dispute Resolution* (April 22, 1996). Army ADR policy is in a SECARMY Memorandum, dated 22 June 2007, “Army Alternative Dispute Resolution Policy” (see Appendix 22).

³ The Air Force Mediation Compendium is at <http://www.adr.af.mil/shared/media/document/AFD-121115-026.pdf>. The IADRWG Conflict Management Reference Book is at <http://www.adr.gov/pdf/desk-reference-handbook-2013.pdf>.

The ADR Continuum

As depicted in Figure 1, all dispute resolution processes occupy a continuum, ranging from simple and informal to complex and formal. Processes that occupy the left side of the continuum are consensual: they try to resolve disputes informally through mutual agreement. The best example is direct negotiations between the parties themselves. Processes that occupy the right side of the continuum are adjudicative: they resolve disputes through litigation, an adversarial process that employs formal rules of evidence and procedure, to reach a decision based on the law and the facts. In between are the various ADR processes, like mediation, which tend to favor the left side of the continuum. Unlike adjudication, mediation does not attempt to find fault or legal liability, or observe formal rules of procedure or evidence. Rather than a third party decide the outcome, the parties decide. Of course, some disputes present issues that are weighty enough to justify the investment of time and resources that litigation requires, but the vast majority of disputes, especially those arising in the workplace, simply do not fit that mold.

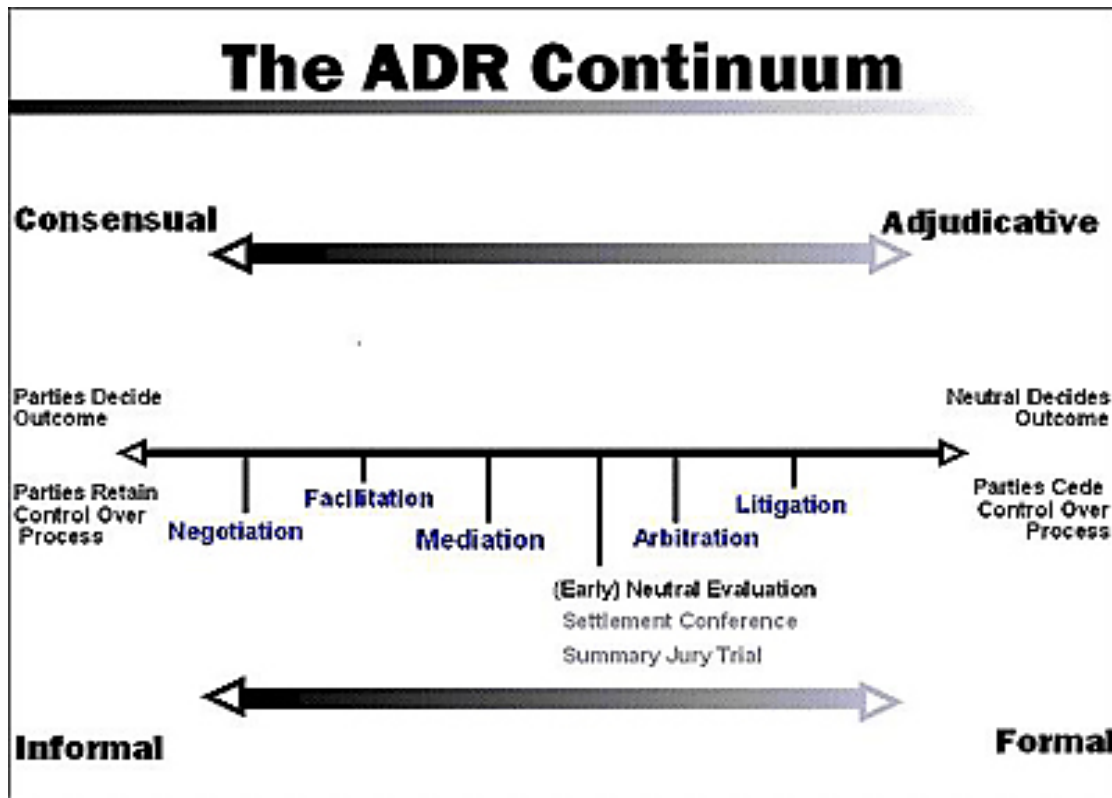


Figure 1. The ADR Continuum.

Although it's informal, mediation does have a basic structure and process. This structure helps maintain fairness, provides a positive course for possible resolution, and ensures legitimacy of the outcome. Mediation often provides the "sweet spot" that gives parties the structure they need to pursue a joint solution, without impeding their right to decide what that solution should be. The mediation process is detailed in Chapter 2.

Mediation Core Principles⁴

Mediation is voluntary. Its success depends on the parties' trust and confidence in both the process and the mediator. Four core principles ensure and reinforce that trust and confidence. The first, **voluntariness**, is the parties' right of *self-determination*, that is, the power to decide for themselves whether to participate in mediation, whether to settle, and on what terms.⁵ The mediator has no power to decide the dispute or impose a solution. The second principle, **neutrality**, means impartiality of the mediator, with no personal interest in the outcome of the case or bias in favor of either side to the dispute. The mediator's role is solely to assist each party equally. The third principle, **confidentiality**, means that disclosure of matters discussed in mediation is restricted in order to promote candor and open communication.⁶ Finally, the fourth principle, **enforceability**, requires that a settlement, once agreed to, is binding on the parties and may be enforced against them. All mediation proceedings must adhere to these core principles.

Mediation vs. Arbitration

Mediation and arbitration are often viewed as the two sides of the same coin, but the two are quite different. Mediation is a collaborative process to reach a resolution through mutual agreement. The mediator has no power to decide the outcome. By contrast, arbitration is an adjudicative procedure in which the parties present their positions to the arbitrator, who renders a decision (the award). An agreement to arbitrate a dispute (or future disputes) may be enforced in federal court.⁷ The arbitrator's award is binding on the parties⁸ and may not be vacated unless fraud, collusion, or misconduct on the part of the arbitrator is shown.⁹ Arbitration is often called "private litigation" because of its similarity to courtroom litigation, without the courtroom. In this respect, arbitration is much closer to traditional litigation than mediation. Arbitration, especially binding arbitration, is particularly attractive to disputants who want a final, binding decision in less time and at lower cost than a traditional lawsuit.¹⁰ Business interests often fit this mold.

Binding arbitration is pervasive in the private sector, affecting everything from employment contracts,¹¹ to consumer purchases, credit card agreements, and most other common commercial transactions. The Army, like almost all federal agencies, does not

⁴ Adapted from the Equal Employment Opportunity Commission's ADR policy in its Management Directive 110, Appendix H (<http://www.eeoc.gov/federal/directives/md110/appendixh.html>).

⁵ In Army workplace disputes, the Army is a party, not an individual management official. Therefore a direction to a management official to participate in mediation does not violate the principle of voluntariness.

⁶ Confidentiality of ADR proceedings is addressed in much greater detail beginning on page 25.

⁷ Federal Arbitration Act, 9 U.S.C. § 4.

⁸ *Id.*, 9 U.S.C. § 9 (arbitration award may be enforced in federal court).

⁹ *Id.*, 9 U.S.C. § 10(a).

¹⁰ It has been suggested that arbitration is losing its luster a bit among corporate counsel, who favor greater reliance on mediation, with traditional court-based litigation for those disputes that don't resolve in mediation. Although it is too early to say that this is a trend, such a shift in thinking, if real, would be significant. See Stipanowich, Thomas, at Mediate.com (<http://www.mediate.com/articles/StipanowichTb120130315.cfm>).

¹¹ For a comprehensive discussion of arbitration clauses in employment contracts, see Roma, *Mandatory Arbitration Clauses in Employment Contracts and the Need for Meaningful Judicial Review*, 12 American University Journal of Gender, Social Policy and the Law 519 (2004) (online at <http://www.wcl.american.edu/journal/genderlaw/12/roma.pdf>).

authorize the use of binding arbitration except as the last step of a negotiated grievance procedure in a collective bargaining agreement.¹²

The Legal Framework for Federal Sector Mediation

Statutory Authorities

Two federal statutes form the legal basis for mediation and other ADR procedures in federal sector workplace disputes. The first, the [Administrative Dispute Resolution Act of 1996](#),¹³ commonly known as the “ADRA,” broadly sanctions and encourages mediation and other ADR processes to resolve agency *administrative* disputes. The ADRA requires each agency to adopt an ADR policy, designate a senior official as the agency “Dispute Resolution Specialist,”¹⁴ and train personnel in mediation, facilitation and negotiation skills. The ADRA is the single most important statutory authority for ADR in federal agency workplace disputes, so expect to see many references to the ADRA throughout this Handbook. The complete text of the ADRA is reproduced at Appendix 20.

The ADRA applies only to administrative disputes, such as EEO complaints and employee grievances. Disputes that are initiated in federal court are subject to a different statute, the [Alternative Dispute Resolution Act of 1998](#).¹⁵ This statute requires each federal district court to have an ADR program for its civil (non-criminal) case docket. Each district court has an ADR program, consisting almost exclusively of mediation.¹⁶ In some districts the judge or magistrate can order parties into mediation, although they can’t force parties to settle. Given the swollen civil dockets in many district courts, there is a lot of pressure for litigants to settle their differences voluntarily and avoid further litigation.

Lawsuits filed against the Army in federal courts are defended by the Department of Justice, so ADR decisions are the prerogative of the U.S. Attorney or DoJ attorney representing the Army. However, they do listen to recommendations by agency counsel, including whether to pursue ADR. Most federal sector workplace disputes have a potential pathway to the federal courts, even if few actually arrive, so the ADR Act of 1998 is not irrelevant to Army dispute resolution. In fact, between the ADRA of 1996 and the ADR Act of 1998, availability of ADR (mediation) as a dispute resolution option pretty well blankets workplace disputes, from the initial administrative claim to a lawsuit filed in federal court. Thus, the longer a dispute drags on in litigation, the more likely the parties are going to find

¹² The Federal Service Labor Management Relations Statute (FSLMRS), 5 U.S.C. § 7121(b)(1)(C)(iii), requires the use of binding arbitration as the final step to resolve grievances filed under a CBA. In non-labor cases, the ADRA, 5 U.S.C. § 575(c), permits agencies, in consultation with the Attorney General, to adopt policies allowing the use of binding arbitration on a case-by-case basis. Very few agencies (about 8) have actually adopted such policies. Army has not.

¹³ Public Law 104-320, 5 U.S.C. §§ 571-584 (October 19, 1996).

¹⁴ The Army DRS is the Principal Deputy General Counsel.

¹⁵ Public Law 105-315 (Oct. 30, 1998), 28 U.S. Code, §§ 651-658.

¹⁶ Go to <http://www.justice.gov/olp/adr/compendium.html> for a compendium of all federal district court ADR programs.

themselves either in settlement negotiations or an ADR proceeding, typically mediation, whether they want to settle or not.¹⁷

Regulatory and Policy Authorities

Several regulations significantly affect ADR in Army workplace disputes. A Department of Defense directive, DoDD 5145.5 (April 22, 1996),¹⁸ requires that all DoD components, including the Military Departments, have ADR policies and programs in place. Currently, Army ADR policy is contained in a 2007 Secretary of the Army memorandum (see Appendix 22; a PDF version of the memorandum can be downloaded [here](#)). This policy encourages the use of ADR to resolve disputes as early as possible, by the fastest and most inexpensive means feasible, and at the lowest possible organizational level.¹⁹

All the administrative forums empowered to adjudicate federal workplace disputes encourage mediation or make it available, or both, for disputes that are under their jurisdiction, as detailed below.

EEO Complaints

The most extensive regulatory framework for ADR is found in EEO complaints. The EEOC requires all federal agencies to have ADR available to resolve complaints filed against them.²⁰ The EEOC further implements this requirement in Chapter 3 of Management Directive (MD) 110,²¹ and the Army implements the policy in [Army Regulation \(AR\) 690-600, Administrative EEO Discrimination Complaints \(9 Feb 04\), Chapter 2](#).²²

Because ADR is an integral part of the EEO complaint process, and EEO complaints make up the largest share of Army workplace disputes, management of ADR resources locally often falls to the servicing EEO officer. Although other ADR processes are authorized, mediation is by far the most common ADR process used to resolve EEO complaints.

Non-EEO Disputes

Non-EEO workplace disputes include employee grievances, labor-management disputes, adverse action appeals, and other employment-related matters.

Negotiated Grievances. Grievances submitted by bargaining unit employees are subject to the negotiated grievance procedure in the applicable collective bargaining agreement,

¹⁷ The ADRA and the ADR Act of 1998 impact only *federal* mediations. States and other non-federal jurisdictions have their own statutes and rules governing ADR and mediation.

¹⁸ DoD Directive 5145.5, Alternative Dispute Resolution (April 22, 1996). This directive is currently undergoing revision for reissuance as a DoD instruction, DoDI 5145.05, but general ADR policy in DoD will remain unchanged.

¹⁹ Air Force and Navy ADR policies are similar. See [AFPD 51-12, ¶ 3 \(9 JAN 2003\)](#); [SECNAVINST 5800.13A, ¶ 7 \(22 DEC 2005\)](#).

²⁰ See Title 29, Code of Federal Regulations (CFR), § 1614.102(b)(2).

²¹ EEOC ADR Policy Statement, MD-110, Ch. 3 (Section II). See Note 7.

²² AR 690-600 can be downloaded at http://www.apd.army.mil/pdf/files/r690_600.pdf.

which must include binding arbitration as the final step, and may include mediation as an option.

Administrative Grievances. Grievances filed by non-bargaining unit employees are processed under the Department of Defense administrative grievance procedure, which authorizes ADR at any stage of the process.²³

Adverse Action Appeals. These appeals are the responsibility of the Merit Systems Protection Board (MSPB). The Board allows an additional 30 days to file an appeal when the agency and employee agree to try ADR on their own,²⁴ and offers an internal mediation program to resolve docketed appeals anytime before the appeal is adjudicated.²⁵

Labor-Management Disputes. Arbitration awards, Unfair Labor Practice (ULP) claims and other labor-management disputes are handled by the Federal Labor Relations Authority (FLRA). The FLRA provides training and direct ADR support to litigants through its [“Collaboration and Alternative Dispute Resolution \(CADR\) Program.”](#)²⁶

Other Employment-Related Disputes. Prohibited Personnel Practice (PPP) investigations and other specialized employment-related matters are the responsibility of the U.S. Office of Special Counsel (OSC). OSC offers mediation services to the parties in select Prohibited Personnel Practice and veterans’ employment and re-employment rights cases.²⁷

Providing Mediation Services

Mediation’s Place in Conflict Management

Managing conflict often requires an incremental approach. Disputes typically develop in three stages; at each stage, resolving the dispute becomes progressively more difficult than the stage before. Conflict management focuses on these stages in order to promote resolution of the underlying conflict as early and inexpensively as possible. The first stage of a conflict’s development occurs before it has developed into a formal dispute, when it may be more responsive to informal intervention techniques, such as facilitation or coaching. If first stage efforts fail or are not attempted and the conflict develops into an actual dispute (as indicated by the filing of a complaint, grievance, etc.), informal ADR processes, like mediation, can be used to attempt resolution while the dispute is still in its infancy. Examples include using mediation to resolve an EEO issue in the informal precomplaint phase, or to resolve a grievance at the first stage of a negotiated grievance procedure. If mediation fails, or is not attempted, at stage two, the dispute may move into

²³ DoD Instruction 1400.25, Vol. 771, Enclosure 3 (Dec. 26, 2013), paragraph 771.2.2.

²⁴ See 5 CFR § 1201.22(b)(1) for time standards for filing an appeal.

²⁵ See “Mediation Appeals Program,” <http://www.mspb.gov/appeals/mediationappeals.htm>.

²⁶ See http://www.flra.gov/authority_cadro and http://www.flra.gov/authority_cadro_program_faq.

²⁷ OSC has a broad portfolio, including investigating prohibited personnel practice complaints, whistleblower disclosures, violations of the Hatch Act, and claims filed under the Uniformed Services Employment and Reemployment Rights Act (USERRA). OSC offers mediation in select cases. See <http://www.osc.gov/adr.htm> for more information.

the third stage for resolution by formal adjudication.²⁸ The goal of an incremental approach to conflict management is to avoid as many disputes as possible as early as possible, so that litigation is used only for those few cases that truly warrant it.

Not all locations have early conflict resolution services, or those that exist are spotty. Likewise, mediation and other ADR services may not be reasonably available, or they may be limited to the EEO complaints program.²⁹ Further, in disputes involving bargaining unit employees, making mediation or other early dispute resolution processes available may entail a collective bargaining obligation and other union rights.³⁰

Best Practices for Preparing for Mediation

Regardless of the particular forum (EEO or non-EEO) or the issues in dispute, there are six fundamental aspects to every mediation process. They are:

1. Parties are informed of the availability of mediation and how it works;
2. Logistical arrangements, such as scheduling the session, reserving adequate space, and booking the mediator, etc., are made;
3. There is a written agreement to mediate, signed by the parties before the mediation session is held, setting forth the basic parameters of the mediation. A sample mediation memorandum and acknowledgment are at Appendices 6 and 7.
4. The mediation session is conducted promptly and professionally.
5. Any settlement agreement, or impasse advisement if there is no settlement, is routed to the appropriate official(s) for coordination and appropriate action.³¹
6. Feedback is solicited from the parties following the mediation. A sample form for collecting voluntary feedback is at Appendix 8.

In addition to these fundamental aspects, there are 10 further considerations that are important to a positive mediation experience (whether settlement is reached or not).

1. *Know Who Your Stakeholders Are*

²⁸ Ironically, the vast majority of disputes in litigation ultimately settle!

²⁹ EEO offices are authorized to include non-EEO issues for resolution by ADR during the informal pre-complaint stage, thus providing some opportunity for ADR of issues that do not implicate EEO laws. See MD-110, Chapter 3, Section II.A.4; AR 690-600, ¶ 2-1.d.

³⁰ This is especially true for any ADR process utilized as an alternative to a step in the negotiated grievance procedure (NGP) in a collective bargaining agreement (CBA).

³¹ This step should be made known to the parties prior to entering into an agreement to mediate and should be understood in the context of the confidentiality and enforcement procedures unique to the type of dispute being mediated. See, e.g., 5 U.S.C. § 574(h).

Anyone with an official interest or role in processing and/or resolving the dispute is a stakeholder in mediation. This includes employees, unions, management and leadership (civilian and military supervisors and managers and commanders), EEO officers, LMER specialists, comptroller (if money is involved), and the labor and employment law attorney in the Legal Office. Stakeholders should be made aware of what ADR resources are available and how to access them.

2. Gather Sufficient Information

When a dispute arises, information must be gathered from the parties to determine whether mediation is appropriate for resolving the dispute and whether the parties want to try it. Interview the parties to get their version of the facts and issues in the dispute. Information obtained from the parties during the interview may be confidential, so avoid making any external disclosures of information gleaned during intake specifically relating to a decision to try mediation. A sample intake form is at Appendix 1.

3. Determine Whether the Dispute is Right for Mediation

Mediation is not always the right choice for resolving a dispute. Some disputes have features that are incompatible with mediation, or require outcomes that mediation can't provide. Any dispute whose resolution must address issues and interests that are beyond the immediate parties to the dispute is usually not a good fit for mediation. Examples of such cases were captured by Congress in the ADRA, and are included in the list of "factors not favoring mediation" on pages 9-11.

Since not all disputes are suitable for mediation, each case should be reviewed to ensure mediation is appropriate, and when it is, mediation should be offered and encouraged.³² **Reminder:** engaging in mediation does not obligate either side to settle, nor does it foreclose access to other available processes if mediation fails. Avoid making an *unconditional* offer of mediation unless or until it has been determined to be appropriate, or its appropriateness is unquestioned.

Under the ADRA, the agency reviews and decides whether mediation is appropriate for a particular dispute. In Army EEO complaints, this responsibility is assigned to the commander, who can delegate it, preferably to the EEO officer.³³ In non-EEO cases there may not be a "designated" official. Local commanders or other officials with comparable authority over workplace disputes should designate the person(s) responsible for reviewing cases and making ADR appropriateness determinations. Another option is to use a team approach in reviewing cases for mediation: EEO, CPAC, HR, Legal, even the

³² Even in EEO pre-complaints, where ADR is generally authorized as an alternative to traditional counseling, its availability is premised on its being appropriate for the particular dispute. See MD-110, Chapter 3, Section II.A.5.

³³ AR 690-600, Chapter 2, Section 2-1c.

union, have an interest in the available mechanisms by which a dispute is to be resolved. A “Case Evaluation Worksheet” to help with the determination is at Appendix 5.³⁴

In the discussion that follows, we take a look at the factors for determining whether mediation is appropriate, or not, for resolving a dispute.

➤ *Factors favoring mediation*

There are no hard-and-fast rules here, but if the dispute meets at least one of the characteristics listed below, it should be a good case for mediation. A workable rule of thumb: if the dispute is one in which a negotiated settlement would be acceptable, it should be suitable for mediation, since mediation is just an assisted negotiation. Other factors:

- Parties have tried direct negotiations to resolve the dispute without success, and believe a neutral third party could help break the impasse.
- Both parties desire to maintain confidentiality.
- There is a continuing relationship that must be preserved.
- The claim presents underlying non-legal issues, such as communication problems, that can’t effectively be resolved by litigation.
- The case has meaningful litigation risk (i.e., risk of loss) for management if it goes to trial.
- The parties wish to resolve multiple disputes in multiple forums (e.g., EEO, MSPB, grievance procedures) in a single, “global” settlement.
- The parties want to resolve the dispute in a way that doesn’t establish a precedent for future cases.
- The parties wish to avoid the expense and delay of litigation.
- Parties have unrealistic views of their cases which may be unduly inflating their expectations if the case goes to trial or other hearing on the merits.

➤ *Factors not favoring mediation*

When is mediation *not* appropriate? The ADRA lists six situations where an agency must “consider” not using ADR.³⁵ Basically, these are cases where the ADR goal of

³⁴ Under EEOC guidelines, agencies may determine ADR to be inappropriate based on case-specific considerations, or limit its availability by geographical location or issue, but they may not exclude entire bases (e.g., race, color, sex, national origin, handicap) from ADR consideration. MD-110, Ch. 3, Section II(A)(5).

individual, consensual, and confidential dispute resolution is incompatible with other agency interests or goals. Some of these statutory situations are listed below, along with non-statutory factors that may also weigh against ADR. Any decision not to offer mediation or to reject a request for mediation should be based on at least one of these factors. A decision not to participate in ADR is not subject to challenge or appeal, but it shouldn't be arbitrary. Moreover, declining mediation at one point in the dispute does not foreclose agreeing to participate at a later point. Disputes that don't resolve at an early stage of the case often do so later, when parties are more motivated to settle.

Specific reasons for finding ADR to be *inappropriate* for resolving a dispute:

- There is credible evidence of fraud, gross mismanagement, or criminal misconduct committed by either party.
- Logistical complications or geographical separation make mediation impractical. Be sure to cite the condition(s) relied upon when invoking this rationale. [**Note:** Even if conditions make in-place mediation impractical or impossible, you may consider conducting mediation through other means that don't require everyone to be in the same room, such as telephone, videoconferencing or even web-based conferencing and communication platforms. Although these alternatives can expand the reach of mediation, they tend to be more impersonal, taking away the non-verbal cues and mannerisms that normally are an important part of the mediation dialogue. Use them as a last resort, and ensure that the parties agree to the process, that all participants are versed in its use, and that each participant is physically located in a private environment to protect confidentiality.]
- The case involves significant legal, policy, or constitutional issues, and one or both parties need an authoritative decision to serve as precedent. [**Note:** officials responsible for resolving workplace disputes who are unsure of whether a particular case exhibits any of these characteristics should consult the servicing labor and employment lawyer and L/MER.]
- The dispute significantly affects non-parties. For example, a dispute whose resolution would materially change working conditions of non-party employees, or would alter the application of a collective bargaining agreement, may be inappropriate for mediated settlement, which binds only the parties who negotiated and signed the settlement agreement.
- The case requires creation of a public record, and mediation and other ADR processes do not produce such a record (just the opposite: they are confidential, with no written record of proceedings).

³⁵ 5 U.S.C. § 572(b). Note that the presence of an "ADRA factor" merely requires the agency to *consider* not using ADR; it does not prohibit its use outright. Each case should be evaluated individually. If after discussing relevant factors the parties wish to mediate and the relevant agency departments concur, mediation may well be productive.

- There is a need for uniform treatment toward this issue or this disputant, e.g., the issue has nationwide impact or many similar suits are pending and there is no legitimate reason to settle with only one party.
- ADR would interfere with or undermine the development or consistent application of Federal Government policy.

Existence of any of these factors justifies, but does not require a decision not to use ADR, so long as the factors are considered in each case.

4. Assess the Case's "Problem-Solving" Potential, Not Just "The Merits"

The EEOC's ADR policy in discrimination cases reflects in part its recognition that most of the complaints it receives every year do not present violations of the law that can be remedied through litigation or even the EEO complaint process.³⁶ But they do raise non-legal issues that can be resolved through ADR procedures like mediation. This is why the EEOC allows non-EEO claims to be mediated as part of the informal EEO pre-complaint process, even though such claims can't be adjudicated as part of a formal EEO complaint.³⁷

Managers and lawyers who represent the agency in workplace disputes often make decisions regarding mediation on a narrow view of the case—whether the claim has any legal merit. If it does, they'll mediate; if it doesn't, they won't. As implied from the EEOC's policy of allowing non-EEO issues to be mediated and resolved as part of the informal pre-complaint dispute resolution procedure, there are many non-legal workplace issues that can't be resolved through litigation but can be resolved through mediation. Managers and agency lawyers are well-served by viewing these cases from a problem-solving perspective, not just a win-or-lose litigation perspective.³⁸ Thus viewed, a case's *legal merit* is just one consideration in deciding whether to mediate or not.

The lesson here is straightforward: don't assume mediation is useful only when your case looks like a loser. Mediating even when your case is a winner for management gives you and management the opportunity to identify and fix problems that would otherwise go unaddressed, thus avoiding further litigation, while preserving or even improving the parties' continuing working relationship.

³⁶ EEOC statistics back up this assertion. In FY 2012 (most recent data), only 3.1 percent of all federal sector EEO complaints decided on the merits found unlawful discrimination. See, EEOC Annual Report on the Federal Workforce for Fiscal Year 2012, Section B(h), at <http://www.eeoc.gov/federal/reports/fsp2012/index.cfm>. The FY 2012 figures are typical, as evidenced by comparable rates for FY 2011 (2.9%), FY 2010 (3.3%) and FY 2009 (3%).

³⁷ MD-110, Chapter 3, Section II.A.4; AR 690-600, Chapter 2, ¶ 2-1d (commander can include issues for resolution by ADR that would not otherwise be cognizable in the EEO complaint procedure.) Note, however, that if ADR fails to resolve an issue included for ADR under this authority, the issue cannot be investigated under the regular EEO procedures unless it is like or related to another issue that is appropriate for investigation.

³⁸ We need to be clear here that we are not talking about truly frivolous claims—those brought solely to harass or abuse the process—which should not be rewarded with mediation. Most claims that fail to state a cause of action are not frivolous; they're motivated by an honest, good faith disagreement rather than a malicious desire to harm or obstruct.

5. *Time Mediation for Maximum Value*

When is the best time for mediation of a dispute—early, or later on? It depends. Conventional wisdom says ADR should be offered as early as possible, before the parties become too entrenched in their positions. Additionally, early mediation saves time and money, especially if settlement is reached.³⁹ On the other hand, mediating too early can lead to bad results if the parties lack adequate information to make rational decisions on whether to settle and on what terms. These information gaps or imbalances can be remedied in the mediation itself through an information exchange regimen as part of the agreement to mediate. Often an information imbalance resolves itself as the dispute works its way through the system and more facts become known.

Most workplace disputes are relatively straightforward, so they should be screened for mediation when they are submitted, and if found appropriate, mediation may be offered as soon as practicable. If mediation doesn't resolve the dispute, the other dispute resolution procedures are still available. In addition, failure to reach resolution early on does not foreclose successful mediation at a later point. As a case drags on and costs mount, parties often find motivation to settle.⁴⁰ These factors tend to offset whatever entrenchment has occurred due to the passage of time. An ADR administrator needs to be alert to the dynamics that can make mediation a more viable dispute resolution option, even after the case has been around for a while.

Here are some general guidelines for when mediation can or should be offered in specific dispute categories.

➤ *EEO Complaints*

Mediation can be used at any point⁴¹ during the life cycle of an EEO complaint, but is most often used at the informal pre-complaint stage, after initial contact with the aggrieved. In the pre-complaint stage, the aggrieved must be advised that he or she can choose between the traditional counseling process, or ADR (if appropriate for the dispute), but not both. If ADR is selected, the processing period is automatically increased to 90 days.⁴² If mediation fails to resolve the matter, the aggrieved is issued a notice of the right to file a formal complaint of discrimination, and the informal pre-complaint stage is ended. It is acceptable (and encouraged by the EEOC) to engage in mediation more than once during the life cycle of an EEO complaint such as in the informal stage and again in the

³⁹ A 1998 Air Force Audit Agency study of EEO complaints over a two year period showed that on average, resolving a complaint at the informal stage cost one-eighth as much in time and money as resolving it at the formal complaint stage.

⁴⁰ This seems to be the pattern in EEO cases. Army data submitted to the EEOC over the last few years have shown that Complainants at the formal complaint phase are more willing to agree to ADR when it is offered, and more willing to settle, than their counterparts in the informal precomplaint phase. This is not unique to the Army. Government-wide, settlement rates for mediation conducted at the formal stage of the EEO complaint process tend to be considerably higher than those at the informal, precomplaint stage.

⁴¹ Ensure appropriate collective bargaining obligations are fulfilled if EEO complaints are included in the negotiated grievance procedure.

⁴² 29 C.F.R. § 1614.105(f).

formal stage if a complaint is filed.⁴³ Even on appeal mediation is available through the EEOC's "FAST" Program.⁴⁴ If the Complainant has filed a civil suit in federal district court, ADR is subject to Department of Justice supervision and local court rules.⁴⁵

➤ *Administrative Grievances*

Army administrative (i.e., non-collective bargaining agreement) grievances are processed under the administrative grievance procedure in Department of Defense Instruction 1400.25, Vol. 771, Enclosure 3 (Dec. 26, 2013) (replacing DoD Civilian Personnel Manual, 1400.25-M, Subchapter 771). Paragraph 771.2.2. authorizes ADR at any stage of the process. For non-bargaining unit civilian personnel assigned to HQDA and its field operating agencies, DA Memo 690-7 (1996) sets forth the administrative grievance process. Facilitation (not mediation) is authorized for resolving grievances subject to the procedure, presumably during the informal problem-solving stage and, if requested, at the more formal administrative grievance phase.⁴⁶

➤ *Negotiated Grievances/Unfair Labor Practices*

The availability of ADR as a dispute resolution option in bargaining unit grievances and ULPs depends on any agreement between management and the union to utilize it. The case intake official should review the applicable collective bargaining agreement (CBA) and any external agreements that modify or supplement the CBA, and consult with the servicing L/MER specialist or labor and employment attorney to determine if and when mediation can be offered, and what unique constraints may apply. ADR clauses in CBAs often provide early mediation as an alternative to Step 1 of the grievance procedure; others provide mediation as a later option before binding arbitration is invoked. An agreement could even permit mediation at both stages, if the parties agree.

➤ *MSPB Appeals*

The case intake official should coordinate with the responsible L/MER or labor and employment attorney prior to and after mediation of cases involving appealable adverse actions for which an appeal has not been filed. This is also true of potential mixed cases involving allegations of discrimination made through the local EEO office. MSPB rules extend the deadline for filing an appeal by 30 days when the employee and agency agree to use ADR to attempt to resolve the appeal, and the MSPB offers its own voluntary in-house mediation program for appeals after they are filed.⁴⁷

➤ *Office of Special Counsel (OSC) Cases*

⁴³ 29 C.F.R. § 1614.108(e) permits the complainant and the agency to extend in writing the 180-day investigation period by up to an additional 90 days, which could be used to accommodate an ADR proceeding. Mediation at the formal stage can help relieve pressure from Administrative Judges to meet time standards applicable to formal complaint processing.

⁴⁴ See <http://www.eeoc.gov/federal/adr/fastprogram.cfm> for more information.

⁴⁵ See discussion of ADR in the federal courts on pages 4-5.

⁴⁶ DA Memo 690-7, ¶¶ 8, 9 (31 Oct 96).

⁴⁷ See Notes 27-28 on page 6 for citations.

OSC offers ADR (mediation) in “selected cases” involving Prohibited Personnel Practice (PPP) and Veteran’s Employment and Reemployment Rights (USERRA) investigations. Since this is a service offered by OSC on a case-by-case basis, the timing of mediation is subject to OSC’s schedule.⁴⁸

➤ *General Workplace Issues (Non-process Disputes)*

Non-process disputes include general workplace conflicts and disagreements that have not been filed or recorded as part of an established complaint system or other dispute resolution procedure. Conflicts that occupy this space can benefit from mediation or even simpler approaches like conflict coaching or facilitated discussions. Unless a local ADR program or plan provides differently, early involvement to resolve such disputes should generally be treated as an informal facilitated discussion rather than mediation, even if it employs a more structured mediation process. There is no formal settlement agreement, although there may be an informal memorandum reflecting any agreement by the parties that purports to resolve their differences. See the discussion on settlements beginning on page 58 for more information on this point.

6. *Educate the Parties*

Parties need to understand the nature of their dispute and how mediation attempts to resolve it. Those contemplating mediation should also be informed of the particular mediation program at their location before being asked to participate. Inadequate knowledge about the mediation process will greatly diminish its credibility and effectiveness. Lack of information may also dissuade a party from agreeing to mediation.

The following is a list of points that should be discussed with each party prior to mediation, preferably during initial intake when the dispute is submitted or shortly thereafter. It is assumed that a case intake official, such as an EEO counselor, will convey this information in the first instance, but the mediator should be prepared to reinforce it either in the agreement to mediate or in opening remarks, or both. (These items are also listed in the intake checklist at Appendix 1, Part IV.)

➤ *Information pertaining to mediation in general:*

- ➔ Inform both sides that electing mediation does not foreclose other available remedies if mediation fails, so long as applicable time limits and procedural rules are met. Any questions that can’t be answered immediately should be referred to the appropriate Army official, CPAC, regulation, or other resource.

⁴⁸ See <http://www.osc.gov/adr.htm> for more information regarding OSC’s mediation program. It should be noted that OSC’s investigation of USERRA cases was pursuant to a 3-year pilot with the Department of Labor which recently ended. This may adversely affect the availability of mediation for USERRA cases, either before DoL or OSC.

- Briefly describe the mediation process, distinguishing it from the alternative traditional procedures, such as the EEO complaint process or negotiated grievance procedure. Emphasize mediation's four core principles: voluntariness, impartiality, confidentiality and enforceability (see discussion at page 3).
- Explain the goal of mediation is to resolve the dispute through voluntary agreement of both parties. While good faith participation is required, *NO ONE* is obligated to settle or accept any term that is not voluntarily agreed to.
- Describe the confidential caucus and explain its purpose to encourage candid discussion of the issues in a safe environment, without fear of reprisal.
- Explain the mediator's role to assist the parties in resolving their dispute, not to judge, dictate terms, or decide the case. Describe the mediator's duty to remain impartial and to maintain confidences.

You can use this *Handbook* as a guide for this information. In EEO mediations, EEOC MD-110, Chapter 3 and Appendix H, also provide good information.

➤ *Information specific to the case at hand:*

- Inform the parties of the mediator's identity (if known) and get any information that might bear on conflicts of interest (for example: does either party know the mediator personally, and if so, what is the nature of the relationship?). Anyone with an official, personal or financial interest in the dispute or its outcome should not serve as the mediator.
- Unless modified by local agreement, inform the parties that they have a right to be represented in the mediation sessions. The representative may attend the session or be available by phone for consultation.
- Go over the agreement to mediate with the parties and have them sign. A sample agreement, in the form of a memorandum and acknowledgment, are at Appendices 6 and 7. See Rule 7 on page 17, "Get a Written Agreement to Mediate." (some mediators use their own pre-mediation agreements, so this function may be taken over by the mediator)
- Cover logistical and procedural matters relating to the mediation (some of these are generic; specific guidance will be issued by the mediator):
- Identify location, day and time of the mediation session;
- Any issues related to special disability accommodations or need for alternative media to conduct the mediation, such as telephone, video teleconference, or online dispute resolution (ODR). If the latter, explain procedures for operating the equipment used to conduct the mediation;

- Amount of time to make available for the session (8 hours preferred, 4 hours minimum);
- Names and contact information of any representatives or other non-party participants;
- Use of personal cell phones and other personal digital devices while in session (mediator discretion);
- Timing and duration of breaks (mediator discretion);
- Opening statements by parties (mediator discretion);
- Taking notes during session and disposition of notes at end of session (mediator discretion);
- Use of documents and exhibits in mediation session (mediator discretion);
- Any settlement applies only to the parties who sign the agreement;
- Explanation of and consent to presence or participation of co-mediators, mediation mentors, or observers if used (mediator discretion);
- Explanation of the process for drafting and coordinating the settlement agreement if settlement is reached;
- Who the parties may need to notify if the case does not resolve;
- Parties will be asked for feedback at the conclusion of the process.

A Note on Mediating Sexual Harassment Claims

Allegations of sexual harassment must be reported through command channels and investigated irrespective of whether contact with an EEO counselor has occurred or an EEO complaint has been filed. EEO complaints alleging sexual harassment are not automatically inappropriate for mediation, but mediation must not interfere with an investigation required by 10 U.S.C. § 1561 or other authorized investigations. *See, e.g.,* AR 20-1, Chapter 7 (Inspector General investigations); AR 15-6 (commander-directed investigations).

7. Get a Written Agreement to Mediate

It is always wise to confirm the parties' agreement to mediate their dispute in writing; in EEO cases, a written agreement to mediate is mandatory. There is no standard format

for the agreement, but it must cover essential information: time, place, and likely duration of the mediation session, role of the mediator, expectations of the parties, confidentiality, and other aspects of the process. A sample Mediation Memorandum is at Appendix 6. A sample Agreement to Mediate is at Appendix 7. Its purpose is to confirm the parties' understanding about the mediation process and serve as the basis for the agreement to mediate. The Agreement to Mediate is very short and merely documents the parties' agreement to abide by the terms of the mediation memorandum. Appendices 6 and 7 are intended to be used in tandem. Alternatively, the parties may sign a stand-alone agreement to mediate, but ensure it covers the same subject matter.

8. Acquire and Prepare the Facilities for Mediation

The ADR administrator, case intake official, or other designated individual, schedules the mediation for a mutually acceptable date and time, and secures suitable facilities to conduct the mediation session. (See Appendix 1, Section III) Special attention should be paid to the following: (1) neutrality of the location; (2) size and configuration of the mediation room; (3) table and seating arrangements for the mediator and parties; (4) suitable waiting area for non-caucusing parties; (5) access to telephones; and (6) access to a computer and printer to assist in the drafting of a settlement agreement. The person making the arrangements must also consider the special needs of the parties or non-party participants, such as disability accommodations. An EEO office with facilities meeting these requirements is a suitable choice for conducting the mediation. **NOTE:** If the mediation is to be conducted using a non-traditional platform, such as by telephone, video teleconference or a web-based conferencing platform, ensure parties are located in a confidential environment, with access to whatever equipment is necessary to conduct the mediation.

9. Schedule Sufficient Time to Conduct the Mediation

Workplace mediation sessions typically take about four hours or less, however some cases may take longer due to complexity, emotions, or value. Ensure the parties can devote a minimum of four hours for uninterrupted mediation; eight hours is preferable, to accommodate cases that promise resolution yet might still go beyond four hours. In rare cases, it may be advisable to plan for the possibility that mediation will go longer than one day. The mediator and the parties should determine whether additional time would be productive before extending mediation beyond a day.

10. Have the Right People at the Table

Success in mediation depends on ensuring that the right people are at the table, and that participants have appropriate authority to negotiate and settle the dispute. The discussion below addresses three common aspects of this issue: participation by parties and their representatives (e.g., attorneys and other advocates) and technical experts, participation by the management official, and participation by the union.

➤ *Parties, Representatives and Technical Experts*

The parties and the mediator (or co-mediators) are direct participants in mediation. Party representatives may also be at the table and participate.⁴⁹ For mediation apprenticeship or mentoring training, and with the parties' consent, a mediator trainee may also be present at all stages of the proceedings, including private caucuses. Generally, the mediator may limit the number of non-party participants in the mediation room at any one time to ensure confidentiality and an orderly process. One exception may be the participation of unions, as discussed at pages 20-21. Technical experts should stand by or be available by phone to answer questions that may arise during mediation. In-person participation by a technical expert should always be in joint session, not private caucus. All participants in mediation, whether parties or not, should observe the rules of confidentiality applicable to federal ADR proceedings (more on confidentiality beginning on page 25).

➤ *The Management Official*



The Army is not a “person” in the traditional sense, so its interests are represented in mediation by a management official designated for that purpose, who is authorized to act for the responding Army organization. In some cases the immediate supervisor may be the designated official, but often it will be another official, or a higher level supervisor in the chain of command, or a personnel specialist, or even an attorney from the Legal Office, who serves as the management official. It all depends on the facts and circumstances of each case. Often the immediate supervisor is a logical choice to participate for management because of personal knowledge of the events giving rise to the dispute. Having the immediate supervisor there also facilitates direct communication between the employee and the supervisor, which is often helpful to achieve a resolution. If the immediate supervisor is not the management official in a particular mediation, it is recommended that he or she have input into any preparation or planning meetings prior to the mediation session, as well as being on standby while the session is in progress.⁵⁰

⁴⁹ Many ADR practitioners prefer not to have representatives physically present during mediation, especially early in the dispute when maintaining informality is particularly important. In fact, most parties in early informal mediation, such as EEO pre-complaint mediation, appear without representation. Where the employee is unrepresented and the management official is accompanied by counsel, a potential “balance of power” issue arises. The mediator must weigh the desire to avoid intimidation, which could impair the quality of the process, against the ethical obligation to maintain impartiality. If the employee freely agrees to the arrangement, that should address the concern. If not, the mediator may ask the agency to consider having counsel available for consultation, without actually being present at the table.

⁵⁰ The EEOC’s guidance on the management official’s authority in mediation is a bit confusing when applied to the immediate supervisor. On the one hand, EEOC insists that all mediations should include a management official who has full settlement authority. EEOC MD-110, Chapter I, Section IV. On the other hand, this official should have no potentially conflicting role in the case, such as being named a Responsible Management Official (RMO), or being directly involved in the events or actions giving rise to the complaint. MD-110, Chapter 3, Section VI.A.9. The practical effect of this advice is to disqualify the immediate supervisor from serving as the management official unless he or she has no involvement in the events giving rise to the claim and has settlement authority. Most immediate supervisors probably don’t fulfill these

There will be cases where the immediate supervisor should not be the management official. For example, the supervisor may have a conflicting personal interest in the outcome that can't be separated from his or her official duties, or his or her presence in the mediation may introduce a potential element of intimidation that should be avoided, or the supervisor does not have sufficient authority to settle. In such cases, an official higher in the chain or outside it altogether may be a better choice. On the other hand, management officials not personally involved in the events giving rise to the complaint may have little or no knowledge of the case, which can frustrate mediation efforts and may deprive the employee of an emotional outlet that often leads to resolution. Rather than adopt a blanket policy, management should examine each case to determine the right person to serve as the management official in a particular mediation.

Whoever is designated as the management official must have sufficient *authority* to meaningfully negotiate on behalf of management and sign a written settlement agreement should the case settle. The extent of the employee's authority is seldom an issue. The extent of the management official's authority, and whether it is sufficient to cover the matters agreed to, are questions that commonly arise in federal workplace mediation. The management official representing the agency's interests at the table must have actual authority to agree to the terms of a settlement on behalf of the agency in order to sign a settlement agreement binding on the agency. If this authority is lacking, or if the management official is uncertain whether it exists, the official who actually has the authority should be known to the parties and the mediator and be readily available by phone or in person. If the mediator is in doubt as to the management official's authority to agree to terms, the mediator may discuss it directly with the official having such authority. In any event, the mediator must be confident that sufficient authority exists before any settlement agreement is signed.



➤ *Union Participation in Mediation*

Unions can participate in certain workplace mediations in two ways.⁵¹ One is as the representative of a party who is a bargaining unit employee. The other is pursuant to the union's "formal discussion" rights, if the employee is part of the bargaining unit the union represents, and if the mediation qualifies as a "formal discussion" under the Federal Service Labor-Management Relations Statute (FSLMRS).⁵² Generally, unless the collective bargaining agreement or other negotiated agreement states otherwise, the union has a right to be present during mediation of a grievance filed under the negotiated grievance

two conditions at the same time. As a consequence, the management official in most EEO mediations will probably not be the immediate supervisor. In such cases, consider having the supervisor available to participate as a "non-party" in the mediation. Ensure there is no perception of management "ganging up" on the employee, especially if the employee has no personal representation.

⁵¹ This discussion assumes the employee is a member of a collective bargaining unit.

⁵² 5 U.S.C. § 7114(a)(2)(A).

procedure in the collective bargaining agreement. In the case of mediation of EEO complaints, the issue is less clear.

The FLRA has taken the position that mediation of a *formal* EEO complaint in which the complainant is a bargaining unit member is a “formal discussion” between management and the employee under the FSLMRS, giving the union the right to attend the mediation on behalf of the bargaining unit. This position was upheld by the D.C. Circuit Court of Appeals in *Dover AFB v. Federal Labor Relations Authority*.⁵³ The court of appeals held that a formal (i.e., written) EEO complaint is a “grievance” and that mediation of the complaint in which management is present is a formal discussion of that grievance, giving the union a right to attend if the complainant is a member of the union’s bargaining unit. The court left open the question whether a complainant’s objection to union attendance would defeat the union’s rights (the complainant in *Dover* didn’t object), commenting that such a “direct” conflict might result in an outcome favoring the Complainant. However, in a more recent case seemingly presenting the very scenario described in *Dover*, the FLRA once again held in favor of the union, discounting the complainant’s objection to the union’s presence. The Authority found that the objection, consisting of checking a box on a preprinted form, was insufficient to present a direct conflict between the Complainant’s individual rights and the union’s formal discussion rights. Accordingly, the union prevailed.⁵⁴ Perhaps a more explicit, less *pro forma*, objection by the complainant could have trumped the union’s claims. We won’t know until a case comes along with those facts. In the meantime, the union’s right to sit in on mediation of a formal EEO complaint is still intact.



A union demand to participate in mediation pursuant to its “formal discussion” rights (as opposed to participation as the employee’s personal representative), presents an issue that must be resolved by the servicing labor counselor or LMER before proceeding with or without the union’s presence. Actions to allow or bar the union from attending must be made by management acting through proper authorities, not the mediator. If the union does assert a right to attend mediation after the mediation session has commenced, the mediation should be paused until the union’s status and continuing presence is sorted out. If the union does attend, suitable precautions should be taken to protect against unauthorized disclosure of dispute resolution communications. As a non-party to the mediation, the union is not subject to the confidentiality protections of the ADRA (discussed beginning at page 25), but can be requested to voluntarily agree to observe the rules. Moreover, the union would not be allowed in confidential caucus sessions because both parties (management and employee) are not in the same meeting. Underlying this discussion is the Complainant’s right of self-determination to decide whether to continue to participate in mediation with the union’s presence, or withdraw.

⁵³ 316 F.3d 280 (D.C. Cir. 2003).

⁵⁴ *U.S. Air Force, Davis-Monthan AFB and AFGE Local 2924*, 64 F.L.R.A. 845 (May 28, 2010).

Acquiring the Mediator

To be successful, mediation requires a mediator who is sufficiently trained and experienced to ensure a positive experience for both parties, even if mediation is unsuccessful. But how is a qualified mediator acquired? There must be at least one source for a qualified mediator, and preferably several sources. Some of the most common sources of mediators are explored below.

Investigations and Resolution Division (IRD)

This group is a division of the Defense Civilian Personnel Advisory Service, or DCPAS (formerly the Civilian Personnel Management Service). IRD investigates Army (and other DoD) formal EEO complaints, and also provides mediation services for formal complaints and informal precomplaints as resources permit. IRD mediators generally have a great deal of experience with EEO complaints, and the cost is subsidized by DoD, leaving the requesting activity a very modest set fee for the mediator's services. IRD mediators are in short supply and high demand, so being able to schedule one on short notice can be a problem. Since their focus is on formal complaint disposition, IRD is not a reliable source of mediators for EEO precomplaints, nor are IRD mediators available to mediate disputes outside of the EEO process, such as grievances. The IRD website is at <https://extranet.apps.cpms.osd.mil/Divisions/Investigations%20and%20Resolutions/ADR%20Support.aspx> (CAC enabled).

"Shared Neutrals" programs

If your organization or installation is in an area serviced by a Federal Executive Board (typically larger metropolitan areas), you may have access to the FEB's roster of "shared neutrals," consisting of volunteer mediators from federal agencies in the local area who are available to do no-cost mediations on a reciprocal basis. Shared neutral programs are also a good way for Army employee mediators to gain additional mediation experience by volunteering to mediate other agency disputes in the local area. Activities in the National Capital Region also have access to the federal Sharing Neutrals Program operated by the Department of Health and Human Services. For more information, consult their website at <http://www.hhs.gov/dab/divisions/adr/sharingneutrals/sn.html>.

DoD Roster of Neutrals

The DoD Center for Alternative Dispute Resolution maintains a roster of qualified mediators from all Military Departments and other DoD components. The roster is world-wide, so the roster manager attempts to match a request for mediation support with a mediator on the roster who is in the same geographical area as the requester. There is no fee for the mediator, however the requester is expected to cover travel and per diem costs if applicable. The DoD roster uses a co-mediation model whenever practicable, so the roster is an excellent opportunity for new mediators to gain additional experience. For more information, go to www.dod.mil/dodgc/doha/adr/index.html.

Federal Mediation and Conciliation Service

The FMCS provides access to arbitration and mediation support in non-EEO cases, such as negotiated grievances, Unfair Labor Practice, and other labor-management disputes.⁵⁵

Local collateral duty mediators

Maintaining an internal roster of Army employees who provide mediation services on a collateral duty basis gives the ADR administrator maximum flexibility to provide a mediator at no cost, whenever needed. Any Army location with appreciable workplace dispute activity should consider maintaining an internal mediator roster. However, managing the roster can be a challenge because all mediators on that roster should be appropriately trained, with suitable experience to assure competence, and reasonably available to take time from regular duties to serve as a mediator. Moreover, the particular mediator assigned to a case should not belong to the same organization as the disputing parties. Having mediators assigned to tenant organizations on post can provide additional flexibility in this regard. Supervisors of collateral duty mediators should allow them time off from regular duties to perform mediation services, subject to mission requirements and time limits for collateral duties, of course.

Private sector mediators

Contracting for private sector mediators is always an option if funding is available. Keep in mind that depending on the local market, private professional mediators can charge up to several hundred dollars per hour for mediation. Mediation services are available on the GSA schedule.

Regardless of source, the mediator selected for the dispute must meet with the approval of the disputing parties. Normally this is not a problem.

Standards of Conduct for Federal Employee Mediators

There are no mandatory uniform national standards regulating mediator competence, training, or ethical behavior, nor is there a mandatory standard for federal employee mediators. Several years ago a consortium of the American Arbitration Association (AAA), the Dispute Resolution Section of the American Bar Association (ABA), and the Association for Conflict Resolution (ACR), jointly approved the “Model Standards of Conduct for Mediators,” a set of ethical standards for mediators to observe in providing mediation services. The standards were intended to serve three goals: to guide the conduct of mediators, to inform the mediating parties, and to promote public confidence in mediation as a process for resolving disputes. As model standards, they are not binding on States (unless made so by state legislation) or the Federal Government. Nevertheless, they

⁵⁵ Go to <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=443&itemID=15823> for a list of services FMCS provides.

provide a uniform ethical framework for mediation practice in the United States, and have provided *de facto* guidance for federal agency mediations for years.

In 2006, the Steering Committee of the Federal Interagency ADR Working Group (IADRWG) published a “Guide for Federal Employee Mediators” that adopted and supplemented the AAA/ABA/ACR Model Standards for use by federal employee mediators. Neither the Model Standards nor the federal supplement are binding on Army mediators, but the Model Standards represent a consensus in the ADR community as to ethical mediation practice, and are useful in guiding the day-to-day delivery of professional mediation services. Mediators who observe the Model Standards should find it easier to maintain a professional mediation environment. The supplement to the Model Standards is at Appendix 23.⁵⁶

Although the Guide for Federal Employee Mediators identifies and supplements nine of the Model Standards, there are six that are of particular relevance to Army mediators and are discussed below. Please note that the discussion below under these six standards is not complete; practitioners should consult the full Guide for additional, explanatory material, including special notes specific to federal mediation practice.

Standard I – Self-Determination

This standard requires a mediator to conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of mediation, including selection of the mediator, process design, participation in or withdrawal from the process, and whether to settle or not and on what terms.

Standard II – Impartiality

This standard requires the mediator to decline to mediate if the mediator cannot conduct the mediation in an impartial manner, free from favoritism, bias or prejudice. This standard also prohibits the mediator from accepting anything of value or engaging in any conduct that would raise a question as to the mediator’s actual or perceived impartiality. If a mediator is unable to conduct a mediation in an impartial manner, the mediator must withdraw.

Standard III – Conflicts of Interest

This standard requires a mediator to avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator’s impartiality. A mediator

⁵⁶ The Guide for Federal Employee Mediators is also available at http://www.adr.gov/pdf/final_manual.pdf.

must disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.⁵⁷

Standard IV – Competence

This standard requires the mediator to have the necessary skill and ability as a mediator to satisfy the reasonable expectations of the parties. This standard places an obligation on the mediator to know his or her limits, and to withdraw when those limits are exceeded. It also places an obligation on the ADR administrator who manages a roster of mediators to ensure adequate proficiency of mediators through experience and training.⁵⁸

Standard V – Confidentiality

This standard requires the mediator to maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law. Since federal sector mediators must also comply with the statutory confidentiality requirements in the ADRA,⁵⁹ this standard is also subject to the ADRA requirements, as discussed in the section on confidentiality below.

Standard VI – Quality of the Process

This standard requires a mediator to conduct mediation in accordance with the standards of conduct and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants. This standard is essentially a catch-all, in that even if a behavior or circumstance does not violate a more specific standard, it may undermine the integrity of the entire procedure, requiring the process to be terminated and appropriate corrective action taken. For example, a conflict of interest under Standard III may be waived by the parties after full disclosure by the mediator, thereby satisfying that standard, yet be so profound that even a waiver cannot overcome the threat to the integrity of the process as a whole, real or perceived. This standard is intended to address those situations.

⁵⁷ This standard is similar to the ADRA standard for conflicts of interest. See 5 U.S.C. § 573(a) (“A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.”) The Army standard for conflicts of interest in EEO cases is much more restrictive. AR 690-600, ¶ 2-2.c(2) requires the neutral to have no conflicting official, financial, or personal interest in the dispute or its outcome, and employees of EEO, CPAC, and SJA/legal offices may not serve as ADR neutrals within their serviced activities, even for cases in which they have had no conflicting involvement. There is no provision in AR 690-600 authorizing the parties to waive the conflict, whether actual or perceived.

⁵⁸ This would apply to internal Army mediators on local rosters, not mediators acquired from external sources such as shared neutral programs or the DoD Investigations and Resolutions Division (IRD).

⁵⁹ 5 U.S.C. § 574. See discussion on statutory confidentiality.

A Note on EEO Mediation Requirements

EEOC prohibits EEO counselors from mediating complaints or pre-complaints they have counseled or investigated. Army prohibits EEO counselors from mediating any case arising in the activity they service (not just cases they counseled or investigated). AR 690-600, para. 2-2.c(2). EEOC requires mediators to know and understand the complaint processing procedures in 29 C.F.R. Part 1614 and MD-110, as well as the laws EEOC enforces. The mediator must also have a basic understanding of the theories of unlawful discrimination (e.g. disparate treatment, disparate impact, reprisal, harassment and reasonable accommodation) and the available remedies, including equitable relief, compensatory damages, costs, and attorney's fees. See also AR 690-600, for specific qualifications and training requirements for neutrals.

Statutory Confidentiality Under the ADRA

Confidentiality is a core principle of mediation and one of its strongest selling points. Unlike litigation, which is conducted in public and produces a public record, mediation is conducted in private, with no written record. Privacy makes mediation a safe environment for open and candid discussion, without fear of retribution, but its promise of confidentiality challenges traditional notions of open government. To balance these competing interests, Congress added a section to the ADRA, 5 U.S.C. § 574, to specifically address the parameters of confidentiality in federal ADR proceedings.

Section 574 applies to both the neutral and the parties in an ADR proceeding. This is a statutory duty, which is separate from whatever ethical duty the mediator has to maintain confidences. It is very important that ADR administrators and mediators in federal dispute mediation have a basic understanding of what section 574 protects from disclosure, and for whom the protection applies. Confidentiality is a complicated subject, and the exact intent and scope of § 574 have not been tested in the courts, so we are often left with more questions than answers in response to specific scenarios. With that said, however, we will review the basic parameters of confidentiality under § 574.

General Rule

The general rule is that a mediator in an ongoing mediation “shall not” voluntarily disclose or be compelled to disclose a “dispute resolution communication” or any communication “provided in confidence” to the mediator.⁶⁰ There are several exceptions to this general rule, which we’ll cover later on. For now, the takeaway is this: the neutral’s statutory obligation is to keep mediation-related communications confidential, even in response to compulsory process such as a subpoena.

⁶⁰ ADRA, 5 U.S.C. § 574(a).

The mediator should always seek legal guidance before responding to a request or demand to disclose information concerning a mediation he or she conducted, even if the request comes from within the mediator's own agency. It may be that an exception exists that would permit disclosure, but even here, the preference is to look for disclosure from someone other than the neutral, usually the parties themselves.⁶¹

Not everything said in mediation is necessarily confidential. To qualify, a communication must be a "dispute resolution communication," or a communication "provided in confidence to the neutral." What are these? Let's take a closer look.

Dispute Resolution Communication (DRC)

A dispute resolution communication (DRC) is an oral or written communication that meets the following two requirements: it is *directly related to a dispute resolution proceeding*, such as mediation; and it's *made for the purpose of that dispute resolution proceeding*.⁶² So, for example, a statement made by a party to the mediator during joint discussion in a mediation session is confidential: the mediator is barred from disclosing it unless disclosure is authorized by the parties or required by law. By contrast, a written memorandum that was made six months before the mediation was convened and was not made for the purpose of the mediation is not confidential, even if it's presented in mediation, because it doesn't meet the two-part time and purpose requirement for a DRC. You can't make a non-confidential communication confidential merely by presenting it later in mediation.

A DRC can be oral or written, and includes notes produced by the mediator and parties during the mediation. A common practice in mediation to ensure confidentiality of notes taken during mediation is to collect and destroy personal notes of the mediator and parties at the conclusion of the process.

Agreements to use ADR, settlement agreements, and arbitration awards, are *not* confidential, even though they are part of an ongoing ADR proceeding, because the ADRA expressly *excludes* them from the definition of a DRC.⁶³ One reason could be that these documents are evidence of the ADR process used and the disposition of the dispute. They become part of the official case file, subject to review by any number of offices, and may be subject to disclosure, in whole or part, under the Freedom of Information Act.⁶⁴ However, the mediator does not make that determination.

Communication Made to the Neutral "In Confidence"

⁶¹ AR 690-600, paragraph 2-2, enforces this protection of the neutral in EEO mediation by prohibiting either party from calling the neutral in a subsequent hearing or other proceeding.

⁶² 5 U.S.C. § 571(5), (6).

⁶³ 5 U.S.C. § 571(6).

⁶⁴ 5 U.S.C. §§ 571(5); 574(j) (Statements qualifying for protection under § 574 are exempt from disclosure under FOIA, exception (b)(3). Release of non-confidential material, such as a settlement agreement, under FOIA may still be foreclosed by other FOIA exemptions.)

The second type of confidential communication is a communication “provided in confidence to the neutral.”⁶⁵ This is a statement, made *to the mediator*, with the express intent of the source that it not be disclosed, or made under circumstances that would create a reasonable expectation on the part of the source that it not be disclosed. If you’re the mediator, and a party or other participant in mediation says to you: “I’d like for you to keep this confidential,” do so, unless legal authority determines otherwise. Likewise, if a statement is made in an environment where an expectation of confidentiality can be presumed (e.g., caucus), treat it as confidential even in the absence of an express request for confidentiality.

To sum up, the *general rule* is that communications that are made in the course and for the purpose of a mediation, or that are made to the mediator with the expectation of privacy, express or implied, are confidential and are not subject to disclosure. Of course, there are exceptions, as explained below.

Exceptions

Most of the exceptions to confidentiality in § 574 are applicable to both the neutral and the parties. However, there are some that are applicable only to the parties, and there is one that is specifically applicable only to the neutral. These exceptions are listed below. Even if disclosure is authorized by an exception, best practice dictates that the mediator be the last resort for disclosure, and, in any event, always consult with legal counsel before disclosing any information.

Exceptions Applicable to the Mediator

The mediator may disclose:

- Any communication the parties agree in writing can be disclosed;⁶⁶
- Communications that exist in the public domain prior to the mediation;⁶⁷
- Information that is required by statute to be made public (but the neutral should disclose only if no one else is reasonably available);⁶⁸
- Information that a *court* requires be disclosed to prevent a manifest injustice, help establish a violation of law, or prevent harm to the public health or safety;⁶⁹

⁶⁵ 5 U.S.C. § 574(a).

⁶⁶ *Id.*, §§ 574(a)(1) & (b)(2) (Note: If a nonparty participant provided the confidential dispute resolution communication, that participant also must consent in writing.)

⁶⁷ *Id.*, §§ 574(a)(2) & (b)(3).

⁶⁸ *Id.*, §§ 574(a)(3) & (b)(4).

⁶⁹ *Id.*, §§ 574(a)(4) & (b)(5). To qualify for this exception, there must be actual court action to direct disclosure, based on one or more of the findings specified in subsections (a)(4) and (b)(5).

- Evidence that is otherwise discoverable, i.e., was in existence prior to the dispute resolution proceeding.⁷⁰
- Information that is necessary to resolve a dispute between the mediator and a party arising out of the ADR proceeding.⁷¹

Exceptions Applicable to Parties Only

The first five exceptions available to the mediator above are also available to the parties under § 574(b). The exception to resolve a dispute between a party and the mediator is applicable only to the mediator. Three additional exceptions apply only to the parties: a party may disclose any information that was made available to all parties during an ADR proceeding.⁷² This means that in most cases, anything communicated by a party in joint discussion may be disclosed by the other party (but not by the mediator). A party is also always free to disclose his own communications,⁷³ even if they were made in caucus, and a party (but not the mediator) can disclose any communication necessary to clarify the meaning of a term in a settlement agreement.⁷⁴

Notwithstanding the exceptions that would ordinarily open the joint discussion to outside disclosure by any of the parties, Army policy in EEO mediations is that the Agreement to Mediate must include a provision that *all* communications made during ADR proceedings be kept confidential.⁷⁵ This would include joint sessions, a significant expansion of the ADRA's statutory confidentiality protection. However, the ADRA does not expressly prohibit such agreements, and no court has ruled on the issue.⁷⁶ In guidance issued in late 2000, the Federal ADR Council observed that lack of confidentiality between the parties in joint session could hamper free and open discussion, and recommended such an agreement between the parties to limit disclosures. In making this recommendation, the Council cautioned that the protection of such an agreement is limited: it binds only the parties to the agreement, and because it purports to expand confidentiality beyond the express provisions of the ADRA, the protection against disclosure afforded by FOIA is lost.⁷⁷ Moreover, the obligation to report certain information that is not specifically addressed in the ADRA, such as fraud, waste and abuse, or other matters that may be eligible for whistleblower protection, is probably not affected by an attempt to expand ADRA confidentiality. Otherwise, as a practical matter, communications that occur as part of mediation are widely considered to be "off-limits" to further disclosure, and the parties

⁷⁰ *Id.*, § 574(f).

⁷¹ *Id.*, § 574(i).

⁷² *Id.*, § 574(b)(7). Examples of a communication generated by the neutral and made available to all parties includes outcome prediction and advisory opinions provided to the parties.

⁷³ *Id.*, § 574(b)(1).

⁷⁴ *Id.*, § 574(b)(6).

⁷⁵ AR 690-600, ¶ 2-2.c(3).

⁷⁶ See the IADRWG Steering Committee publication, "Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide for Federal Workplace ADR Program Administrators" (April 2006), at pp. 7-8. This publication is available online at www.adr.gov/pdf/final_confid.pdf.

⁷⁷ See 65 Fed.Reg. 83085 (December 29, 2000), <http://www.adr.gov/pdf/confid.pdf>.

to mediation are expected to keep it that way.⁷⁸ A written agreement reflecting that understanding merely reiterates and emphasizes the point.

The “Waiver” Clause

What if the mediator receives a request or demand for information that was discussed in mediation? What should he or she do? Section 574(e) provides an answer. Known as the “waiver clause,”⁷⁹ this provision requires the mediator to make a reasonable effort to notify the parties of the demand. A party who receives this notice then has 15 calendar days to decide whether to defend the neutral against disclosure, otherwise any objection to disclosure is waived, and the mediator presumably is free to respond. Army policy is to *not* call the mediator as a witness in any subsequent action concerning the same dispute,⁸⁰ so in all likelihood, the waiver clause will arise only when the request or demand for disclosure comes from an external source, in a case unrelated to the mediated dispute. A mediator who receives a demand for mediation-related information should immediately inform the office that sponsored the mediation, the CPAC, Legal Office, or all three, to determine appropriate course(s) of action. ***Never make disclosure your first response!*** Fortunately, such demands have been extremely rare, and usually result from lack of awareness of the ADRA. Once the strictures on disclosure by neutrals are pointed out, the demand is withdrawn.

Other Protections from Disclosure

Just because a piece of information is not confidential under the ADRA does not necessarily mean it is automatically subject to disclosure. The Privacy Act⁸¹ may apply to prevent disclosure if it involves personally identifiable information (PII), or the parties may have a contractual agreement to limit disclosure. For example, while a settlement agreement resulting from mediation is not confidential under the ADRA, the parties may want to insert a clause limiting or preventing disclosure of the terms of the agreement. As a contractual provision, a non-disclosure clause in a settlement agreement binds only the specific parties to the agreement. Moreover, the legal enforceability of such clauses is an open question. Both the Army and the Department of Justice disapprove of their inclusion in settlement agreements. Nevertheless, they are not prohibited, and some agencies, including Army activities, still include them as part of the “boilerplate” language in settlement agreements entered into at the administrative stage of the dispute. Protection may also be available under Federal Rule of Evidence 408, which prohibits introduction of evidence of settlement discussions concerning matters in litigation.⁸²

Reporting Fraud, Waste & Abuse, Criminal Conduct, Threats of Violence

⁷⁸ Federal Rule of Evidence 408, which bars introduction of prior settlement offers as evidence in subsequent litigation, reflects this same rationale: protecting settlement discussions from disclosure promotes voluntary settlement efforts, which are favored over litigated outcomes.

⁷⁹ *Id.*, § 574(e).

⁸⁰ See AR 690-600, ¶ 2-2.c(3).

⁸¹ 5 U.S.C. § 552a.

⁸² Of course, F.R.E. 408 applies only if the case ends up in litigation, which is relatively rare.

When a mediator is also a federal employee, a question may arise about the mediator's duty to disclose information revealed in confidence in mediation that ordinarily carries a duty to disclose, such as credible threats of injury to others, criminal misconduct, fraud, waste and abuse, or a disclosure that would qualify for whistleblower protection. The exceptions to confidentiality in Section 574 do not explicitly extend to disclosures of this type, thus presenting the employee-mediator with a dilemma: do I comply with my duty as a federal employee to report the information, or do I comply with my duty as a mediator to observe and protect confidentiality? Federal agency ADR programs have taken various approaches to this dilemma: the agency ADR policy can specifically exclude such information from confidentiality protection, thus removing it from the reasonable expectation of the parties. Another approach is to include a similar disclaimer in the agreement to mediate, which has a similar effect on parties' expectations of confidentiality. Another approach is to inform the parties in the pre-mediation interview that such disclosures are not subject to the ADRA confidentiality rules. Finally, the mediator during opening remarks should reinforce the parties' expectations by informing them that statements alleging or admitting fraud, waste and abuse, criminal misconduct, or threats of violence, are subject to disclosure. In short, there are ways to accommodate the need for confidentiality with the requirement to report certain information. The sample Mediation Memorandum at Appendix 6 and the sample Mediator's Opening Statement at Appendix 10 contain examples of such advisories.

Essential Takeaways for the Mediator

The rules pertaining to confidentiality in mediations are complicated and the solutions are not always apparent. Nevertheless, it is important for ADR administrators and mediators to have a basic understanding of these rules so that they can appropriately protect confidential communications and help define the parties' reasonable expectations.⁸³ Beyond that, there are four relatively easy-to-remember takeaways that should be part of every mediator's toolkit:

- Use the caucus to maximize confidentiality of communications;
- Treat all information in mediation as confidential for purposes of disclosure;
- Never disclose mediation-related information unless cleared by appropriate legal authority; and
- Remember the waiver rule.

⁸³ The Interagency ADR Working Group Steering Committee has published a comprehensive confidentiality guide written for federal agency ADR program administrators. Its focus is on confidentiality in workplace ADR proceedings. It is available for download at the IADRWG's web site at http://www.adr.gov/pdf/final_confid.pdf.

Post-Mediation Actions and Other ADR Program-Related Tasks

Customer Evaluations

All participants in mediation should be asked for feedback as soon as the mediation is completed so that mediation services can be improved if necessary. ADR administrators are free to focus such feedback however they want, but two good focus areas are the process itself, and the mediator. Responses can be anonymous. The ADR administrator should use the responses to determine what, if any, weaknesses need to be addressed for program improvement. It is recommended that the responses be tabulated and the forms themselves be destroyed. A sample feedback form is at Appendix 8.

Records

Most workplace mediations occur in conjunction with another, established dispute resolution process, such as the EEO complaint processing procedure, or a negotiated grievance procedure. Any records generated as a result of mediation, e.g., the agreement to mediate and any settlement agreement, should be included in the official case file for that dispute and that process. Personal notes generated by the mediator and parties during mediation should be collected and destroyed by the mediator at the conclusion of the mediation.

Roster Management

ADR administrators who maintain a roster of local Army mediators need to continually manage it to make sure the right number of mediators for anticipated workload are available, that they get a sufficient number of mediations per specified period (quarter or year) to maintain proficiency (a good target is at least one per quarter, or four per year), that they get adequate refresher or supplemental training each year (there is no set standard, but we recommend as a minimum the same number of hours per year [8] specified for EEO counselors), and that their chain of command is supportive of their mediation duties.

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CHAPTER 2 CONDUCTING THE MEDIATION

Understanding Conflict

AT the heart of every dispute is a conflict, i.e., a state of discord that exists when the needs and interests of one person differ from those of another. Resolving a dispute requires recognition and understanding of the underlying conflict, which in turn requires knowledge and appreciation of the competing needs and interests that underlie the conflict. Conflict is manifested in perceptions, feelings, and actions. Perceptions of unfairness or a violation of rights or other wrongs trigger emotional responses, such as anger, frustration, or fear, which in turn lead to action, often via some complaint mechanism. Addressing conflicts early, when they are just beginning to ripen, helps avoid disputes later on.⁸⁴

Conflict is dynamic. External factors feed the conflict and help it grow. *Communication problems* produce incomplete and inaccurate perceptions, which feed *emotions*, which in turn fuel the conflict. *Values* imbue the conflict with a moral dimension that can make compromise difficult or even impossible. The surrounding *structural environment* may introduce constraints and limitations that increase frustration and exacerbate the conflict.⁸⁵ Finally, a longstanding *history of acrimony* in the parties' relationship can elevate small, trivial issues into major ones, making them harder to resolve.⁸⁶



The goal of mediation and other dispute resolution techniques is not just to settle the instant dispute, but to deal with the underlying conflict as well. With that goal in mind, let us turn our attention to the mediation process itself, and its underlying dynamics.

Features and Components of Mediation

Mediation Techniques

Mediation has several variations, depending on the problem and what the parties want to achieve. The most common mediation technique, *facilitative* mediation, is the classic mediation method, and is the Army's preferred mediation technique. Other recognized

⁸⁴ See discussion on pages 6-7 of additional responses to early, pre-dispute conflicts.

⁸⁵ For example, a rigidly hierarchical, bureaucratic structure that requires everything to go through the supervisory chain may serve to hinder reporting or correcting sources of conflict, leaving them to fester until they have metastasized into formal complaints and lawsuits.

⁸⁶ For more discussion on this topic, see Bernard Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide* (Jossy-Bass 2000).

techniques are *evaluative* mediation, *transformative* mediation and *narrative* mediation. Each has unique features, but all are voluntary and all share the mediation core values that were discussed in Chapter 1. While facilitative mediation is the default technique in workplace disputes, occasionally the nature of the dispute and the mediator's skill and experience may invite the use of the other methods as well. Let's examine each technique in a little more detail.

Facilitative Mediation



In this mediation technique, the mediator helps the parties to begin and maintain a dialogue focused on resolving the issues in controversy, but does not evaluate the merits of the parties' legal arguments or the value of proposed settlement offers,⁸⁷ or render opinions, or issue a decision. The mediator's main role is to validate and normalize each party's point of view through reframing and rephrasing, active listening, and reality checking, often in private caucus with each party. Because resolution usually does not turn on the legal merits of the dispute, facilitative mediation doesn't require the mediator to possess any special subject matter expertise beyond specific mediation skills.⁸⁸ This last feature makes facilitative mediation particularly attractive to program administrators who rely on collateral duty mediators who are not experts in the law.

Evaluative Mediation



The evaluative mediator facilitates dialogue between the parties just like the facilitative mediator, but also evaluates the merits of the parties' respective positions and gives an expert opinion as to the likely outcome if litigation ensues. This opinion is advisory, not binding on the parties, so they may accept or reject it in whole or part. However, it is useful for giving each party an independent expert assessment of their case by a trusted and respected source. This encourages compromise. The mediator must be knowledgeable about the law and subject matter of the dispute, because the legal merits of the claim, while not dispositive, are important (especially when taxpayer dollars are at stake). An evaluative mediator has no more authority to impose a resolution on the parties than does a facilitative mediator, but the prestige and gravitas that come from the mediator's expertise (or status as a judge) often prove to be critical to settlement.

⁸⁷ The focus in mediation is problem solving, not adjudicating legal liability. All settlements, whether reached through mediation or other dispute resolution process, routinely contain provisions disclaiming any legal liability on anyone's part.

⁸⁸ Although EEO facilitative mediation does not require "expertise," the EEOC does require the mediator to be familiar with the anti-discrimination statutes enforced by the EEOC and the major theories of recovery. See "Note on EEO Mediation" at p. 25.

Transformative Mediation

The transformative mediator focuses on the downward trajectory conflict has on the parties' interpersonal relationship. It seeks to reverse this trajectory by empowering each individual (the "empowerment shift") and recognizing the other's needs, interests, values, and points of view (the "recognition shift"). The overarching goal of transformative mediation is to foster a fundamental improvement, or transformation, of the parties' relationship and the overall environment in which they interact. This form of mediation is less structured and more free-flowing than evaluative or facilitative mediation, and can be particularly effective in addressing and repairing deeply engrained or long-standing issues that go beyond the immediate dispute.



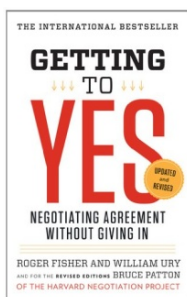
Narrative Mediation

The narrative mediator approaches conflict as a clash of competing stories, or narratives, in which the parties have internalized the conflict according to their perceptions, beliefs and values. The goal is to construct an alternative, positive storyline that is incompatible with the story in which the conflict is embedded. This new story displaces the old one and externalizes the conflict, or the source of the conflict, thereby diminishing or negating its influence. From there, compromise is possible. Narrative mediation is similar to the reframing process facilitators use to change perceptions that fuel the conflict.



All four of these techniques are designed to help the parties recognize and take control of the conflict fueling their dispute, and to construct a solution to that conflict. While each mediation method features a different approach, the endgame remains the same: empower the parties to resolve, on their own, the issues that divide them.

The Interest-Based Negotiation Model



Facilitative mediation is an assisted negotiation process. Therefore, it uses a negotiation model as its basic process framework. The most prevalent model for facilitative mediation is the "***interest-based negotiation***" (IBN) model, pioneered by Roger Fisher and Bill Ury of the Harvard Negotiation Project in their seminal 1981 work, *Getting to Yes*.⁸⁹ The significance of IBN, to facilitative mediation is that it converts the dispute from a clash of competing positions to a more manageable discussion of underlying interests. More on IBN begins at page 42.

⁸⁹ *Getting to Yes*, a perennial best-seller, is now in its third edition (Penguin Books, 2011). Since *Getting to Yes* was first published in 1981, myriad books and training aids have been published expanding on the concept, and the Harvard Program on Negotiation has trained thousands in the method. Sadly, Roger Fisher passed away in 2012 at age 90, but Bill Ury is still actively engaged in mediation and dispute resolution activities all over the world.

The Mediation Process

Though informal, mediation is a structured process that focuses the parties on generating options for resolving their differences. The Army uses a fairly standard procedure consisting of five distinct stages: (1) the mediator’s opening remarks; (2) the parties’ opening statements; (3) joint session(s); (4) individual caucus(es); and (5) closure. The whole process is not necessarily linear; it often “bounces” back and forth between joint session and caucus, or between caucuses, as required by circumstances and the mediator’s discretion. Also, the mediator may need to make some procedural adjustments if the mediation is being conducted through non-traditional means, such as video conferencing, telephone, or online mediation. Let’s discuss each stage of the model in turn.

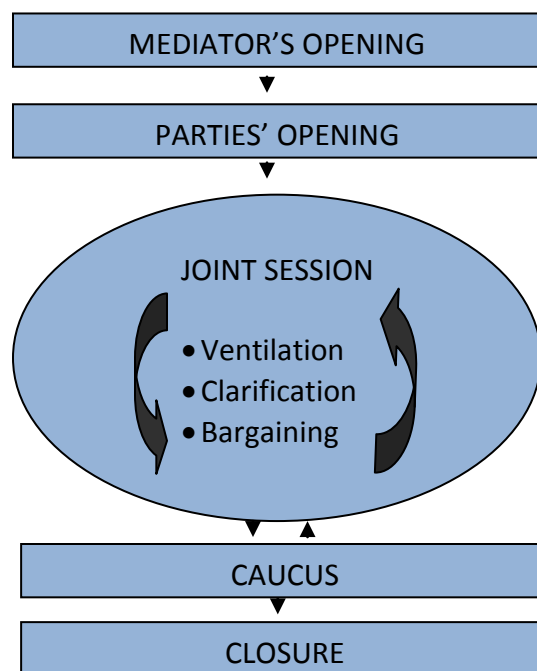


Figure 2. Facilitative Mediation Model.

Mediator's Opening

The mediator’s opening remarks formally initiate the mediation session. This is probably the mediator’s first in-person contact with the parties together, focused on the process that is about to unfold. It is, therefore, a crucial part of the proceedings. Aside from establishing the ground rules and general procedures for the mediation session, a good opening should set the tone for the mediation, establish the mediator’s authority, and build trust and confidence in the mediator as a credible and impartial arbiter. There are several important aspects of the opening statement; some of the most prominent ones are outlined below.

Prepare Your Remarks

The mediator should prepare the opening in advance. A live mediation is not the place or time to “wing it!” Many mediators, once they have developed a good opening, always use that same opening (with modifications as necessary to tailor it to the particular proceeding). Good speaking skills are especially helpful for the mediator in the opening. An inexperienced mediator should practice the opening until he/she is thoroughly familiar with it. Once familiar, it is still a good idea to utilize a checklist to ensure you cover all the important points. A sample checklist is provided in Appendix 9 and a sample narrative opening is at Appendix 10. Even if scripted, avoid just reading the opening; address remarks directly to each party, using plenty of eye contact. This not only conveys your genuine interest in the parties and their dispute, it establishes credibility and confidence in your abilities as a mediator.



Identify Mediator’s Background and Qualifications

The first thing a mediator should do in the opening is to introduce himself or herself to the parties. This introduction should include the mediator’s identity and qualifications. The mediator should explain that s/he is qualified to be the neutral because 1) s/he has been duly appointed to be the mediator; and 2) s/he has been trained in mediation. Of course, any prior experience in mediations may also be highlighted. Have parties introduce themselves, state how they would like to be addressed, and verify that each has set aside sufficient time to devote to mediation and has appropriate authority to settle.

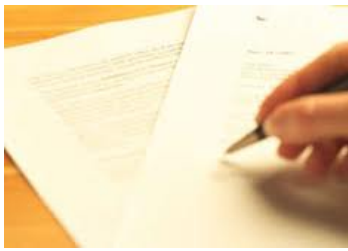
Address Conflicts of Interest and Impartiality

During the opening, the mediator must assert his or her neutrality and impartiality in the process. The mediator should acknowledge any actual or potential conflicts and ask the parties to do the same. If the mediator is also an Army employee or a union official, it is important for parties to know the mediator’s unit of assignment or union affiliation.⁹⁰ If there are any conflicts or perceived conflicts, do the parties want to continue with the mediator or select someone else? Disclosure of such information ensures that the parties’ consent to the mediator’s continued involvement is fully informed, and increases the parties’ confidence in the mediator.



⁹⁰ To preserve the appearance of impartiality, an Army employee should never be assigned to the same functional organizational unit as either party. In fact, Army EEO ADR policy prohibits Army mediators who are assigned to the EEO office, CPAC or legal office from mediating disputes arising “within their serviced activities.” AR 690-600, para. 2-2.c(2). This means an EEO counselor also trained as a mediator would not be able to mediate a complaint in her office even if she had no otherwise conflicting involvement in the complaint.

Review the Agreement to Mediate



The mediator should next confirm the existence and terms of any agreement to mediate previously signed by the parties or awaiting their signature.⁹¹ The mediator should ensure the parties' understanding of the terms of the agreement so there are no misunderstandings later. Furthermore, the mediator may want to use the agreement to mediate as a tool later in the process to move beyond impasse. Getting each party to acknowledge their agreement to mediate makes its use later in the process easier.⁹²

Describe the Mediation Process and the Mediator's Role

Go over the stages of mediation and their purposes, beginning with parties' statements as their opportunity to state their cases without interruption, followed by joint sessions in which parties are expected to fully participate in a good faith search for resolution. Explain the mediator's role as an impartial facilitator to help the parties reach resolution, not a judge; the mediator does not evaluate parties' claims, render opinions, or take sides. Describe the caucus as a tool for private confidential discussion between the mediator and each party, and the closure, which will be marked either by settlement, or impasse. Answer any questions the parties may have.



Establish Ground Rules

The mediator will establish ground rules for the mediation. This includes not only explaining the process, but also laying out the mediator's expectations and rules for the parties to follow.⁹³ The mediator should emphasize the collaborative nature of mediation, and encourage the parties to treat each other with respect and civility. The mediator should also review the rules of confidentiality applicable to the mediation. While confidentiality should already have been addressed during case intake or as part of the agreement to mediate, the mediator must ensure the parties understand what can and cannot be held in confidence. The mediator should also get the parties to agree to disposition of personal notes at the end of the session. Ground rules also include more mundane matters such as timing of breaks, location of rest rooms, turning cell phones and other digital devices off, etc. Finally, the mediator should thank the parties for being willing to attempt to settle their dispute



⁹¹ The agreement to mediate is a good source for information to be included in the opening statement. A sample agreement to mediate is found in Appendices 6 and 7.

⁹² See the discussion on impasse at page 58 for more on this use of the agreement.

⁹³ Some sample rules are included in the sample mediator's opening statement at Appendix 10.

and assert a note of confidence that they will be successful. Ground rules applicable to the parties are equally applicable to their representatives.

Parties' Opening Statements

Each party has the opportunity to present an opening statement. The party asserting the claim being mediated (the complainant or other claimant) goes first. The mediator should allow the party to give his or her side of the dispute, uninterrupted by the other side. This may be the first time that each party hears the other side's view on the issues. Because of this, the mediator should allow both parties to fully explain their side even if they become emotional. Venting by parties often is the first step in moving toward resolution. Sometimes a party may want to use charts or graphs or other exhibits during their opening; their use can be helpful, but this is the mediator's discretionary call.

It is very important that the mediator listen closely to the opening statements, paying careful attention to the issues as articulated by the parties. Many times the issues as defined by the parties in their openings are different from those articulated in the complaint or grievance.

Often the mediator can learn from a party's opening statement the hidden concerns or interests motivating the dispute and sometimes can even discover the real source of the problem. This type of information is invaluable later when getting the parties to turn their attention away from their positions and toward their interests.⁹⁴

Parties' opening statements can provide a clue as to how far apart the parties are at the onset. This will give the mediator an initial view of the challenge ahead as well as helping to determine when and if caucuses should be utilized. Of course, the attitudes of the parties and the ability of each party to articulate their positions will also be evident. This information will assist the mediator in determining who may be in need of caucuses more often and how much the mediator will need to assist the parties in understanding the other party's views on the issues.

Joint Session⁹⁵



The joint session is the first opportunity for the parties and the mediator to interact. The mediator might start the joint session by summarizing the parties' opening statements to ensure accurate understanding of the issues as they see them, and asking each side what they hope to achieve in mediation. Clarifying questions can be asked of each party if necessary to identify or isolate the issues and interests. This is also an opportunity to begin assisting the parties in shifting the focus from their positions (legal or otherwise) to a

⁹⁴ See the discussion of Interest-Based Negotiation, beginning on page 42.

⁹⁵ Joint sessions are also called joint discussions. Either term is acceptable.

discussion of their underlying interests. Careful observation is required, though. Caucus may be the more appropriate forum for more sensitive issues.

The mediator may prefer that the parties direct their comments to each other rather than the mediator. The amount and speed of the mediator's withdrawal from the conversation is case-specific and depends on how the parties are able to interact, and whether the emotions or communication abilities of the parties make unassisted, face-to-face discussion productive, or even possible. If the parties are unable to communicate with each other, the mediator should consider serving as a buffer between the two, even if that means moving between caucuses rather than presiding over increasingly contentious joint sessions.⁹⁶

The Caucus

A unique and important feature of mediation is the *caucus*, a private, one-on-one meeting between the mediator and each party. Unlike matters discussed in joint session which are available to all, matters disclosed to the mediator in caucus are highly confidential; the mediator cannot disclose anything a party discloses in caucus without the party's approval, unless disclosure is required by law. This makes the caucus particularly useful to defuse tensions, to address matters the party doesn't want to discuss openly, to float ideas for settlement, to critically assess the strengths and weaknesses of the party's position, or for any other purpose where privacy is needed. In addition to the standard caucus session between mediator and parties individually, the mediator can caucus with herself or himself (or with a co-mediator), and with party representatives as well. The number, timing, and length of caucuses are discretionary with the mediator.



A Note on the Caucus in Online Dispute Resolution (ODR)

Non-traditional mediation formats may present special challenges to the caucus. Some ODR platforms allow private one-on-one conversations between participants using private chats and other technologies, but older technologies like telephone and phone-based videoconferencing may not. It is important for the mediator to understand the technological capabilities of the medium being used before attempting mediation using non-traditional means. Mediators using an ODR or other non-traditional platform to conduct mediation for the first time should be co-mediated by someone having experience with such platforms.

⁹⁶ This form of mediation is often called “shuttle mediation” because the mediator shuttles back and forth between the separated parties, serving as their conduit for discussion. Shuttle mediation requires a mediator with well-developed listening and communication skills to accurately present each party's respective contributions to the discussion, while maintaining the appropriate degree of confidentiality.

Sometimes a caucus is necessary not because a party needs it, but because the mediator needs it. This is an acceptable reason to call for a caucus. The mediator is supposed to be the calmest, most controlled person in the mediation. If the circumstances of the mediation make meeting this responsibility difficult, the mediator should take a mediator's caucus. In other circumstances, issues may arise during the mediation where the mediator will need guidance from the labor counselor or some other outside source. This is another situation where a mediator's caucus is appropriate. Neither party needs to know the caucus is for the mediator. In mediations conducted by *co-mediators*, caucusing between them is highly recommended to ensure unity of purpose and approach, and appropriate sharing of duties.

Although not common, occasionally a mediator may need to request a caucus with one or both of the parties' representatives alone, without their clients. This may be necessary to address behavioral issues that are disrupting the mediation, or to discuss possible lines of discussion that would be more effective coming from the representatives. Any concerns the mediator has with a representative's behavior in joint session should always be addressed privately, outside the presence of the client. Caucusing with a *party* in the absence of the representative should always be avoided unless absolutely necessary, and then only with the express permission of the party and the party's representative.

Closure

At some point, after joint sessions and caucuses, the mediation process will come to a close. This can occur in one of two ways: with an agreement and settlement, or with no agreement (impasse).

When settlement no longer seems possible, i.e. the parties are in stalemate and no further movement appears likely, or one or both parties have removed themselves from the mediation altogether, the mediator should declare an impasse and terminate the session. Despite the failure to reach a resolution, the mediator should thank the parties for availing themselves of the process and encourage them by recounting any progress that was made during the mediation (including perhaps the mere fact that they actually talked to each other). The mediator should ensure the parties know who to contact for information regarding their options now that mediation has concluded without resolving the dispute. Who knows, one of those options might be another stab at mediation!

In cases that settle, the mediator works with the parties to refine the terms of settlement to ensure common understanding and agreement. Once the mediator is satisfied that the terms accurately reflect the parties' actual intent and that all issues have been resolved to the parties' mutual satisfaction, the terms should be reduced to a written settlement agreement⁹⁷ for review and signature.⁹⁸ Partial settlements, i.e., settlements

⁹⁷ Many locations require settlement agreements to be drafted by the legal office, so this may not apply. Even so, the mediator in most cases still must draft the specific terms agreed to before giving them to the servicing labor counselor for incorporation into the settlement agreement.

⁹⁸ In EEO matters, if mediation is successful, the mediator will supply the EEO officer of the terms agreed upon so the settlement agreement can be prepared. The servicing labor counselor will review the draft agreement for legal sufficiency before the parties sign the agreement. See AR 690-600, ¶¶ 2-3.g, 3-7.d.

that purport to resolve some, but not all, issues, are possible, but are typically not favored; one of the reasons for attempting ADR in the first place is to wrap all disputed issues into one resolution, including those pending in other forums.⁹⁹ Settlements are discussed in more detail beginning on page 58.

The Interest-Based Negotiation (IBN) Model

Introduction: Redefining Positions as Interests to Generate Options for Resolution

The IBN negotiation model introduced by Fisher and Ury in *Getting to Yes* is the foundation of facilitative mediation. The essential idea behind IBN is that parties are much more likely to agree to something when their interests are met than they are when confronted with take-it-or-leave-it positions and ultimatums. IBN shifts the focus from competing positions to the interests that underlie the positions, usually a much more promising path to agreement. *All* negotiations ultimately involve the apportionment and distribution of *something*, whether it's money, property, benefits, or obligations. The object of the negotiation may be tangible (money, benefits) or intangible (better communication, better work performance, more respect), but in the end, there is a "pie" that must be divided. Position-based negotiation strategies tend to view "the pie" as a fixed volume, so that any outcome that benefits one party must impose a corresponding cost on the other, a zero-sum game. Anything other than splitting the pie down the middle results in a "win" for one party and a "loss" for the other. Even splitting the pie equally, i.e., a "tie," often produces an unsatisfactory outcome for both parties.



Suppose in a negotiation one party prevails using a positional negotiation strategy, emphasizing his or her power, or other advantage, over the other side. What is the impact on the parties' relationship if they have to continue to work together or otherwise deal with one another? Is trust restored, confidence improved? Or are parties trapped by resentment and victimhood? IBN rejects the stark win-lose alternatives found in positional negotiation. Instead of a zero-sum game mindset prevalent in positional negotiation, IBN seeks to "expand the pie," giving each side something more, or perhaps something else, than they had when they started, even if it's less than was initially demanded. This approach produces the oft-repeated "win-win" scenario. Most importantly, by striving to satisfy interests, IBN promotes better working relationships.

Admittedly, this all sounds pretty good in theory, but how does it work in practice? Surprisingly well, in fact, IF the parties are serious about resolving their problem, using the IBN method. One-on-one negotiations often fail because the parties don't fully abandon their positional thinking to focus on the interests driving those positions. Shifting from positions to interests is not easy. A shift like that usually requires the parties to

⁹⁹ An agreement that resolves issues in different cases into one comprehensive settlement is referred to as a "global settlement." Mediation is well-suited to producing global settlements, which makes it especially attractive as a vehicle for terminating protracted litigation in multiple forums.

compromise their positions. People don't like to compromise, especially on things they feel strongly about. They want to "win." In mediation, winning has to mean something other than "total victory." It can't be a zero-sum game; one person's gain does not have to be another's loss; both can gain something of value at the same time, even if it's not what they originally demanded. The techniques taught in mediation training, and discussed in this Chapter, are intended to help parties to a dispute reach that goal. The framework for this endeavor is IBN. In the next several pages, we discuss the principles of IBN in some depth, both as an introduction to those unfamiliar with the process and as a refresher for those more experienced.

The Five Basic Elements of IBN¹⁰⁰

Figure 3 depicts the five major components of IBN: (1) *Separate* the people from the problem; (2) Focus on *interests* not positions; (3) Create *options* for mutual gain; (4) Use *objective criteria* to ensure legitimacy of the outcome; and (5) *Know* your "BATNA." BATNA is an acronym for **B**est **A**lternative **T**o a **N**egotiated **A**greement, and is concerned with options available to the parties if they don't reach agreement, and how those options stack up against what can be achieved through a negotiated agreement. BATNA is discussed at length later on. All five elements of IBN fit together; all must be considered in executing the IBN framework to reach a resolution that meets the parties' interests. It is essential that the mediator intimately understand these elements in order to properly apply them as part of the facilitative mediation method. In the discussion that follows, we will look at all five elements, as well as other aspects of successful negotiation.

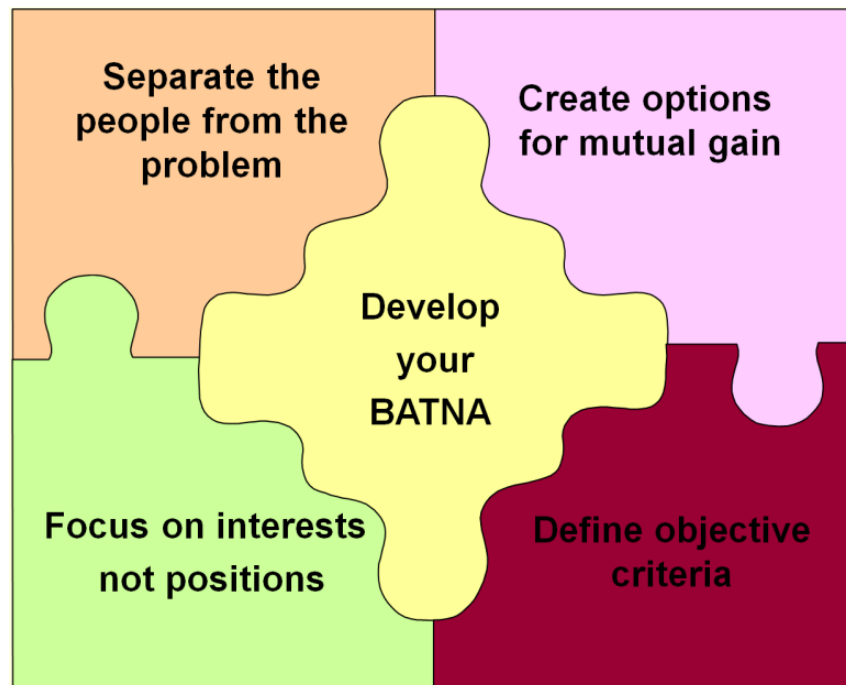


Figure 3. The Five Elements of IBN.

¹⁰⁰ See Roger Fisher and William Ury, *Getting to Yes*, p. 97 (Bantam 1991).

Element 1: Separate the People From the Problem

Workplace conflicts often are caused or aggravated by the personalities involved. Animosity, distrust, and other personal issues get in the way of objectivity in dealing with the problem. Misperceptions, strong emotions, and communication problems can also inhibit resolution. So, the first order of business in the IBN approach is to refocus the discussion on the *problem*, not the *people*. The old adage, “hard on the problem, soft on the people,” applies here.

Perceptions

Our perceptions define how we see a dispute: its nature, those responsible, the degree of fault, the existence and extent of the injury, and the appropriate remedy, are all filtered by our perceptions. Perceptions are inherently subjective and personal to each of us. For that reason, no two people will *ever* see a dispute the same way. Disputants typically perceive their side to be the “right” side and the other side to be the “wrong” side, and they develop positions based on those perceptions. So the mediator’s first challenge is to tap into those perceptions, and understand how each side may view the same issue so differently. The mediator must then acquaint the parties with the other side’s point of view. Shifting one’s perspective does not require one to agree or sympathize with the other side’s argument, but it does require an understanding of why they think the way they do. *Getting to Yes* co-author William Ury put it this way: “The single most important skill in negotiation is the ability to put yourself in the other side’s shoes. *If you are trying to change their thinking, you need to begin by understanding what their thinking is.*”¹⁰¹ Putting oneself in the other side’s shoes helps the parties understand their competing positions better (without having to agree with them) and uncover the interests underlying those positions. Because interests tend to reflect genuine needs, they are less prone to biased perceptions.



The mediator should defuse any negative signals, expressed by either side, as soon as possible. If you’re the mediator, be aware of your own biases (we all have them) and resist the temptation to judge each side’s views through the lens of your biases. Never assume your view is the same as a party’s. To avoid this trap, encourage the parties to openly discuss their perceptions, preferably with each other, rather than drawing assumptions. This can be done either in caucus or in joint session.

Emotions

Emotions are an integral part of dispute resolution. They can’t be prevented and shouldn’t be ignored, but they do need to be *managed*. Emotions play a big role in how parties visualize their dispute: regardless of a claim’s asserted legal basis, certain fundamental

¹⁰¹ William Ury, *Getting Past No: Negotiating in Difficult Situations*, p. 19 (Bantam Reissue 2007).

values float to the surface, values like *justice, fairness, respect, self-worth, belonging,* and *contributing*. When people feel one or more of these values has been denied them because of the actions of another, they often get emotional. Rather than shutting down emotion, or letting it rage uncontrollably, the mediator needs to manage it to get to the crux of the issue. Here are three suggestions: first, allow the party to vent; often a good rant is all that's needed (more on venting at page 57). Second, ask questions to discern what's driving the emotion, and use that information to attack the problem. Third, try to redirect *negative* emotions into *positive* ones. For example, if lack of respect at work is an underlying issue, try focusing the discussion on the complainant's positive contributions to the mission. Of course, unbridled emotion can be counterproductive, so the mediator needs to carefully monitor the discussion and be prepared to call a recess or caucus if things get too heated. In extreme cases the mediation may need to be terminated.



Communications

Communication problems are often at the root of the dispute, and good communication is a must for resolving it. Without communication there can be no negotiation. Fortunately, mediation is a tremendous tool for creating or restoring communication between the parties. Even if the dispute doesn't settle, lanes of communication opened up in mediation can lay the foundation for future settlement discussions and, more importantly, a better working relationship. In fostering communications between the parties, the mediator has a dual responsibility to ensure through questioning that he or she has a correct and clear understanding of what the parties are saying, and to ensure that each party has a correct and clear understanding of the statements of the other party. To this end, the mediator must listen carefully so as to be sure of each party's meaning. The mediator also must speak clearly and plainly, and ensure that his or her statements and questions are clearly understood by the parties. *Active listening* techniques are tools the mediator uses to ensure full understanding. This may seem like a small point, but simple differences between what was meant and what was heard are often the greatest impediments to agreement. It is essential that the parties and the mediator be on the same page, especially when there is an agreement purporting to resolve the dispute. Useful information on communication skills for the mediator, including active listening, questioning, and rephrasing and reframing, are at Appendix 11.



To recap: successful negotiation that results in all parties getting enough to be satisfied starts with separating the people from the problem. Eliminating or mitigating the personal barriers of perception, emotion and poor communication allows us to attack the problem, usually with much better results.

Element 2: Focus On Interests Not Positions

Positions are pre-determined outcomes that often cannot be easily satisfied, especially when they come in contact with opposing positions. Interests are needs that can be met, often with solutions that hadn't even been considered previously. Interests, even when they differ, can actually coexist with each other. Positions tend to focus on the past, to actions already taken and things already done, whereas interests focus on the future, the way ahead. Every negotiation (or mediation) starts with an opening *position*. A position is a declarative claim or demand for something. Take the statement: "You illegally discriminated against me and owe me \$300,000 in damages for my injuries!" There are two positions in this statement: a claim that management broke the law, and a demand for money as a remedy. In all likelihood, these claims will be met by an equally positional retort: "We did nothing illegal, and we owe you nothing!" So long as these opposing positions are being advanced as all or nothing propositions, agreement is impossible.

Instead of bouncing competing positions back and forth, let's ask what's motivating them? What are the parties trying to accomplish? Why are they advancing their positions? What are they hoping to gain, and what will fulfill their needs or desires? The answers to these questions are all *interests*. A position can be satisfied only by acceding to it. In our hypothetical discrimination claim, the only way for management to satisfy the complainant's *position* is to admit guilt and fork over the \$300,000; the only way for the complainant to satisfy management's *position* is to withdraw her claim entirely. Satisfying both positions at the same time is impossible. The solution lies not at the extremes, but somewhere in between. Interests can be satisfied in more ways than one, giving the parties much more flexibility in their search for a solution. For example, perhaps the perception of discrimination is really a complaint about the general attitude of disrespect that permeates the entire workplace, and is not directed at one particular group or individual, thus reducing the claim for damages substantially, while opening up other possible avenues for repairing the real problem.

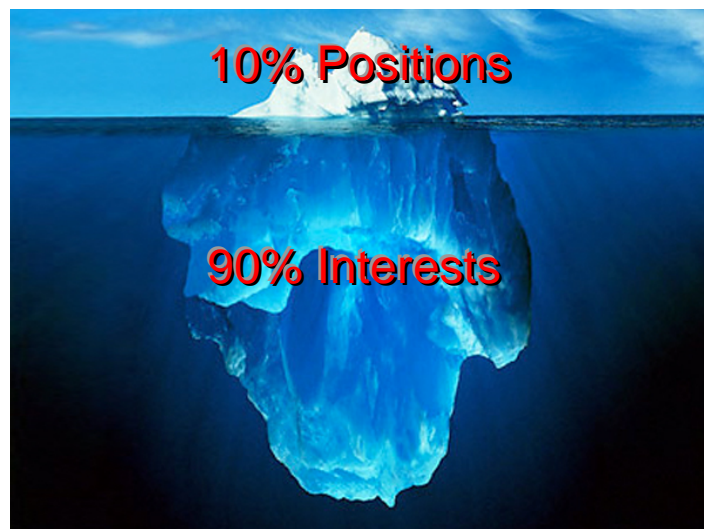


Figure 4. Positions vs. Interests

In most cases, positions are the part of the dispute we can readily see; the visible part of the iceberg. The interests animating the party's positions are much more massive, but are submerged and not readily visible (Figure 4). We ignore interests—both ours, and the other side's—at our peril.

Parties negotiating a resolution to a dispute often do not divulge their interests on their own (assuming they even know what their interests are). This can lead to impasse, which frequently leads to mediation. Be alert to this. Use joint sessions or caucus, or both, to get the parties thinking about interests: their own, and their counterpart's. This will help to recast the dispute as a joint, collaborative search for a solution rather than an adversarial clash of opposing positions. If the mediator has taken the advice we gave in the previous discussion of perceptions, this should be a manageable task. Examples of common interests in workplace disputes can be found at Appendix 12.

Element 3: Create Options for Mutual Gain

Once interests are uncovered, options for satisfying those interests can be brainstormed. These potential solutions should attempt to address issues and concerns of each party. The mediator should not propose “the” solution, but may throw out ideas for parties' consideration, and should always ask questions of the parties to elicit potential solutions from them. It's more difficult for a party to disavow an idea when he's the one who proposed it. Frequently, both parties share some common interests, making it easier to generate options to meet these shared interests, as depicted in Figure 5. For example, in the workplace context, accomplishing the organization's mission is almost always a shared interest of the manager and the employee. Improving workplace communication is another. While not necessarily sufficient to resolve the dispute, finding shared interests or other areas of agreement provides momentum to tackle the more difficult issues in which the parties' interests do diverge.

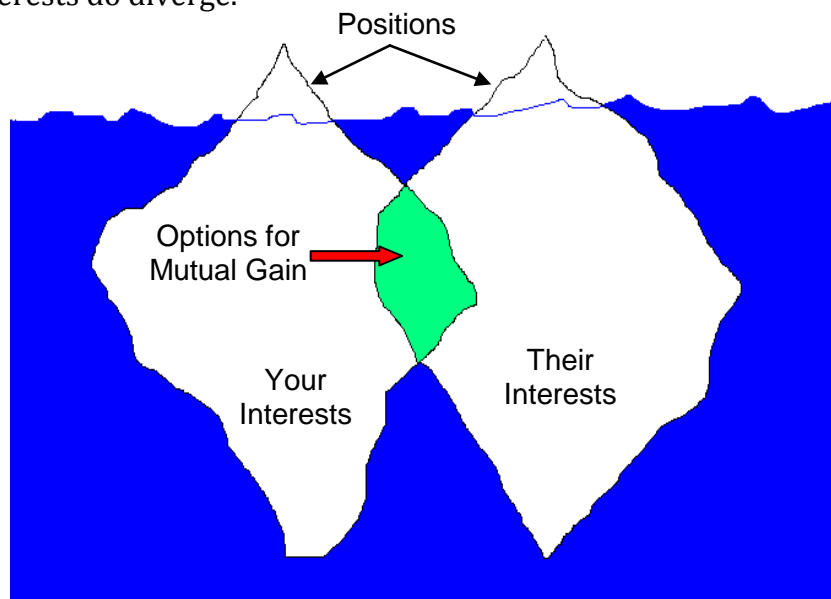


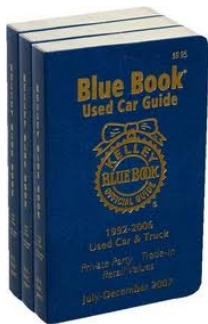
Figure 5. Options for Mutual Gain.

Option development can be impeded by various barriers, most of them of our own creation, such as, making premature judgments, assuming there is only one solution (when many may be available) and believing that an option benefitting one side necessarily disadvantages the other. Brainstorming helps the parties to broaden proposed options, search for solutions that benefit both sides, and avoid prematurely dismissing solutions as unworkable. The mediator should never strong-arm or pressure any party in this procedure. Further, the mediator must remember that his or her role is to keep as many options open as possible, not to make subjective judgments or comments regarding the merits of a proposal. A common mistake made by mediators is to grab on to what they perceive as the right solution, without asking whether that solution actually addresses a party's interest. Before latching on to a proposal as a good candidate for settlement, be sure it actually meets both parties' interests.

Element 4: Insist on Objective Criteria

After brainstorming options for resolving the dispute, the parties have to begin separating the more promising ones from those that have less merit or aren't workable. A good strategy for narrowing and selecting options for resolution is to evaluate them using objective criteria. A good settlement today must still be good next month, six months from now, next year, or even longer. Agreeing on the criteria to employ, and making sure they're objective, builds long-term commitment to the solution. This is critical, because an agreement that does not have this commitment is a candidate for one or both parties developing "buyer's remorse" down the road, which defeats the whole purpose.

Often parties can describe in broad terms the settlement they desire, but may not be able to articulate the details of such a settlement. There may be situations when a need to develop objective criteria is not necessary if the parties readily identify options that are agreeable. On the other hand, when parties compromise their original positions in order to settle their disagreement, they want to be assured that they're getting a good deal. How do they know they're getting a good deal? The answer: objective criteria.



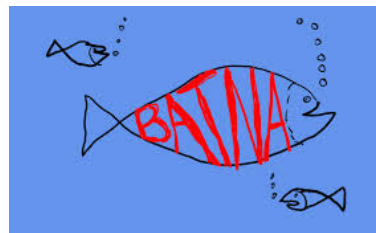
Objective criteria give the parties a means of evaluating settlement options fairly, using standards that both parties credit. Objective criteria can limit the effects of reactive devaluation.¹⁰² Moreover, parties are much more likely to comply with and carry through on terms of a settlement that they each view as *legitimate*, and objective criteria provide legitimacy. Objective criteria include past practice, industry standards, accepted references such as a used car guide to measure the proposed settlement, or any other criterion so long as the parties agree to its legitimacy. Even the result of a coin toss can qualify, if the parties freely agree to abide by that result. Once the parties develop options for resolving their dispute, the mediator can walk each option through the criteria developed at this stage to help the parties determine whether the option meets the interests of the parties. Sometimes the objective criteria can become the settlement. Both

¹⁰² Reactive devaluation is described on page 51.

parties, for instance, might be willing to agree to follow industry standards or other independent criteria. Once this agreement has been reached, the only thing that remains is to research the details of the criteria.

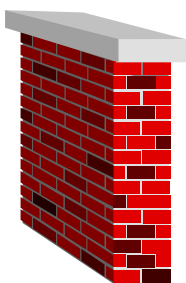
Element 5: Understand and Develop Your BATNA

To understand BATNA (Best Alternative to a Negotiated Agreement), first understand this simple proposition: we negotiate with others is to get something we can't get on our own. A smart negotiator knows going in what he or she can get on their own, so they don't waste time negotiating for it. That's the whole idea behind BATNA. In any negotiation (or mediation), the parties must be aware of what their alternatives are if they don't reach agreement. "What can I do on my own if we fail to resolve this?" Those things you can do on your own, without agreement of the other side, are your alternatives to a negotiated agreement, and the *best* of those alternatives is your BATNA. Knowing your BATNA serves as a benchmark when further negotiation makes sense, and when it doesn't. Every participant in mediation should think about the answers to these four questions: (1) What is the best outcome I can achieve through mediation? (2) What can I do on my own to serve my interests if the mediation breaks down and we fail to agree? (3) Which of these options is the best? And (4) Is this option better or worse than what I can achieve through a mediated settlement? If a resolution that can be achieved in mediation is better than one's BATNA, stay and mediate for that resolution. If it's worse than the BATNA, walk away.



Tools for Dealing with Impasse

Barriers to Agreement



Impasses are common in unassisted dispute negotiations. That's because barriers to reaching resolution are hard to overcome when it's just the two of you. Mediation counters many of these barriers by introducing a neutral third party to the process. Still, even under the best of circumstances not every case will settle in mediation, no matter how skilled the mediator. On average, about one in three mediations is destined for failure. Sometimes parties don't want to "get to yes," at least not on the terms being offered by the other side. Nevertheless, many of these barriers can be overcome in mediation, if the mediator recognizes them and takes appropriate countermeasures.

Emotional Barriers

While providing an outlet for emotions can result in a catharsis that leads to resolution, unchecked emotions can also interfere with the clear thinking needed to reach a fair and

lasting settlement. Fear, anger, and frustration are often bound up in the parties' positions, which is why separating the people from the problem is so important. Nevertheless, emotions can never be completely eliminated from the process. The need to save face, the desire to punish the other side, or the need to vent, must be accounted for and may need to be accommodated. Emotions can spin out of control in unassisted one-on-one negotiations because there is no moderating influence. A mediator acts as a buffer for emotions, keeping them in check and channeling them in a positive direction.

Reactive Devaluation

Opposing parties naturally view with suspicion any offer or idea that originates from the opposition. This is especially true when the parties' relationship is acrimonious or distrustful. The first reaction to a proposal is to reject it outright because of its source, not its relative merit. This is called *reactive devaluation*, and it prevents otherwise good ideas from getting their due consideration. When both sides engage in this pattern of behavior, impasse usually follows. A mediator can reduce or eliminate the effect of reactive devaluation by serving as the source or conduit for exchanging ideas so that they appear to come from the mediator, not the other side.

The Negotiator's Dilemma

The IBN model encourages the parties to engage in open and candid discussion about their interests. A party in a one-on-one negotiation may want to be candid and open, but fears being taken advantage of by the other side, so holds back. Holding back this information keeps the discussion at the level of a back-and-forth over positions. Impasse isn't far behind. A mediator can overcome this by using confidential caucuses to encourage sharing this information in a safe, confidential environment.

Loss/Risk Aversion

People treat gains and losses differently when it comes to decisions whether to settle or litigate. Studies show that people tend to be risk-averse when they stand to gain, and risk-seeking when they stand to lose. When a party sees a settlement proposal as a loss (like the payment of money, for example), he may be more likely to reject it and risk litigation to get a better outcome, even if that outcome is unlikely. When he sees it as a gain (as in, "I can finally get this claim off my desk!"), he is more likely to accept it because it's a "sure thing." The mediator's role here is to help the parties reframe a perception of loss into a perception of gain in order to maximize the likelihood of agreement.

Judgmental Overconfidence

Parties usually inflate the strength and value of their cases, and minimize or ignore weaknesses. This tendency afflicts lawyers and laymen alike. As a result, they may refuse an otherwise good offer, thinking they can do better in litigation (see discussion of loss/risk aversion above). Judicious use of reality checking by the mediator can help

parties view their positions more objectively. Reality checking is discussed in greater detail beginning on page 53.

Information Imbalance

Parties in a dispute usually get most of their information from their own sources, so they may only have part of the story, and what they have may be biased to their position. For example, if management's only source of information from the employee is the complaint, and all the rest of its information comes from the supervisor and other management officials, it's likely that management's case is going to be skewed in favor of management. The converse holds true for the complainant, who generally does not pull information from management sources. A mediator can equalize the parties' access to information so both sides are working with the same set of facts, which usually produces better outcomes.

Incompatible Negotiation Styles

In some cases, impasse is more likely because of negotiation strategies, or because a party simply does not want to settle. Parties who come into a negotiation insisting on a non-negotiable "final offer" or a "take-it-or-leave-it" proposal are headed for impasse. Likewise, parties who exhibit by their behavior that they're not serious about reaching a resolution are an impasse waiting to happen. The mediator is under no obligation to accommodate "participants" who are not serious about participating. On the other hand, if the individual's behavior is the result of a negotiation style that may be amenable to shifting to a more collaborative mode, the mediator may have something to work with, using one or more of the tools discussed below.

Tools to Avoid or Overcome Impasse

Many impasse situations can be avoided or overcome through the mediator's application of skills and tools. This is one area where experience helps: regardless of innate talent or training, mediators with a lot of experience tend to recognize early on where the impasse "pressure points" are and what needs to be done to try to overcome them. Even so, there are cases where the parties are so dug in that even the best mediators are stymied. Fortunately, with proper intake processes and parties who participate in mediation in good faith, such cases are more the exception than the rule. There are a number of tools and approaches that can assist in avoiding or breaking through an impasse.¹⁰³ Six of these are discussed below.¹⁰⁴

➤ Tool 1: Reality Checking

¹⁰³ Professor William Ury discusses these approaches at length in *Getting Past No: Negotiating in Difficult Situations* (Bantam Books 1991). This book is a "must-read" for any mediator.

¹⁰⁴ Additional tips for getting past impasse can be found in Appendices 14 and 15.

Reality checking (also called reality testing) is a technique the mediator uses to help a party to critically examine a position or belief by comparing how others might view it, or to some other external benchmark. The purpose is to foster a more realistic assessment of the viability of the position or belief. A common subject of reality checking is the belief that a party's position will prevail if the dispute goes to trial or hearing, when in fact such an outcome is probably unlikely. Other beliefs can be tested as well: the likelihood of getting a better-paying job, or getting an advanced degree, or perhaps even winning the lottery! Reality checking can also be used to help move a party from a positional bargaining approach to a more realistic discussion of interests. Reality checking should be reserved for caucus, not joint sessions.

Reality checking may sound like evaluative mediation, but it's not. The facilitative mediator does not evaluate anything; the parties conduct the evaluation. The mediator merely invites a more objective analysis by asking open-ended questions that are designed to stimulate a realistic appraisal of the party's options if the case doesn't settle (not unlike an analysis of one's BATNA). Suitable questions might ask the claimant how he or she would meet the burden of proving a prima facie case, or ask management how it would defend the claim if it went to hearing. Or perhaps the mediator could ask each party how they would approach the case, hypothetically, if their roles were reversed. Other questions could explore the procedural aspects of litigation or other formal procedures and what the effect would be, including costs, time and impact on continuing working relationships.



Suppose one of the complainant's interests in filing the complaint is the additional income she would have received had she been selected for promotion. Reality checking might ask what alternatives for extra income might be available, thus meeting this interest. Or a supervisor who wants to fight the complaint tooth and nail could be asked what effect such a complaint, regardless of its merit, might have on career progression. Many avenues of reality checking can reveal themselves as the mediator and party discuss the case in caucus. Reality checking is not intended or used to judge a case, or to predict the future. Rather, its purpose is to instill in the parties a more objective eye of their own cases, and their counterparts'. When one understands the risks and pitfalls of one's case, offers of settlement that were once dismissed may now seem more attractive.

Appendices 15 and 16 outline the elements required to prove various EEO claims, which a mediator might use to craft questions for reality checking. It is not necessary to ask tough, hard-hitting questions, nor is it appropriate to cross-examine the party. Open-ended, non-threatening questions that do not suggest a particular answer are best. For example, instead of saying, "Don't you think the EEOC would find against you given the fact that you scored much lower than the selectee?" the mediator might ask, "How do you think the EEOC would view the difference in scores with regard to your discrimination claim?" The latter question does not suggest a particular answer or telegraph an opinion about the merits of the case, but it does get the party thinking about how an outside decision-maker might view the case, and how the party would meet that scrutiny.

Reality checking is particularly useful when the parties are “*pro se*” (without representation), and may not have given their cases much critical attention, but it’s also useful even when parties have legal representation. One would hope that attorneys representing their clients in mediation have already reality checked the client on the strengths and weaknesses of their position, but don’t assume that to be the case. Asking counsel for their views of the case, in caucus, can serve the same purpose as asking a *pro se* party. Again, the purpose is not to give an opinion or argue the merits of the case (that is absolutely forbidden in facilitative mediation), but to ensure that if the case ends up in impasse, it’s not because the parties didn’t have a clue about how strong or weak their cases really are.

➤ *Tool 2: Walk a Mile in Their Shoes*

We have visited this concept before, in our discussion of the first two elements of IBN: separating the people from the problem, and focusing on interests, not positions. Impasse



often results from the failure to understand the other side’s thinking, both in terms of their perceptions, and their interests. Knowing where someone is coming from usually makes it easier to envision where they want to go. Part of the mediator’s job is to reorient each side to exploring and understanding the other side’s point of view.¹⁰⁵ This does not require either party to share, agree or sympathize with that point of view; only to understand it. A common tactical error for a negotiator

is to focus only on how to get what he wants from the other side. An alternative approach thinks first about how to give the *other* side what it wants, then use that as leverage to get what he wants. This builds trust, rapport, and a more hospitable environment for compromise by the other side. It is the mediator’s task to facilitate this kind of thinking on both sides of the dispute. The secret to successful negotiation can be summed up succinctly: *find ways to satisfy their interests so they can satisfy yours.*

➤ *Tool 3: Reframe the Narrative*

Parties usually come to mediation with a negative narrative, focused on the past. As the mediator, you want to encourage the parties to focus on a positive future, not a negative past (remember, there is no assignment of fault in mediation). This often requires them to *reframe* the narrative. *Reframing* is a process that takes a set of values, beliefs, or perceptions that give negative meaning, and transform them into a more positive meaning. In workplace disputes, negative perceptions of the other side are common. The challenge for the mediator is to help the parties move from those negative frames of reference to a more positive frame that permits the parties to actually



¹⁰⁵ Remember Bill Ury’s admonishment in *Getting Past No*: “The single most important skill in negotiation is the ability to put yourself in the other side’s shoes.” See Note 106 and accompanying discussion on page 45.

focus on the problem rather than the personalities in working toward a joint solution. Reframing is one of the most difficult tasks the mediator must face, especially when negative feelings have built up over months, years, even decades! However, it is essential to successful resolution of the dispute.

Reframing is accomplished primarily through rephrasing and questioning, usually in caucus to encourage candid responses. There is no blueprint for reframing; each case is different. The examples below demonstrate how reframing might be accomplished in two hypothetical cases.

- ✓ **Example 1 of reframing:** Carla complains that Steve, her boss, is constantly on her back about missing suspenses, which she feels is unfair because his time standards are impossible to meet. Steve counters that missed suspenses make the office look inefficient (which reflects poorly on him), and Carla is by far the worst offender. In mediation, the mediator might begin to reframe Carla's complaint by saying, "I understand your concern about meeting Steve's time standards. Why do you think he set those standards?" The mediator could also pose similar questions to Steve: "I believe I hear you to say that meeting suspenses is important because it reflects positively on your organization, and missing suspenses reflects negatively. What factors led you to set the time standards that you did?" The goal of these questions is to establish agreement that standards of some kind are necessary and appropriate, thereby narrowing the inquiry into whether the standards Steve established for the office could stand some improvement to make it easier for Carla to meet them without sacrificing quality or productivity. This shifts the focus from a negative "blame game" to a much more positive search for a joint solution that satisfies both Carla's and Steve's interest in an efficient, productive work environment.
- ✓ **Example 2 of reframing:** Linda, a new supervisor, is in mediation for a disciplinary action she took against Ken. In joint discussions, Linda adamantly refuses Ken's proposal to mitigate the punishment. In caucus, Linda tells the mediator she's afraid of losing stature as a supervisor if she appears "soft" on punishment. Asked why, Linda replies: "I'm the only woman supervisor in the division, I need to be tough." The mediator then asks, "Besides toughness, what other attributes are important in a supervisor?" If Linda doesn't mention them, the mediator might ask: "What about problem-solving and dispute resolution? Are those important?" If Linda acknowledges that they are, the mediator can ask Linda whether problem-solving is a strength or weakness. Linda will probably agree it's a strength. This offers Linda the opportunity to trade a negative frame of weakness (fear of not being tough enough) for a positive frame of strength (being a problem-solver). Now Linda can approach the issue of punishment mitigation with an open mind. That doesn't mean she'll agree to Ken's proposal, but at least she's prepared to consider it.
- ✓ **Other examples of reframing:** Asking the manager, "Why do you think Gail filed this complaint?" "What do you think she really wants as a result of this complaint?" Or, "Let's reorient our point of view here...try putting yourself in Doug's position. As

a supervisor, how do you think he sees things?” Or, “If you were Doug, what would be most important to you?” Asking one party to “justify” the other side’s argument is an excellent way to begin reframing the narrative.

➤ *Tool 4: The Value of Venting*

While displays of emotion in mediation might make other participants uncomfortable, they are to be expected, and they must be dealt with appropriately. We have previously noted that emotions can derail unassisted negotiations, often because of the lack of a moderating influence. At the same time, acknowledging emotions and allowing a party to



vent is often the key to resolution. It is important for all parties in mediation to speak plainly and honestly about their feelings, and to be heard by the other side. This plain talk can often be loud and argumentative and can be a challenge for the mediator to manage. Sometimes, however, what seems to be non-productive arguing can be the cathartic event that makes settlement possible. The mediator should allow the parties to vent their emotions and frustrations to the greatest extent possible, with due regard for safety, security, and propriety. Remember the caucus as a particularly useful “escape valve” to help lower the tensions and keep emotions under control.

For the mediator it is very important that no outward reaction be made to a party’s emotional display. Such a reaction can jeopardize the mediator’s impartiality, or create the appearance of bias. Furthermore, the mediator retains the responsibility of maintaining the safety of the participants. While venting should be embraced and not feared, such a joint session should be ended if it appears that either or both parties are close to losing control of their actions. It always remains the mediator’s responsibility to remain calm and maintain the quality of the proceedings. In rare instances when emotions cannot be curtailed, the mediator must always be mindful of security precautions and terminating the mediation if it cannot be conducted in a safe environment.

➤ *Tool 5: Use ZOPA and BATNA to Create Value*

In most negotiations the parties have a range of options their willing to consider for settlement. The least attractive option is a party’s “reservation point” (also known as the walk-away point, or “bottom line”), and the most attractive is the “aspiration point,” or goal. These points serve as references in negotiation, and can help negotiate a smarter deal. For example, a plaintiff in settlement discussions of a lawsuit who has a walk-away point of \$100,000 and a goal of \$200,000 is more likely to settle nearer her goal (\$200,000) than a negotiator who has not set these reference points.

When each party’s range of settlement options partially overlaps with the other, this area of overlap is called the Zone of Possible Agreement, or “ZOPA.” Anything that comes within this area of overlap should be an acceptable outcome for both parties (even if not ideal), and may be the basis for agreement. Unlike BATNA, which is the best option *outside*

the negotiation, ZOPA exists only *inside* the negotiation, to narrow differences between the parties to make a negotiated solution possible. Figure 6 illustrates this relationship.

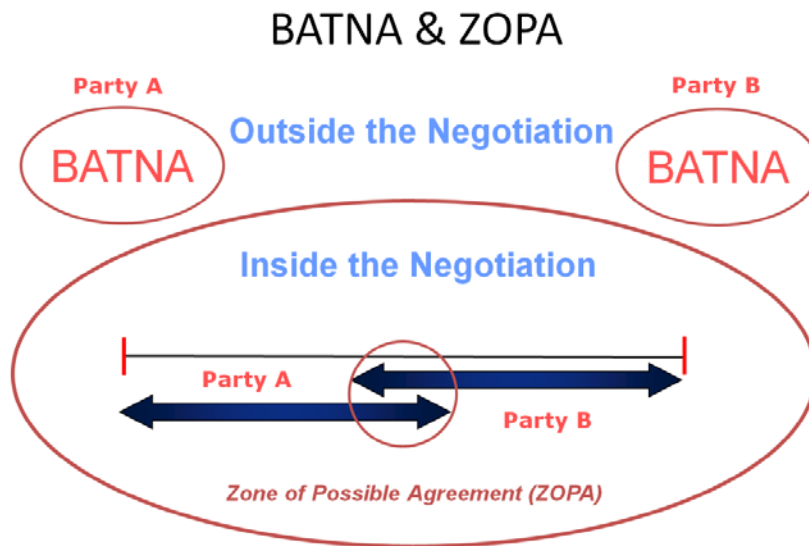


Figure 6. BATNA and ZOPA. The ZOPA occupies the circled area where each party's range of acceptable options overlaps. An agreement within this zone should be possible.

A simple example involving a negotiation for the purchase of a used car illustrates how ZOPA works. Sarah is selling her car. She's asking \$7,000, but is willing to accept \$5,000 if that's the best offer she can get. Her goal in any negotiation over price is her asking price of \$7,000; her walk-away point is her minimum acceptable offer, \$5,000. Her range of acceptable outcomes is between \$5,000 and \$7,000. Ed wants to buy Sarah's car, but wants to pay as little as possible. He offers \$4,000, but is willing to pay up to \$6,000. His goal is \$4,000; his walk-away point is \$6,000. Ed's range of acceptable outcomes is between \$4,000 and \$6,000. When Ed's and Sarah's ranges of acceptable outcomes are combined, there's an overlap between \$5,000 and \$6,000. This is the ZOPA, where an agreement on price is possible. See Figure 7.¹⁰⁶

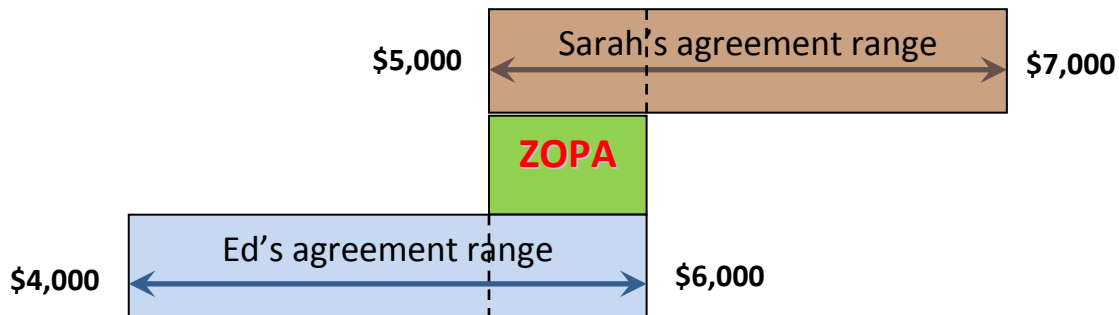


Figure 7. In this example, the ZOPA is the range between \$5,000 and \$6,000, where each party's range of acceptable outcomes overlap. Each party's BATNA may affect the ZOPA.

¹⁰⁶ Assume these price ranges are within Kelley Blue Book values, or other reputable source.

❖ *How ZOPA and BATNA Interact*

How does BATNA impact the negotiation depicted in Figure 7? So far the only players are Sarah and Ed, who are looking at a fairly narrow window for a deal, somewhere between \$5,000 and \$6,000. However, suppose another potential buyer comes along and offers Sarah \$6,500 for her car. Or perhaps Ed has learned of another car just like Sarah's that he can get for \$4,500. Under either scenario, Sarah or Ed now has an outside alternative that can be achieved without each other, that is better than anything in the ZOPA. Unless Sarah or Ed, or both, are willing to revise their walk-away points to expand the ZOPA to cover these outside options (i.e., Sarah lowers her price to \$4,500, or Ed raises his offer to \$6,500), this negotiation is probably headed for impasse.

❖ *Relevance of ZOPA and BATNA to Mediation*

These negotiation concepts apply with equal force to mediation, except the mediator may have to help the parties recognize the ZOPA, and construct their BATNA in order to keep them engaged in pursuit of a negotiated solution. The mediator does not want the parties to walk away from mediation without knowing their alternatives, and the value of those alternatives. Helping the parties widen the ZOPA can make a negotiated solution appear much more attractive, and keep the parties working toward a joint solution.

Ideally, parties in mediation should know their range of acceptable settlement options, as well as their alternatives if they don't settle. But the reality is, most of them don't know their alternatives, or if they do, they misjudge their value. As a result, parties may pass up a good deal, or accept a bad one. The mediator should be aware of this and may explore with the parties their BATNA and ZOPA to narrow the areas of disagreement and make settlement more likely. Open-ended questions and other techniques to get parties thinking about what they're willing to accept, and what they can do if they don't settle, helps establish the ZOPA. Once established, the ZOPA can narrow the focus of settlement discussions. This exploration should be conducted, at least initially, with each party separately in caucus. Though not unique to IBN, understanding BATNA and ZOPA is essential to successful mediation using the IBN model.

Applying these concepts in workplace dispute mediation likely will not be as simple as a used car purchase. For one thing, while ZOPA works well when the only issue is money and the only question is "how much?" the issues in workplace disputes are often not monetary, so judging the relative value of different solutions is more difficult. Second, even where the issue in controversy *is* money, the differences in settlement ranges will often be much more pronounced. Remember the EEO complainant who demands \$300,000 in compensatory damages, and management's counteroffer of zero? Finding a ZOPA in such a case is unlikely unless the complainant is willing to substantially lower her demand or management is willing to substantially increase its offer, or both. What can the mediator do to try to narrow the difference? One approach might be to explore possible non-monetary alternatives to reduce or replace the demand for damages, thereby narrowing the difference in settlement ranges and perhaps even producing a ZOPA. What if the complainant resists these alternatives, believing she can actually get \$300,000 by pursuing

the complaint? The complainant may think this alternative is her BATNA, but a BATNA must be realistic. Although the rare case might actually be worth the maximum payable damages, the vast majority are not. Therefore, the mediator might consider using reality checking to help the complainant adopt a more realistic assessment. An objective appraisal of the strength of one's case usually makes the BATNA less attractive than a mediated resolution.

➤ *Tool 6: Use the Agreement to Mediate!*

Before declaring an impasse, check the mediation agreement the parties signed before the session to see if there are any commitments the parties agreed to that might encourage more flexibility. No one expects the mediation agreement to obligate any party to settle, but it should obligate the parties to exercise their best efforts, to engage in meaningful dialogue, and to make an honest effort to resolve the dispute. Reminding the parties of these commitments might have a positive effect and energize the parties to keep at it. Or not, but it's worth a shot before taking the final action of terminating the mediation.

Settlement

The discussion up to this point has focused on avoiding impasse, and achieving a resolution. While achieving resolution is important—after all, it's the goal of every mediation—making sure that resolution enjoys the commitment of the parties to abide by it is just as important, if not more so. A mediation that resolves the issues in dispute is not a success if the whole deal falls apart because the parties, or the mediator, didn't take the time to get the agreement right.



Mediation is often described as a “non-binding” process, meaning the parties are free to reject proposed settlement terms and even walk away from the process entirely. However, once a resolution is reached, and a settlement agreement is signed, that agreement is binding and enforceable, like any other contract. There is nothing “special” about a settlement agreement obtained through mediation. Such agreements must meet the same standards and are subject to the same rules of construction and enforceability as settlement agreements reached by any other means.

When a dispute settles, the parties' agreement should *always* be memorialized in writing, and should accurately and fairly reflect the terms and conditions agreed to. While local procedures for drafting and reviewing settlement agreements may vary, the parties should be thoroughly familiar with and agreeable to the terms of the agreement before signing. Be sure legal representatives are involved in drafting and reviewing the agreement with their

clients before they sign. Oral agreements should be avoided in all but the most informal of settings.¹⁰⁷

Assisting the parties in crafting settlement terms that accurately reflect their agreement is one of the most important services any mediator can perform. It is also one of the most difficult. The following guidance is designed to assist in crafting a settlement agreement that will settle the current claim, without establishing the basis for additional claims in the future, and will survive the review process. Sample settlement agreements can be found in Appendices 17 and 18.

Use of Settlement Agreements in Pre-Disputes

Mediation or other informal ADR processes can be employed to resolve a dispute before it goes into a formal process like EEO. While early resolution of pre-disputes is encouraged, use of formalistic written settlement agreements is not. The parties may execute an informal memorandum memorializing the things they have agreed to do in the future, but they should understand it is not a formal binding settlement agreement. Compliance with such an agreement is completely up to the parties. Moreover, such an agreement does not waive legal rights or prevent either party from pursuing whatever alternative legal remedies they may have.

Have Reviewing Authorities Available

First, prior to the mediation session, the mediator and case intake officials should ensure that appropriate officials are available by phone to answer substantive questions raised by the parties regarding proposed settlement terms. Having these officials available to vet the agreement beforehand can ease a lot of administrative red tape that sometimes delays or prevents settlement. The review and approval of the following officials for all settlement agreements may be required: (1) management official(s) with settlement authority for approval of the terms of the agreement; (2) the appropriate legal office coordination for legal sufficiency; (3) the comptroller for any payment of monetary benefits; and (4) the local CPAC or HR office (may involve multiple personnel functions for implementation of the terms of the agreement) to ensure regulatory compliance and ability to implement the terms of the agreement. If the settlement is for a negotiated grievance or other labor-management dispute for which ADR is an authorized dispute resolution option, union review may also be indicated. The standard to be employed by reviewing officials is not whether they would have negotiated better or different terms (everyone thinks they could have negotiated better terms), but whether the settlement is legally sufficient and its terms can be carried out.

During the mediation session, either party is free to consult with lawyers or experts to ensure that terms and conditions to a proposed settlement are legal, authorized, and in their best interests.

¹⁰⁷ Although oral agreements are generally binding and enforceable, they should be avoided absent some written memorialization reflecting the parties' intent and understanding. Certain settlement agreements, e.g., EEO claims and agreements that waive age discrimination claims, must be in writing to be valid.

Terms of the Agreement - Who, What, Where, When, and How?

Settlement agreement terms that are vague or ambiguous increase the risk of possible noncompliance or perception of noncompliance, leading to allegations of breach of the agreement. A “best practice” is to review the settlement agreement at least once with just this point in mind -- who does what, when, where, and, if applicable, how? Avoid vague or ambiguous terms like “reasonable period,” “regular basis,” “satisfactory,” and “best effort” wherever possible, unless those terms are specifically defined in the agreement, or refer to an outside source that provides additional definition, or are not intended to direct compliance with a specific term. Another point to remember is that final approval of the settlement agreement may take a few days. It is important to be sure that the “when” and “how” contained in the agreement take this into consideration and provide sufficient time to carry out the agreement’s terms.

Any obligation undertaken as part of a settlement agreement must be within the party’s power to execute. Settlements that involve the payment of money or that provide other benefits may require action by another agency that is not under the Army’s control, such as the Defense Finance and Accounting Service. Accordingly, agreements to pay money should take that into account. Also, make sure any provision relating to the payment of money, such as for back pay or other taxable income, accounts for any applicable taxes and other deductions that are the employee’s responsibility.

Settlement agreements are contracts, so normal rules of contract interpretation are used. When interpreting settlement agreements, courts and administrative boards give the terms their normal, everyday meaning, unless a different meaning is expressly stated in the agreement. Avoid jargon and acronyms unless specific meanings are provided. The goal of settlement agreement writing is to avoid vagueness and ambiguity so that the terms of the agreement can be carried out as intended by the parties.

Ensure Proper Authority

If there is uncertainty about a party’s authority to agree to something, or a question regarding the legality of a particular term, then the parties should consult the appropriate subject-matter expert. Such consultations need to be timely, which is why it is again strongly recommended the mediator/case intake official ensure such experts are available by phone during the mediation session.

After coordinating with the Office of Personnel Management (OPM), the EEOC has published guidance on the authority for implementing settlement agreements in EEO cases, which is worth quoting here in full:

There may be some instances where a proposed informal settlement appears to be at odds with normal personnel procedure or practice contained in regulations implementing Title 5 of the United States Code or processing guidance of the Office of Personnel Management. Such situations could arise where Office of Personnel Management regulations or guidance foresee personnel actions taken in the normal

course of business and do not generally discuss personnel actions taken pursuant to court order or a settlement. Title VII [of the Civil Rights Act of 1964] provides authority to enter into settlements of EEO complaints, and, likewise, Title VII provides authority for agencies to effectuate the terms of those settlements. *What this means, in plain English, is that a personnel action taken to satisfy a settlement of a Title VII civil rights claim is valid against the agency, even if such an action would not be taken in the ordinary course of business. The fact that a settlement agreement does not specifically or expressly include a finding of discrimination (it does not), is irrelevant to the validity of the settlement and the need to enforce it.*

Chapter 32, Section 6(b) of OPM's Guide to Processing Personnel Actions describes the procedure for documenting personnel actions taken as the result of a settlement of an EEOC or MSPB decision. The purpose of this procedure is to protect the employee's privacy. Rather than including personal and irrelevant settlement information on the employee's SF-50, the SF-50 may be processed with the computer code "HAM." ("HAM" is a computer code that prints on the SF-50 a citation to 5 C.F.R. § 250.101.) If an agency's computer system does not permit the use of the citation "HAM," then the SF-50 may cite to 5 C.F.R. § 250.101. This section of the Code of Federal Regulations indicates that the personnel action is processed under an appropriate legal authority.¹⁰⁸ [Emphasis added.]

While this guidance is helpful, there are nevertheless a number of areas where special caution is warranted:

Settlement Agreements Providing for Payment of Funds by the Government

Payment of funds by the Government must be based upon statutory authority. For example:

- ☞ The Back Pay Act, 5 U.S.C. § 5596, allows for the payment of back pay and attorney's fees when the pay is lost due to an unjustified or unwarranted personnel action.¹⁰⁹
- ☞ The Civil Service Reform Act, 5 U.S.C. § 7701, allows for the payment of attorney's fees and interim relief payments.
- ☞ The Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, allows for the payment of back pay as equitable relief.
- ☞ The Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 42 U.S.C. § 1981a, allows for the payment of compensatory damages in cases of intentional discrimination under

¹⁰⁸ See MD-110, Chapter 12, Section VII at <http://www.eeoc.gov/federal/directives/md110/chapter12.html>.

¹⁰⁹ In MD-110, Chapter 12, the EEOC states that Title VII provides authority to award back pay that is independent from the Back Pay Act. The EEOC states that "[t]he Independent Title VII authority to settle EEO claims is significant because unlike the Back Pay Act, section 717 of Title VII does not limit awards of back pay to situations where there has been a finding of unjustified or unwarranted personnel action. Thus, there is no impediment to an award of back pay as part of a settlement without a finding of discrimination." *Id.*, Section III, paragraph 3.

Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990, except in cases where the where the covered entity made a good faith effort to provide reasonable accommodation. [Note: claims arising under the Age Discrimination in Employment Act of 1967 or the Rehabilitation Act of 1973 are not included under this provision]. For claims against the Federal Government, the maximum amount recoverable for compensatory (non-pecuniary) damages is \$300,000 per complaining party.

In addition to the statutes listed above, there are other statutes that authorize the payment of funds. Individuals must be clear as to which authorize the payment of funds in their particular matter. Once authority to make a payment has been identified, the tax consequences must be determined. For payments of back pay, the appropriate tax withholdings must be deducted prior to payment to the employee.¹¹⁰ Also, note that damages paid for emotional distress, such as pain and suffering, loss of enjoyment, anxiety, etc., are taxable.¹¹¹ Refer the parties for appropriate financial management advice on the tax implications. For EEO complaints, use EEOC MD-110, Chapter 12, to examine available flexibilities and options for resolution.

Settlement Agreements that Discuss Modification of Employee Benefits

OPM's fundamental principle is that the Retirement Fund is not a litigation settlement fund. Rather, its purpose is to provide annuities to federal employees and their survivors. The legitimate use of the Retirement Fund is limited by 5 U.S.C. § 8348(a) to payment of benefits under the express and specific provisions of either the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS), and to the costs of administering those systems. Using the Retirement Fund to underwrite a settlement agreement by artificially creating eligibility to or enhancing an annuity is inconsistent with 5 U.S.C. § 8348(a), as well as with the substantive provisions of CSRS and FERS.

If a settlement contemplates changing an employee's benefits, the parties should consult with the CPAC and an Army attorney. It is imperative that the appropriate Army official(s) contact OPM and afford OPM the opportunity to review and discuss specific proposed settlements *before* they are concluded.

Special Requirements for Waivers of ADEA Claims

Any settlement agreement that requires an individual to waive or release a right or claim under the Age Discrimination in Employment Act of 1967 (ADEA) must meet special requirements to ensure the waiver is knowing and voluntary. These include: the agreement must be in writing, in language the individual can understand, it cannot restrict future claims, it must be supported by adequate consideration, and it must advise the individual to consult a lawyer before signing. In addition, the employee must be given at least 21 days to review and consider the agreement before signing, and 7 days after signing

¹¹⁰ See 26 U.S.C. § 3402(a).

¹¹¹ See Small Business Job Protection Act of 1996, Pub. L. No. 104-188, Sec. 1606 (Aug. 20, 1996).

to revoke the agreement. Until this revocation period expires, the agreement is unenforceable.¹¹² A waiver of ADEA rights in a settlement agreement of an *EEO claim* does not need to provide the 21-day consideration period or the 7-day revocation period, so long as the other requirements are met and the individual is given a “reasonable period of time” to consider the agreement before signing.¹¹³ See Appendix 17 for an example of an ADEA waiver provision in an EEO settlement agreement. Contact your local labor counselor for more information on ADEA waivers.

Standards for Compliance

The agreement should contain objective standards so that each party can be sure that its stipulations are being followed. The use of terms such as “good faith,” “best efforts,” or “reasonable” is often necessary and desirable, but such terms alone can be ambiguous and can lead to future problems. If possible, urge the parties to include specific time frames within which to fulfill clear obligations, and when those time frames begin. In guiding the discussion on clarifying the terms and standards, the mediator may ask how the parties and others, who may have to review or implement the agreement but are not present during the mediation, will know that the agreement has been satisfied.

Confidentiality of the Settlement Agreement

A settlement agreement is not confidential under the ADRA. If the parties want to treat such an agreement as confidential, they should include a clause in the agreement addressing confidentiality. Be advised that confidentiality clauses in settlement agreements are not favored by Army or the Department of Justice, but they are not prohibited and are still commonly used. If you include a confidentiality clause in the agreement, be sure to “carve-out” from the non-disclosure requirement those offices that must review and implement the agreement, as well as other offices having a need to know. Regardless of the confidentiality clause, do not include otherwise-confidential communications in a non-confidential settlement agreement, unless parties intend to waive confidentiality as to those communications. Remember, even where an agreement includes a confidentiality clause, it binds only the parties to that agreement. If you are unsure of the limits of confidentiality protections, consult an Army labor counselor.

Labor Unions

If the dispute involves an employee who is part of a collective bargaining unit, or if the proposed settlement will affect other bargaining unit employees, there may be bargaining obligations that must be satisfied prior to implementing a settlement agreement. The mediator or the parties should consult an Army labor counselor or servicing L/MER.

Enforcement

¹¹² Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(f)(1), as amended by Section 201 of the Older Workers Benefit Protection Act, Public Law 101-433 (1990).

¹¹³ *Id.*, 29 U.S.C. § 626(f)(2). “Reasonable period” is not defined in the statute, but an agreement that complies with the provisions of § 626(f)(1) (i.e., a 21-day review period) is deemed to comply with the “reasonable period” in § 626(f)(2).

EEO Complaints

Agreements reached as the result of mediation are enforceable to the same extent as agreements reached by any other process, including non-ADR settlement discussions. In EEO cases, the procedure for alleging a breach or non-compliance by the Army is set forth in AR 690-600, paragraph 5-14. Basically, if a complainant believes the Army has failed to comply with the terms of a settlement agreement, he or she must notify the Army in writing within 30 calendar days of when the complainant knew or should have known of the alleged non-compliance. The complainant may request as relief that the terms of the agreement be implemented or, alternatively, that the complaint be reinstated for processing from the point processing ceased. If the Army does not respond to the complainant or if the complainant is not satisfied with the attempts to resolve the matter, the complainant may appeal to the EEOC Office of Federal Operations for a determination whether the Army has complied with the terms of the settlement agreement. The complainant may file the appeal within 35 days after serving the allegation of non-compliance upon the Army, but no later than 30 calendar days after receipt of the Army decision.

If an EEO complainant alleges retaliation after entering into a settlement agreement (as opposed to a claim of breach of the agreement itself), he/she must contact an EEO Counselor to initiate a new complaint. Generally, the complainant cannot have a settled complaint reinstated, even if the settlement agreement includes a non-retaliation clause.¹¹⁴

Non-EEO Cases

Settlement agreements executed to resolve MSPB appeals or labor disputes filed with the FLRA (including arbitration appeals and ULPs) are made a part of the case record and enforced the same as any other order or decision, under established Board or Authority procedures. This includes oral agreements if they otherwise reflect an intent by the parties to be bound by the terms of the agreement. The remedy for a finding of non-compliance with a settlement agreement is either to order agency compliance with the agreement (if the non-compliance was not attributable to any acts of the employee), or to rescind the agreement and reinstate the case at the point processing ceased.

For settlement agreements entered into to resolve grievances or other disputes that are not in a formal dispute resolution process, there will be no independent enforcement mechanisms. In such cases, parties may want to consider including an enforcement provision in the agreement itself, for example, a provision identifying an official responsible for hearing and deciding claims of breach or requests for enforcement. On the other hand, as discussed previously, if the matter is one which has not ripened into a claim submitted as part of an existing dispute resolution process, or for which no dispute resolution procedure exists, formal settlement agreements should be avoided. Accordingly, no breach remedies would apply.

¹¹⁴ *Martinez v. Department of the Navy*, EEOC Appeal No. 01934493 (1993); see also 29 C.F.R. § 1614.504(c).

CHAPTER 3 **RESOURCES**

Mediation and ADR Reference Materials on the World Wide Web

SEVERAL web sites on the Internet are devoted to mediation and ADR. The Army, Air Force, and Navy ADR programs all have publicly accessible web sites. The Army ADR Program website is at www.adr.army.mil. The Air Force website is at www.adr.af.mil. The Navy website is at www.adr.navy.mil. The IADRWG Steering Committee also maintains a comprehensive website with federal sector ADR publications and guidance at www.adr.gov. There are also numerous academic and private sector websites that can be easily found using any Internet search engine, or you can review links under the “Links” menu on the Army ADR web page. See Appendix 25 for additional references.

Other Mediation Resources

Gaining Experience Mediating Federal Agency Disputes

FEBs and other “Shared Neutral” Programs

Most metropolitan areas of the United States have Federal Executive Boards (FEBs), comprised of the federal agencies with offices in the metropolitan area. Most FEBs maintain “shared neutral” programs. As the name implies, the FEB maintains a roster of trained mediators or other third-party neutrals employed by member agencies and makes them available to other agencies on a reciprocal basis. FEB shared neutral programs provide a good source of mediation services as well as an opportunity to get additional mediation experience in cases arising in other agencies. If your installation has access to an FEB, it may be worthwhile looking into its shared neutrals program. The U.S. Department of Health and Human Services also maintains a large shared neutrals program, accessible on the web at <http://www.hhs.gov/dab/sn/>.

DoD Roster of Neutrals

The DOD Center for ADR manages a roster of neutrals for workplace disputes in all DoD components and agencies. Since its inception in 2005, the roster has grown considerably and includes a wide range of volunteer mediators from many DoD components and the sister services. This roster serves two purposes: providing additional mediation opportunities for DoD mediators who sign up, and providing an extra resource of mediation talent for installations and organizations needing third-party neutral support. For more information, go to www.dod.mil/dodgc/doha/adr/index.html.

Gaining Experience Mediating Private, State, and Local Disputes

Persons who wish to gain experience mediating non-federal agency cases have many options. There are a large number of state, local, and community offices that are looking for trained mediators to provide such services. Some organizations will compensate mediators for their time; others are looking for volunteers. Ensure that off-duty mediation complies with ethical requirements and off-duty employment limitations.

Many colleges and universities as well as private training firms provide training in mediation, ADR, conflict resolution, and other disciplines related to ADR. In addition, the Federal district courts have all instituted court-annexed ADR programs pursuant to the Alternative Dispute Resolution Act of 1998. Some of these programs will provide free training in exchange for a commitment to provide voluntary ADR services for a specified number of days. Check with your local court administrator.

Mediation Training

In the past, Army mediators received mediation training from outside sources, including private vendors, university programs, other federal agencies, and the Defense Equal Opportunity Management Institute (DEOMI). Beginning in 2008, the Army ADR Program Office developed and began deployment of a week-long basic mediation course similar to training programs offered by DEOMI, Air Force, and others. As of 2013, the course curriculum has been revised to provide 30 hours of classroom instruction and evaluated mock mediations using role-play techniques over a four-day period, to develop specific mediation skills. As of 2013, the course has been delivered to approximately 24 different Army audiences at various locations. Beginning in 2013, the Army Basic Mediation Course will be required as part of a new two-week leadership course for all Army CPAC directors through a partnership between CHRA and the Army ADR Program Office. Although not currently offered, the ADR Program Office is also exploring the option of developing an advanced course for experienced mediators, or opening the Air Force advanced mediation course to Army mediators. Mediation training is subject to funds availability

Basic and Advanced Mediation Training

The Basic Mediation Course gives Army personnel an introduction to the facilitative mediation model, interest-based negotiation, techniques for overcoming impasse, active listening skills, confidentiality, and drafting settlement agreements, in a combined 30-hour program consisting of classroom instruction and role-playing exercises in which every student will have the opportunity to mediate at least twice. This course is intended for individuals who will mediate civilian workplace disputes, or whose duties include civilian workplace dispute activity, including EEO complaints, employee grievances and appeals, labor-management disputes, and unfair labor practice charges. There is no tuition or course fee for the Basic Mediation Course.

At the close of the course, students will:

- ✓ Understand which cases lend themselves to mediation and which do not;
- ✓ Understand the mediation process;
- ✓ Be familiar with interest-based negotiations; strategies for re-framing questions and statements made by participants; techniques for overcoming impasses; using “active listening” skills; and “best practices” in preparing for mediation;
- ✓ Understand the scope and limits of confidentiality in mediation;
- ✓ Be able to draft terms of a settlement agreement to effectuate the parties’ agreement and be familiar with settlement drafting guidelines;
- ✓ Be familiar with mediator standards of conduct and how they apply in several situations commonly encountered in a mediation session; and
- ✓ Be familiar with several mediation case studies as well as strategies for successful resolution of ADR cases.

The Army does not have a separate Advanced Mediation Course for experienced mediators. The Air Force has an advanced course which it offers every other year, and has offered seating space for Army attendees who can fund their own attendance. There is no tuition or course fee for the Air Force Advanced Course.

Other ADR/Mediation Training (subject to funding and personnel availability)

Mediation Refresher (1 day [8 hours] for current mediators)

Interest-Based Negotiations (1-2 days for all audiences)

Conflict Coaching (3-4 days for supervisors/managers/dispute resolution specialists—subject to availability)

Collaborative Problem Solving (2 days for all audiences)

Certification of Mediators

Many people think that successful completion of a mediation skills training program and receipt of a diploma or training certificate “certifies” the recipient as competent as a mediator. But almost all basic mediation training programs consisting of classroom instruction and role-play exercises are simply not sufficient to provide the level of experience necessary to competently mediate disputes without assistance. Accordingly, mediation training certificates certify successful completion of the training, nothing more. Minimal competence as a mediator requires actual experience in real disputes, not just classroom role-plays. Therefore, newly trained mediators should be required to participate in at least three actual mediations under the supervision of an experienced mediator before striking out on their own. Co-mediation or mentored mediation, either of

which gives the new mediator the opportunity to exercise the mediation skills learned in training under the helpful eye of a trained and experienced mediator, are necessary before a mediator is ready to mediate cases on his or her own.

The Army ADR Program Office will certify an Army mediator who:

- Has successfully completed the Army Basic Mediation Course, Air Force Basic Mediation Course, or Defense Equal Opportunity Management Institute (DEOMI) Mediation Course; or
- Has successfully completed a comparable mediation skills course offered by another public or private entity that provides at least 30 hours of classroom and role-play mediation skills training;
- Has mediated or co-mediated a minimum three actual workplace disputes, preferably for an Army or other DoD activity; and
- Receives a favorable recommendation from the ADR program manager, mediator roster manager, or other person responsible for managing mediation assets at the mediator's location.

Requests for certification may be sent to the ADR Program Office at usarmy.pentagon.hqda-ogc.mbx.adr@mail.mil, or by FAX to 703-614-8073, or by mail to OGC-ADR, 104 Army Pentagon, Washington DC 20310-0104, ATTN: ADR. Include full name of mediator, recommendation, evidence of having met training and experience requirements, and mailing address to which the certificate will be sent. Certification is good for four years and may be renewed.

Certification does not confer any special status or official recognition of expertise. Rather, it acknowledges and informs that the certificate holder meets or exceeds the minimum standards of training and experience expected of an Army mediator, and enjoys the trust and confidence of the roster manager, EEO Officer, ADR administrator, or other official who manages the mediator's services in Army workplace disputes.

PART TWO

MEDIATION TOOLS

Tools

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SECTION 1

TOOLS FOR THE ADR ADMINISTRATOR

Confidential

Certain information herein, if made for the purpose of an ADR proceeding or if provided in confidence, may be protected from voluntary or compulsory disclosure by the Administrative Dispute Resolution Act, 5 U.S.C. 574. Information so protected is subject to withholding under exemption (b)(3) of the Freedom of Information Act, 5 U.S.C. 552(b)(3).

MEDIATOR CASE MANAGEMENT WORKSHEET

I. INFORMATION ABOUT THE PARTIES

Name of Employee (Claimant): _____

Position and grade or rank: _____

Address: _____

Phone number: _____ Home phone (optional): _____
Fax number: _____ Duty Hours: _____
Email: _____

Name of Management Official: _____

Position and grade or rank: _____

Address: _____

Phone number: _____ Home Phone (optional): _____
Fax number: _____ Duty Hours: _____
Email: _____

Dates Claimant Available: _____

Dates Management Official(s) Available: _____

What is the agreed-upon time and place for the mediation conference? _____

II. BRIEF DESCRIPTION OF THE ISSUE(S) IN CONTROVERSY

Claimant's Information

1. What is (are) the issue(s) in dispute?

2. What management official(s) is/are involved in the controversies? How are they involved?

Respondent's Information

1. What is (are) the issue(s) in dispute?

2. Who has settlement authority in this matter?

3. Who will need to be consulted if an acceptable settlement agreement is crafted? (It is recommended that you obtain the name, office and phone number of these individuals to ensure they are available by phone during the mediation session to ensure any proposed terms in the settlement agreement will be supported by these officials. The legal and personnel offices are a good start.)

III. SCHEDULING THE MEDIATION: ACCOUNTING FOR SPECIAL NEEDS OF THE PARTIES AND THEIR REPRESENTATIVES, IF ANY

1. Does either party have a disability that may require special considerations such as an access ramp, interpreter, or special equipment? If so, what accommodations are needed?

2. Does either party currently plan to bring a representative (attorney or non-attorney) to this session? If so, who are they? What is their expected role?

3. **Name of Representative for Claimant:** _____

4. Representative's address: _____

5. Phone number: _____ Home Phone (optional): _____
Fax number: _____ Duty hours: _____
Email: _____

6. **Army Attorney or other representative for management:** _____

Office address: _____

Phone number: _____ Home Phone (optional): _____
Fax number: _____ Duty hours: _____
Email: _____

7. Who is the Army point of contact for reservation of the mediation conference room?

Phone number: _____ Home Phone (optional): _____ Fax
number: _____ Duty Hours: _____ Email: _____

IV. RECOMMENDED POINTS TO COVER WHEN EXPLAINING WHAT MEDIATION IS AND YOUR ROLE IN THE PROCESS.

_____ Claimant does not waive his/her right to pursue or resume other available dispute resolution processes by attempting mediation. If mediation does not succeed, the claimant may pursue or resume the formal process *as long as applicable time limits are met*.

NOTE: IF THE CLAIMANT ASKS WHAT THE APPLICABLE TIME LIMITS ARE, PLEASE REFER HIM/HER TO THE APPROPRIATE OFFICE TO OBTAIN THIS INFORMATION.

_____ Mediation is a voluntary process. Mediation and any resulting settlement agreement depend on the voluntary agreement of the parties.

_____ Mediation is a confidential process. With some exceptions, statements made in mediation cannot be disclosed to others and are protected from compulsory processes like discovery and subpoenas.

_____ Describe and explain the caucus: how it works and why it makes mediation a powerful dispute resolution process. Emphasize confidentiality of statements made during caucus.

_____ Mediation is not a legal proceeding so normal court rules or procedure and evidence do not apply.

_____ Mediation is an impartial process intended to help the parties resolve their dispute themselves. Mediators are not judges; they do not determine who is right as a matter of law, nor do they

provide legal counsel or advice to either party. As neutrals, mediators are forbidden from favoring one side over the other.

_____ Parties have a right to bring legal counsel or any other type of representative to the mediation session if they so choose.

_____ During the mediation session, either party is free to consult lawyers or other experts to ensure terms and conditions of a settlement are legal and that the parties have the authority to agree to them.

_____ The goal of mediation is to reach a resolution of the issues in controversy, and to memorialize that resolution in a clearly written agreement acceptable to both parties.

_____ The written agreement, when reviewed for legal sufficiency and determined to be properly authorized, is intended to be binding. **[Remind the parties that the written settlement agreement may require a management and legal review before it becomes binding on the Government. Settlement Agreements that result from mediations are enforceable to the same extent and using the same processes as any other administrative settlement for the type of dispute that gave rise to the claim.]**

_____ Sessions typically last about four hours, but can go longer, so parties should be advised to allow a full uninterrupted day (eight hours) for the mediation session.

V. BEST PRACTICES CHECKLIST

THE FOLLOWING SHOULD BE COMPLETED BY THE MEDIATOR OR CASE INTAKE OFFICIAL

<u>Action</u>	<u>Dates</u>
1. If employee's position is included in the bargaining unit, verify that ADR has been negotiated and any bargaining obligations have been met.	_____
2. Explained mediation process to Claimant.	_____
3. Explained mediation process to Management Official.	_____
4. Determined the dispute is/is not appropriate for mediation. If not appropriate, give reason(s).	_____
5. Ensured that if one party plans to bring a representative to the mediation that the other party is notified of this.	_____
6. Reserved a conference room in a neutral location on the date and for the time (4-8 hours) set aside by both parties.	_____
7. Mailed or faxed mediation process letter to Claimant and Management Official at least 48 hours prior to the mediation.	_____

8. Obtained written confirmation from Claimant and Management Official that each understands and agrees to the mediation process specified in the letter. _____
9. Confirmed availability of the mediation conference room prior to the mediation session. _____
10. Confirmed Army subject matter experts are available by phone during the time scheduled for mediation to provide legal, policy, or practical advice regarding potential settlement options or terms. _____
11. Made arrangements with relevant management officials and Army attorneys for an *expedited review* of the settlement agreement after mediation. _____
12. Ensured appropriate accommodation if a disability or special need is identified by any of the parties. _____

THE FOLLOWING ARE TO BE COMPLETED BY THE MEDIATOR ONLY

13. Conducted the mediation. _____
14. Completed settlement agreement coordination process. _____
15. Prepared and submitted the mediation result and lessons-learned report (if required). _____

ALTERNATIVE DISPUTE RESOLUTION QUESTIONNAIRE

In an effort to improve the Alternative Dispute Resolution (ADR) program, we would like to understand why you did not choose to participate in ADR to resolve your dispute. Your responses are confidential—your name and phone number are optional. By including that information, however, follow-up discussions may be held to ensure we understand your responses.

Instructions: Please return this document to: _____

Section I

1. Your role in the dispute:

- Employee
- Manager

2. Type of dispute:

- Equal Employment Opportunity (EEO)
- Negotiated Grievance
- Administrative Grievance
- Merit Systems Protection Board (MSPB) appeal
- Other

3. Reason(s) why you did not elect ADR (select all that apply):

- Was not offered ADR
- Did not understand ADR process
- Prior experience with ADR was not positive
- Did not think ADR sounded worthwhile
- Felt intimidated by the prospect of speaking face-to-face
- Had no interest in negotiating because case is too strong
- Do not think the specific ADR process (mediation) offered is appropriate
- Was advised by someone not to use ADR

4. If you were advised not to use ADR, who advised you?

- Friend
- Co-Worker
- Family Member
- Legal Counsel
- Union Representative
- Other

5. Additional comments regarding your decision not to participate in ADR: _____

Section II

6. Have you previously participated in ADR? Yes No

7. If yes, type of dispute:

- EEO
- Negotiated Grievance
- Administrative Grievance
- MSPB appeal
- Other

8. Please describe your experience – include specific positive or negative aspects of that ADR:

Section III

Name (*Optional*): _____

Phone number (*Optional*): _____

Section IV

9. Additional Comments:

Your responses are confidential. Thank you for helping improve the ADR program.

Concepts for Parties New to Mediation

Mediation. Mediation is an informal and confidential dispute resolution process in which a specially trained neutral third party (the mediator) assists the parties to resolve their differences by mutual agreement. The mediator has no authority to impose a decision on the parties or dictate settlement terms. This means parties are free to reject any settlement proposal they do not agree with, and can withdraw from mediation at any point if no agreement is reached.

Commitment. While no one is asked to commit to settle the case in advance of mediation, all parties should commit to a good faith effort to participate in the proceedings with the goal of settling the dispute. If settlement is reached, all parties are expected to commit to the terms of the agreement once it is signed and finalized.

Mediator. The mediator is a neutral, impartial individual, specially trained in mediation skills, whose role is to help the parties try to resolve their differences. The parties consent to the appointment of the individual named as the mediator in their case. Consent may be revoked if the mediator fails to meet his or her responsibilities, including conflicts of interest and the duty of impartiality. The mediator facilitates settlement discussions and applies his or her best efforts to assist the parties in reaching a mutually acceptable resolution of the dispute.

Mediator's Responsibilities. The mediator will not serve as a mediator in any dispute in which he or she has any financial or personal interest in the result of the mediation. Prior to accepting the appointment, the mediator is to disclose any circumstances likely to create a perception or presumption of bias or prevent a prompt meeting with the parties.

Limit of Mediator's Authority. The mediator does not have the authority to decide any issues for the parties, but does attempt to facilitate the parties' voluntary resolution of the dispute. The mediator is authorized to conduct joint and separate meetings with the parties and may ask questions and offer suggestions, including possible settlement options, designed to help the parties to achieve a resolution. If necessary, the mediator may also obtain expert advice concerning technical aspects of the dispute. Arrangements for obtaining such advice are made by the mediator through the individual or office that convened the mediation.

Mediation Participants. The parties or their representatives must have the authority to settle the issues. Everyone necessary to the settlement decision shall be present or readily available for consultation. Participation by non-parties is generally within the discretion of the mediator. In cases involving union participation pursuant to "formal discussion" rights (as opposed to participation as a party or party representative), the mediator should consult with the servicing CPAC or legal office.

Representatives. Representatives are optional for the parties; however, if the claimant has a representative present, the management official should also be allowed to have a representative if desired. Representatives may participate on behalf of the parties, but the mediation process is for the parties themselves and they are expected to actively participate as well.

Parties' Responsibility. The parties understand that the mediator cannot and shall not impose a settlement in their dispute. **The parties are responsible for negotiating a mutually acceptable settlement.** However, the mediator will make every effort to facilitate the negotiations. The mediator does not warrant or guarantee that settlement will result from the mediation process.

Matters in Dispute. At or before the first session (preferably before), the mediator should be informed of the matters in dispute that are intended for resolution in the mediation. This will greatly assist the mediator (and the parties) in understanding the issues in dispute, and will help focus the discussion on those issues.

Privacy. Mediation sessions are private. Only the parties and their representatives, if any, may attend the session. Other people, such as mediator trainees, attend with the consent of the mediator and the parties. However, note the discussion of union participation in “Mediation Participants” above.

Confidentiality. Confidentiality is a critical part of mediation. Confidential information disclosed to a mediator by the parties in the course of the mediation will not be divulged by the mediator, nor will the mediator be called as a witness to testify as to confidential matters discussed in mediation. The parties as well are expected to maintain the confidentiality of the mediation and shall not rely on or introduce as evidence in any administrative or judicial proceedings: (a) views expressed or suggestions made by the other party with respect to a possible settlement of the dispute; (b) admissions made by either party in the course of the mediation proceeding; (c) proposals made or views expressed by the mediator; or (d) the fact that the other party did or did not indicate a willingness to accept a proposal for settlement made by the mediator.

Evidence. Mediation is not a legal proceeding. Witnesses are not examined, there is no sworn testimony, and rules of evidence do not apply. However, parties are welcome to bring documentation into mediation if they feel it is useful to support or illustrate their position. Parties (and their representatives, if any) should understand that while candor and openness are encouraged in mediation, it is up to each of them to decide what to say and what types of evidence to bring and present at the mediation session. This is not a trial, but a settlement conference and the parties involved should be most familiar with the dispute and have full authority to settle.

Agreements. If an agreement is reached, the parties may decide to voluntarily relinquish or compromise certain rights, but they will do so only after going through the process and voluntarily deciding that the agreement developed is an acceptable resolution to the dispute. Parties may wish to have a lawyer and/or management official review the proposed agreement prior to signing. Proposed Army settlement agreements (in EEO cases) must receive legal sufficiency reviews prior to parties signing the agreement. No party participant in mediation may be compelled to accept any term of settlement with which the participant disagrees.

No Records. There shall be no stenographic record of the mediation process and no one shall record any portion of the mediation session. All notes taken during the conference will be collected by the mediator at the conclusion of the mediation and destroyed.

Termination. The mediation shall be terminated either by the execution of a settlement agreement by the parties or by declaration of the mediator of an impasse. Impasse can be based on a determination by the mediator that further negotiation would be futile, or on a withdrawal from mediation by one or both parties.

**FACT SHEET ON ALTERNATIVE DISPUTE RESOLUTION (ADR)
FOR EEO COMPLAINTS**

1. What is ADR? Alternative Dispute Resolution, or ADR, is a term that refers to a variety of processes to resolve disputes without litigation in court or other formal tribunal. Almost all ADR processes are non-adversarial, meaning the parties work together to find a solution to their dispute. All ADR processes employ a trained, neutral third party to assist the parties resolve the dispute. Common ADR processes include mediation, facilitation, conciliation, fact-finding, and neutral evaluation. Arbitration is also an ADR process, one of the oldest in fact, but the use of binding arbitration to resolve disputes involving federal agencies is severely limited.

2. What is the Army ADR policy? It is Army policy to encourage the voluntary use of ADR processes, such as mediation, whenever appropriate, to resolve disputes at the earliest stage feasible, by the fastest and least expensive method possible, and at the lowest possible organizational level. Use of these techniques may resolve the entire issue in controversy or a portion of the issue in controversy. See Secretary of the Army Memorandum, SUBJECT: Army ADR Policy, dated 22 June 2007 (http://ogc.hqda.pentagon.mil/ADR/Documents/SECARMY_ADR_Policy.pdf).

3. What ADR resources are available? ADR is authorized as an alternative process for resolving both informal and formal claims of discrimination that are submitted to the Army under Equal Employment Opportunity Commission (EEOC) rules and Army Regulation 690-600. Therefore, Army EEO offices are obligated to make ADR resources available in appropriate cases to those who want to use ADR to resolve their EEO claim. This means qualified mediators, either local mediators, or outside mediators from other DoD organizations or non-DoD federal agencies. Whatever the source, mediators are provided at no charge to the parties.

4. What type of ADR will be used? Facilitative mediation is the preferred mediation process for resolving Army EEO complaints, at both the precomplaint and formal complaint stages. Facilitative mediation is a confidential process in which a neutral third party, the mediator, helps the parties to find a mutually agreeable resolution of the issues in dispute. While the mediator exercises a degree of control over the process in order to facilitate the discussion and maintain decorum, he or she does not evaluate the legal merits of each party's case, impose a decision, or in any way direct the outcome of the mediation. As a voluntary process, mediation can be terminated by either party at any time prior to executing a binding settlement agreement. Fortunately, most mediations end with an agreement satisfactory to both sides, without the expense, delay and acrimony of litigation.

5. How does ADR fit in with EEO complaint processing procedures? In general, persons who have a complaint of discrimination against a federal agency (including the Army) must pursue an administrative complaint process before filing a lawsuit. This process begins with an informal 30-day counseling procedure, involving case intake, counselor inquiry and other fact-gathering or claim resolution activities. This period can be extended for not more than 60 days with the Complainant's consent. If the aggrieved and management agree to use ADR instead of the informal counseling procedure, this period is automatically extended to 90 days. If ADR does not resolve the claim (i.e., result in settlement), the aggrieved has the right to file a formal complaint. If a formal complaint is filed, the agency has 180 days to investigate the complaint, after which the Complainant can request a hearing before the EEOC, a decision on the merits without a hearing, or file a lawsuit in federal

court. The EEOC hearing process generally takes a year or more before a decision is rendered, and can take much longer if there are appeals. ADR is authorized for use in the formal complaint process. If used, the ADR procedure may result in resolution of the complaint much earlier than the formal process would. Mediation of a formal complaint is voluntary, and parties are not obligated to settle. But more often than not, they do settle, thus avoiding the additional time, expense, and uncertainty of the traditional formal complaint procedures. If ADR is made available for a formal EEO complaint, it can be attempted at any point during the Army's processing of the complaint, prior to issuance of a final agency decision.

6. If I agree to mediation, where does my mediator come from? The Army has invested time, money, and training to develop internal mediators. At most installations, there are trained mediators to assist parties. In addition, DoD maintains a cadre of trained and experienced mediators in the division responsible for investigating EEO complaints, and it also maintains a roster of mediators worldwide who are available at no cost to the requesting organization (other than any travel expenses). In addition, Army installations near a Federal Executive Board can avail themselves of the FEB's "Shared Neutrals Program," a roster of local federal agency mediators who are available to mediate cases on a reciprocal basis. Several installations also have cooperative arrangements with local court mediation programs to provide no-charge mediation services on a reciprocal basis. Not only is this a good source of mediation talent; it provides additional mediation opportunities for Army mediators to hone their problem-solving skills!

7. Is ADR right for every case? The Army can't exclude from ADR every claim based on a particular basis for the complaint. For example, the Army could not declare all religious discrimination claims ineligible for ADR. But it can and should evaluate individual complaints to determine whether ADR is appropriate *in that case*. Not all cases are appropriate for ADR. For example, a case may not be right for ADR because it involves a significant unsettled legal issue that only litigation can resolve, or its resolution would unduly affect the rights of non-parties (who didn't agree to the resolution), or a public record of the proceedings is required (ADR is confidential—no public record is permitted). In addition, cases involving allegations of criminal wrongdoing, or fraud, waste and abuse, may be inappropriate for ADR. A decision by the Army not to pursue ADR in a particular case is not appealable to the EEOC or the courts. Fortunately, most EEO complaints don't present any circumstances that would disqualify them from ADR.

8. Can I be forced into ADR? No. The decision to participate in ADR is a voluntary choice for the aggrieved/Complainant and the Army activity. Managers and supervisors have an obligation to cooperate in the ADR process once the decision has been made to engage in ADR. ***The decision to engage in ADR does not obligate any participant to settle or accept any term that is objectionable!*** Once ADR has begun, it can be terminated by either party. If ADR is terminated or is otherwise unsuccessful in the informal precomplaint stage, the aggrieved has the right to file a formal complaint of discrimination. In the formal complaint process, termination of ADR without a settlement does not affect further processing of the complaint. If ADR does not settle the complaint, anything discussed in the ADR process cannot be used in any subsequent administrative or judicial proceeding.

9. Am I entitled to representation in ADR? You have the right to representation of your choice unless the representation would pose a conflict with the official or collateral duties of the representative. Your right to have a representative remains in effect during your participation in ADR. Be aware, however, that representatives in informal precomplaint mediation are typically *discouraged* because of the informal nature of the process. If representatives do participate, the mediator has the right to set ground rules regulating their participation.

10. What other requirements should I know about? In addition to the core principle of voluntariness, the Army is committed to providing ADR proceedings that reflect **confidentiality**, **neutrality**, and **enforceability**. *Confidentiality* applies to communications between parties and the mediator as part of mediation proceedings, where there is an intent or expectation that those communications will not be disclosed to others unless disclosure is authorized or required by law. *Neutrality* is a cornerstone of any ADR program. Neutrals must remain impartial at all times; they may exhibit no bias in favor of either party, under any circumstances. Mediators are expected to conform to the standards of conduct reflected in the model Mediator Standards of Conduct, as supplemented for federal sector mediators (http://www.adr.gov/pdf/final_manual.pdf). Finally, *enforceability* is crucial. Without the ability to enforce agreements reached through ADR, the process is useless. Settlements must be enforceable! When reached, settlements are reduced to writing, and they should include appropriate safeguards and procedures for individuals if they believe that the terms of a particular written agreement have not been implemented. EEOC complaint procedures require all settlement agreements to be in writing, and they provide a mechanism for seeking relief in the event of a claim of breach.

ADR CASE EVALUATION WORKSHEET

Note: All eligible workplace disputes should be evaluated to determine whether mediation, or some other ADR process, is appropriate for resolving the dispute. While ADR is usually appropriate to resolve a workplace dispute, there may be cases where ADR is not the best or an appropriate solution. The Administrative Dispute Resolution Act of 1996, 5 U.S.C. § 572(b), list six situations in which an agency should consider not using ADR; there may be others as well. Use the following checklist to determine whether ADR is appropriate or not for a particular dispute. Keep in mind that the existence of one or more of these circumstances does not prohibit the use of ADR in any case.

A determination that ADR is not appropriate for a dispute is ultimately the commander’s responsibility, but may be delegated, for example, to the EEO officer. Activities may also use a team approach to appropriateness determinations, utilizing CPAC or HR, Legal, EEO, and others as deemed necessary. A determination that ADR is *not* appropriate for a particular dispute should be made in writing, citing the specific factor(s) relied upon. ADR appropriateness determinations are made by the agency, and are not appealable. However, the agency may always reconsider a prior determination.

<u>Factor</u>	<u>Yes</u>	<u>No</u>
1. A definitive or authoritative decision is needed as precedent, and an ADR proceeding would not be accepted as precedent.	_____	_____
2. The matter involves or bears upon development of government policy that requires additional procedures before final resolution, and ADR would not serve to develop that policy.	_____	_____
3. Maintaining consistency among established government policies is of special importance, and ADR would not likely reach consistent results among individual outcomes.	_____	_____
4. The matter significantly affects persons or organizations that are not parties to the proceedings.	_____	_____
5. Development of a full public record is important and ADR cannot produce such a record.	_____	_____
6. The matter is one in which the agency must maintain continuing jurisdiction to alter the disposition based on changed circumstances (most applicable to agencies with independent regulatory authority over other agencies or the public).	_____	_____
7. The matter involves non-severable allegations of criminal misconduct or fraud, waste or abuse that are under the jurisdiction of law enforcement or prosecutorial authorities, or Inspector General.	_____	_____

8. The matter involves military personnel issues exclusively, and ADR would adversely impact command prerogatives. _____

9. The matter involves a complaint under Article 138 of the UCMJ, or a request for investigation of a sexual harassment allegation under 5 U.S.C. § 1561, or other allegation(s) under investigation pursuant to AR 20-1, Chapter 7 (IG investigations) or AR 15-6 (command-directed investigations) _____

10. The matter is in litigation and can be disposed of expeditiously through motion or other means. _____

11. The matter is one in which there is substantial evidence that it was initiated by the claimant solely to harass or intimidate or otherwise flagrantly abuse the process. _____

12. Logistical constraints exist that would make a viable ADR proceeding difficult or impossible, and no reasonable means exist for eliminating or mitigating these constraints (identify both the constraint and the means considered). _____

13. Other reason(s) ADR is found to be inappropriate. Specify reason(s): _____

NOTE: A “Yes” answer to any of the above *justifies*, but does not *compel*, a decision not to offer ADR, or to reject a request for ADR.

SAMPLE
MEDIATION MEMORANDUM

[Date]

TRANSMITTED VIA FACSIMILE/EMAIL

COMPLAINANT/COMPLAINANT
[Address]

MANAGEMENT OFFICIAL
[Address]

Re: Mediation Conference Between _____
[Complainant/Complainant] and _____ [Management
Official]

Dear: _____ [Complainant/Complainant] and _____
[Management Official],

This memorandum is to affirm your agreement to mediate your dispute, and to confirm the scheduling of the mediation conference. As we discussed, mediation is a voluntary, informal, and confidential process to resolve disputes. Because mediation may be new to you, I thought you should know what to expect.

A. Mediation Conference: Schedule and Expected Duration

The mediator, (Name), will conduct the mediation at the location and time shown on the last page of this memorandum. It is not unusual for the mediation session to last 4-6 hours, and sometimes more. Therefore, plan a full day (8 hours) for the mediation session. If this amount of time is not possible, please advise me immediately and I will reschedule the mediation for another day or time.

B. What is Mediation and How Does it Work?

Mediation is not a legal proceeding. The mediator ***does not*** serve as a judge or decision official, or provide legal advice or legal counsel to either party with respect to the issues in controversy. By agreeing to mediation, _____ [name of Complainant/Complainant] ***is not*** waiving his/her right to proceed with any formal legal dispute resolution process that is otherwise available, provided that he or she complies with applicable time limits. Accordingly, if either party is unsure of the applicable time standards for filing a complaint, grievance, or other claim, please be sure to check with your counsel/representative or the appropriate agency officials.

Success in mediation depends on all participants being prepared to participate fully and in good faith in the mediation process, including presenting documentation you feel is necessary to support your position. Because mediation honors the parties' right to ***self-determination***, neither party is required to agree to any particular terms of settlement or to settle at all. However, each party is expected to constructively contribute to the session and to make an honest and genuine effort to reach resolution of the issue(s) in controversy.

1. Phases of the Mediation Conference.

The mediation conference begins with an opening statement from the mediator regarding his or her role as a neutral. The mediator is not an advocate or legal representative for or against either party, nor is the mediator a judge whose role is to render a decision for or against either side. The mediator's role is merely to assist the help the parties attempt to find a joint solution to the issues in controversy. After the mediator's opening remarks, the Claimant (the Employee) will have an opportunity to tell the mediator and the management official, in his/her own words, about the claim and the remedy he/she is seeking. The management official will then have the opportunity to present management's side of the dispute. After the opening statements, the parties will enter into a joint discussion where clarifying questions can be asked, and potential solutions, if any, can be discussed.

At some point in the proceedings, the mediator may ask to meet privately (caucus) with each participant. Depending on the issues and the progress or lack of progress, the mediator may caucus with each participant more than once. Information discussed in your caucus that is given to the mediator in confidence will not be shared with anyone else, including the other participant, subject to the limitations discussed below. Following the caucuses, the mediator may reconvene the joint session and determine if there is any area of agreement on any issue. If not, the parties will continue to negotiate, possibly re-caucusing with the mediator until it is clear that a settlement is or is not going to emerge at this session. Either party will be free to consult with appropriate legal, union, or management representatives to apprise them of their legal rights, appropriate courses of action, or authority to agree to proposed settlement terms. In addition, each party has a right to have a personal representative of their choosing and, if applicable, at their own expense.

If a settlement is reached, a written agreement incorporating the terms of settlement will be drafted for review and signature by the parties and their representatives. Appropriate management or legal personnel also will need to review and approve the settlement terms before the agreement is signed.

A signed settlement agreement is intended to be binding on the parties. Accordingly, the agreement can generally be used as evidence in a later proceeding in which either of the parties alleges a breach of the agreement. It is also important that the participants understand that any written agreement reached during the course of the mediation could eventually become a public record.

2. Confidentiality.

Mediation is a confidential process. As a federal administrative dispute resolution proceeding, this mediation is protected by the confidentiality protections in the Administrative Dispute Resolution Act, 5 U.S.C. § 574. ***If you tell me something in private, or ask me to keep it confidential, I am bound by law not to disclose this information.*** There are ***some exceptions*** to this rule, but I do not expect them to arise during our mediation. For example, if you acknowledge to me committing a criminal act, or an act of fraud, waste, or abuse, or you threaten physical harm to another, I may be required to report this information to appropriate authorities, irrespective of confidentiality. Another example is if a judge determines, after an appropriate proceeding is held, that disclosure of our private confidential discussions is necessary to prevent a manifest injustice, or establish a violation of law, or prevent harm to the public health or safety, I may be required by the court to disclose our private discussions.

If this mediation involves an EEO matter (informal pre-complaint or formal complaint), you agree that any oral or written statements made for the purpose of and during this mediation, including communications made during all joint sessions, will be treated as confidential and will not be voluntarily disclosed to anyone outside this mediation.

Having said that, I want you to please remember that facts that were discoverable before the mediation session commenced do not become confidential merely because they were presented during a mediation

conference. Additionally, neither the agreement to mediate that you will sign, nor any resulting settlement agreement, is confidential, and may be disclosed to others as provided by law.

You must agree that, should this mediation not resolve your dispute, you will not request information from me in any future legal proceeding, nor will you call or subpoena me as a witness to disclose any information that was discussed in this mediation. The only exception is if you have a specific dispute with me regarding my actions as the mediator in this process, and only then to the extent necessary to resolve the dispute. If anyone asks or directs me to disclose confidential information from this mediation, I am required by law to notify you of the demand. You have 15 calendar days after this notice to inform me whether you intend to defend against my disclosing the information requested, or any objection to disclosure is deemed to be waived. Should I have to notify you of such a request or demand for information, you should immediately consult your labor counselor or HR specialist to determine how to proceed.

3. Your Right to Representation.

Either party may choose to come to the mediation conference alone, with a representative, or with legal counsel, subject to locally negotiated policies for bargaining unit employees. If you plan to have a representative present, I ***must*** be informed of this in advance of the mediation conference so that the other party has the opportunity to bring a representative as well. ***Failure to notify me of your intent to bring a representative prior to the mediation conference could lead to a cancellation of this mediation.***

4. Mediation Time and Location. The mediation conference is scheduled to begin on **(Date and Time)** at **(Location)**. Please plan to arrive at least 15 minutes early so that we can start on time. Contact (Name and contact info of ADR POC) if you need directions or other assistance.

C. Conclusion

To sum up, mediation is an informal process designed to achieve a solution to the problem which satisfies all parties and negates the need for further legal action on anyone's behalf, aside from those steps that may be agreed to as part of a settlement agreement. I congratulate you for agreeing to participate in mediation, and look forward to working with you in your efforts to resolve the dispute to everyone's satisfaction.

Mediator Signature and Contact Information

[NOTE: May be modified to be issued by the Mediation Intake Official, Convenor, or other authorized person, in lieu of the Mediator.]

**SAMPLE
AGREEMENT TO MEDIATE**

(To be read in conjunction with the mediation memorandum at Appendix 6)

1. I have received the mediation memorandum dated _____ from _____
[name of mediator] confirming my agreement to participate in a mediation conference at the location, date, and time listed in that letter. I have set aside 8 hours to accommodate mediation.
2. I have read and understand the mediation process described in the mediation memorandum I received from the mediator. If mediation does not succeed in resolving this dispute, I understand that other available procedures for resolving the dispute may be pursued or resumed ***as long as applicable time limits are met.***
3. I understand and agree that the entire mediation session is a compromise negotiation, meaning it is undertaken in an effort to reach a voluntary settlement of all issues in controversy. All promises, proposals, conduct, and statements made in the course of the mediation session are confidential and will not be voluntarily disclosed by any party for any purpose. See 5 U.S.C. § 574; Federal Rule of Evidence 408. The Claimant also agrees he/she will not disclose or discuss any settlement of the claim(s) with other agency employees (except his or her representative and responsible management personnel).
4. _____ I will _____ I will not have a representative present at this mediation session. (If applicable) My representative's name, phone and address is:

5. I agree to participate in mediation in accordance with the terms of the mediator's memorandum.

Name

Title

Date

Please sign and fax or deliver to your mediator or other ADR POC as soon as possible!

SAMPLE ADR CUSTOMER FEEDBACK FORM

[NOTE: This sample form is intended to illustrate useful information for acquiring and assessing feedback from ADR participants. Its use is entirely voluntary, and it may be freely modified. If you use this sample form “as is,” please be sure to remove this NOTE first!]

We strive to make mediation a pleasant and useful experience for participants, regardless of outcome. Please take a few minutes to provide constructive feedback regarding your experience. Your responses are confidential and are used for quality assurance purposes only.

Date Parties Agreed to Use ADR: _____ Date ADR Completed: _____ Time ADR Started: _____ Time ADR Ended: _____	Case Number (if any): _____ Neutral: _____
--	---

1. What was your role in the case? Employee Union Agency Other (Please specify) _____

2. How would you compare the amount of time taken to resolve this case using the ADR process compared with what you believe would have been required if a formal dispute resolution had been used to resolve this dispute? ADR was:

 Significantly faster Somewhat faster Same amount of time Somewhat slower Significantly slower Don't know

3. **ADR Process** - The following questions concern your experience with the ADR Process. Please tell us how satisfied you were with each of the following features of the process. (For each feature, check the column corresponding to your opinion)

Feature	Very Satisfied	Satisfied	Neutral	Dissatisfied	Very Dissatisfied
1. Amount of information you received about the process.					
2. Amount of control you had over the process.					
3. Opportunity to present your side of the dispute.					
4. Fairness of the process.					
5. Overall outcome of the process.					
6. Speed with which the dispute was resolved.					
7. Outcome of the process compared to what you expected it to be before it took place.					
8. Overall, how satisfied were you with the ADR process?					

4. **Mediator/Facilitator:** Please take a moment to evaluate your mediator/facilitator using the chart on the next page. For each quality/behavior, check the box corresponding to your opinion. If you rate any quality or behavior “Fair” or “Poor,” we invite you to tell us why in the comments section (question 8) below.

	Excellent	Good	Average	Fair	Poor
1. Neutrality (Did the mediator/facilitator have the appearance of impartiality, without favoritism or bias?)					
2. Communication (How well did the mediator/facilitator facilitate communication between the parties?)					
3. Managing the ADR Process (Did the mediator/facilitator effectively handle conflicts, suggest movement ideas, propose problem-solving solutions?)					
4. Patience (Did the mediator/facilitator devote the necessary time and attention to the parties to keep the process moving without appearing to rush or be in a hurry to complete the process?)					
5. Expertise (Did the mediator/facilitator demonstrate the necessary expertise to mediate this type of dispute?)					
6. Facilitative Abilities (Did the mediator/facilitator ask relevant questions to seek out pertinent information and keep the process moving forward?)					
7. Overall Ability of the Mediator/Facilitator in General					

5. Outcome of the Mediation (Please check one): **Full Settlement** **Partial Settlement** **Did not Settle**

6. Would you recommend this process to others? **Yes** **No**

If you answered “no,” please state reason(s):

7. Would you recommend this Mediator/Facilitator for future mediations? **Yes** **No**

If you answered “no,” please state reason(s):

8. Other Comments (optional):

Thanks for your feedback! We want the mediation experience to be productive and successful for everyone, and your comments help us to meet that goal.

SECTION 2

TOOLS FOR THE MEDIATOR

**MEDIATOR'S OPENING STATEMENT CHECKLIST
(MAY BE MODIFIED TO SUIT MEDIATOR'S PREFERENCE)**

	INTRODUCTIONS: Introduce yourself; have each party (and rep, if applicable) introduce themselves if they haven't already; settle on names for use during sessions.
	SETTLEMENT AUTHORITY: Confirm that both parties have sufficient authority to participate in this mediation, to agree to settlement terms and to sign any settlement agreement. If not, name and availability of person with such authority.
	UNINTERRUPTED TIME: Entire day (8 hours) preferred, 4 hours minimum. Make sure parties commit to that schedule.
	QUALIFY YOURSELF AS A MEDIATOR: Indicate that you are a trained mediator. Clarify your role as a mediator as opposed to your professional role (e.g., lawyer, LMER).
	ASSERT YOUR NEUTRALITY: Explain to the participants that you do not represent either side; you're neutral and impartial, and will not favor either party.
	CONFLICTS: Disclose any personal or professional relationship or acquaintance with either party (or representative). If there are none, say so. Any other possible conflicts? If so, disclose and have parties decide if you stay.
	GOAL OF MEDIATION: Goal is to resolve dispute through mutual agreement. Good faith participation is expected from both parties, however, neither party is obligated to accept any term or proposal unless it's voluntarily agreed to.
	MEDIATION IS NOT A LEGAL PROCEEDING: You are not bound by formal rules of evidence or procedure. Encourage informal discussion.
	AGREEMENT TO MEDIATE: Verify that each participant has signed an agreement to mediate or has received and acknowledged a letter agreeing to mediate; review its terms with the parties to ensure understanding.
	MEDIATION PROCESS: Explain stages of mediation, from openings to joint discussions, CAUCUS, and closure. Explain purpose of caucus w/emphasis on confidentiality.
	MEDIATOR TESTIFYING: Should this case go to a formal administrative or legal hearing, you will not willingly testify for either party regarding information unique to this mediation.

	<p>CONFIDENTIALITY: Explain that matters disclosed to you in mediation are confidential; you may not disclose them, voluntarily or under compulsion, unless required by law. If you are a federal employee, you are required to report fraud, waste & abuse, threats of violence, or criminal misconduct, even if revealed in mediation. Participants are expected to comply with these confidentiality parameters as well. Mediation sessions will not be recorded, and any notes taken during mediation will be destroyed after it's completed. Only information reported at end of mediation is that it was held, the date(s), and whether an agreement was reached or not.</p>
	<p>GROUND RULES: Decorum and civility will be maintained throughout all mediation sessions, joint and caucus; cell phones and other devices will be turned off, or left outside the mediation room; parties will be respectful of each other and the mediator. Discuss break arrangements, logistics, any other procedural aspects you think are important.</p>
	<p>SETTLEMENT AGREEMENT: Explain that any agreement will be reduced to writing, reviewed by appropriate officials for legal sufficiency, etc., then signed by the parties. A copy of the signed agreement will be provided to all parties concerned. Participation in the mediation process does not waive your right to legal or administrative proceedings in the event that you do not reach agreement.</p>
	<p>COMMEND PARTIES: Whether agreement is reached or not, commend the parties for voluntarily participating in the mediation process.</p>
	<p>QUESTIONS? Ask if there are any questions regarding anything you covered, or procedures described in your opening. If there are, answer those questions. If not, or if there are no questions, proceed to parties' opening statements.</p>

SAMPLE MEDIATOR'S OPENING STATEMENT
(MAY BE MODIFIED TO SUIT INDIVIDUAL PREFERENCES)

Good afternoon, my name is _____. I am a trained mediator and am qualified to mediate disputes such as the one before us today. My purpose here today is to assist you in the resolution of the dispute that brings us to this table. [Ask each party to identify himself or herself, and ask how they would like to be addressed during the mediation conference.]

Let me begin by stating that I am not acquainted with the parties involved in this dispute. I am not here to represent either side, or any particular position. I will not express opinions or take sides during this process. My goal is to help each of you in reaching a mutually agreeable settlement of this matter. I am not a judge—I have no power to impose a decision on you or to decide how this matter should be settled. This is where mediation differs from other forms of dispute resolution...at all times you are empowered to design a settlement that meets your needs, and addresses your interests. Do either of you have any questions about my role as mediator?

You previously signed (or were presented) a (memorandum or agreement) outlining what you should expect in a mediation session and having you verify that you voluntarily accept the opportunity to participate in mediation. So that you are both comfortable with each other's good intentions, you each (have signed or are prepared to sign) an agreement to freely participate in this process. Your agreement to participate does not obligate you to agree to or accept any particular term or proposal offered by the other party, but it does obligate you to participate in good faith, which means you have agreed to make an honest and conscientious effort to engage in discussions and seek possible options for resolving the dispute here and now. Do each of you understand and agree to this?

I want to remind you that this is not a court of law or a legal proceeding. Therefore, we are not bound by formal rules of procedure or evidence. Although it is my hope and expectation that we will reach a full resolution of this matter here today, if we do not, or if any unresolved issues remain, the dispute may be pursued in any other authorized administrative or judicial forum; this proceeding will in no way delay or interfere with those other processes. If the matter does end up in court or

other tribunal, I will not willingly testify for or against either of you regarding information unique to this conference. Do either of you have any questions about this?

Confidentiality is a critical part of the mediation process. Generally, if you tell me something in private and ask me to keep it confidential, I am bound by law not to disclose this information. As with most rules, there are some exceptions, but I do not expect them to arise during our mediation. For example, if you confess to the commission of a criminal offense, or to an act of fraud, waste, or abuse, or that you plan to commit a violent physical act, I may be required to disclose this information to the appropriate authorities. If a judge determines that disclosure of our private confidential discussions is necessary to prevent a manifest injustice, establish a violation of law, or prevent harm to the public health or safety, we may be required by a court to disclose our private discussions. In addition, information may be disclosed if you, the parties, consent to disclosure in writing.

Having said that, I want you to remember that facts that were discoverable before the mediation session do not become confidential merely because they were presented during a mediation conference. For example, a written statement made before this mediation was convened, which is not confidential, does not become confidential merely because it is presented in this mediation. It is only those things you say or write in confidence to me during the mediation that I will not disclose, unless one of the unusual exceptions I discussed above applies. This means that both the agreement to mediate that you each signed, and any settlement agreement that may result from this mediation, are not confidential. Do either of you have any questions about confidentiality as I have explained it?

Before we begin, let me explain the procedure we will use. When I complete my opening remarks each of you will have the opportunity to make an uninterrupted opening statement to describe the problem as you see it. It is customary for the party that brought the matter to our attention to begin first. Therefore, Mr./Ms. _____, I will ask you to begin. When you have completed your opening remarks, I will ask Mr./Ms. _____ to make an uninterrupted opening statement. At the end of each of your statements I may ask some questions to help clarify or explain matters you raised in your statement.

After opening statements are completed, we will transition into a joint discussion of the dispute, focusing on possible approaches and solutions to the problem. I will ask each of you to think about how you might like to resolve this matter. The purpose of the joint discussion is for each of you to work together in a joint effort to identify the interests you would like to see met, and the possible solutions to meet them. During this discussion, I may ask to meet with each of you separately, in what is called a caucus. The caucus can be used for many purposes, but generally is warranted when joint discussions are no longer moving forward. I use the caucus to help clarify issues or concerns that arise from joint discussion, and to talk candidly about matters that each party may be reluctant to share directly with the other party. Ultimately, the caucus is to help me be of greater assistance in helping you resolve your dispute. I may use the caucus any number of times, and the length of each caucus should not be of concern to either of you. The information you share during the caucus is confidential and will not be shared during joint discussion unless you specifically give consent to such disclosure. I will remind you of this confidentiality at the beginning of each caucus session, and at the end of each caucus session I will ask you what information discussed during caucus, if any, that you (want, or do not want) me to share with the other side. Do either of you have any questions about the procedure we will use or the caucus?

As I said, whether to resolve your dispute is entirely up to you, but I am confident that you will resolve your differences today. When you reach agreement, it will be reduced to writing, reviewed for legal sufficiency, and signed by each of you. Each of you will be provided with a copy of the agreement and I will go over it with you to ensure that the agreement as written accurately reflects your entire agreement.

During the mediation you may wish to take notes. If you leave the room, please take your notes with you or turn them over. At the conclusion of the mediation, whether settlement is reached or not, I would like to collect and destroy these notes (including my own), so as to protect confidentiality. Do each of you (and your representatives) agree to this procedure?

Recesses may be taken during the mediation at the request of either party or upon mutual agreement of the parties. During recesses I ask that you not discuss this mediation with anyone else. So that we can work in confidence without distraction or interruption, I ask at this time that you please turn off or set to "quiet" all cell phones, Blackberry's, and any other any other electronic communication

devices. That includes any recording devices, which are not permitted in mediation. If you need to make phone calls or check email you may do so during a recess, subject to the restriction on discussing this mediation.

During the course of this mediation conference you may notice me nodding or making other gestures in response to something that is being said. My nodding or other gestures should be construed only as acknowledgment of what is being said, nothing more.

Let me once again commend both of you for being here today to try to work this out. Your presence here today demonstrates your willingness to attempt cooperative problem-solving.

Are there any questions at this point? If not, let's proceed with Mr./Ms. _____'s opening statement.

Communication Skills for the Mediator

Listening

Why Mediators Need to be Active and Effective Listeners

Mediators are facilitators of the communication between disputants. Careful, accurate listening enables the mediator to guide the process. Just as important, how the mediator listens is a form of communication itself. Mediators need to be highly effective listeners in order to accomplish the following:

- Creating a safe environment
- Developing rapport
- Narrowing the focus to relevant issues
- Building unconditional acceptance without regard to the beliefs, ideas, and conduct of the parties
- Identifying and summarizing each person's ideas, issues, concerns, and needs behind the scenes
- Clarifying the issues and interests

What is Active Listening?

- Listening to understand, not to respond
- Understanding the meaning behind the words, and their importance to the speaker
- Acknowledging the meaning behind the words, and their importance to the speaker
- Giving feedback to let the parties know their message has been received
- Listen for content, feelings, and values

Consider Your Nonverbal Communication

Use your body to say, "I'm listening." The purpose is to convey listening, interest, caring and the assurance that the other person is important. A mediator should:

- Make frequent eye contact.
- Keep your body oriented toward the speaker (try leaning toward the speaker, but don't get too close).
- Indicate you're listening by nodding your head and through facial expressions (make sure parties understand your nodding/expressions signify **understanding, not agreement!**).
- Make sure you exhibit the same nonverbal communication for **both sides**.

What is Un-active Listening?

Just as active listening can be used in a positive way to convey respect, acceptance, and understanding and reflect accurate receipt of messages, so too can “un-active listening” convey negative messages. Learn to avoid these traps:

Arguing

- This creates the negative perception that you are **Thinking Against** the party with whom you are arguing.
- Avoid arguing or disagreeing with one of the parties or being defensive and trying to justify yourself.

Analyzing

- Just as with arguing, the immediate perception is that you are **Thinking Against** the person being analyzed.
- Avoid analyzing a person as to his or her motivation.
- Avoid making pat, judgmental statements such as, “you shouldn’t be so upset.”
- Analyzing a person’s motivation or looking for a psychological reason underlying a position feels judgmental and negative. “Have you done things like this before?”

Minimizing

- Avoid dismissing the message of the feeling of the person. This includes statements such as: “That’s not such a big thing,” or “Everyone feels that way.”
- This is disempowering language which attempts to substitute the party’s authority over the outcome with that of a mediator. It is perceived as **Thinking For** the party.

Directing

- Avoid finishing the person’s sentence, steering or directing the conversation—this feels to the party as if the mediator is trying to **Think For** the party.
- Avoid cross-examination type questions, such as, “Why didn’t you contact the Personnel Office?” Use open-ended, non-accusatory questions instead.

Examples of constructive language that signify active listening:

When you want to acknowledge feelings:

That seems to matter to you a lot.
That seems to be important to you.
That seems to upset you a great deal.
You seem to be...
My sense is that you might feel...

When you’re confident you have a good understanding:

As you see it...
From your standpoint...
In your experience...
It appears to you...
You think...
You believe...
You're (identify feeling)...
What you're saying is...
You maintain that...
In your opinion...
Where you're coming from is...

Questions

Questions are usually essential to gain understanding of the issues, interests, and possible solutions. Open-ended questions, i.e., questions that are phrased so as not to suggest a particular answer, are best. They allow the respondent to answer in his or her own words, they avoid single-word responses, which usually are not helpful, and they are non-threatening. Often times the single most effective question a mediator can ask is “why,” to probe for reasons that underlie positions and demands. However, be aware that “why” questions can be perceived as accusations. “How did that come about?” may be more effective than “why did that happen?” Or, instead of asking “why are you asking for \$300,000?” you might ask, “You have requested \$300,000. Can you share with me how you arrived at that figure?”

Examples of questions a mediator might ask:

When you need more information:

Could you tell me some more about that?
Could you clarify that for me?
Can we explore that a bit?
Could you share some specific examples with me?
What makes that difficult for you?
How do you feel about that?
How did that make you feel?
How do you feel when that happens?

When you want to increase parties' understanding of each other's point of view:

What do you think [other party's] interests are in this matter?
How do you think [other party] views this issue?
Can you think of any reason why [other party] might view this differently?
If you were [other party], what would be your concerns?
How would you try to address [other party's] points?
Imagine you're [other party]. How would you see the situation?

When you want to identify interests:

What is most important to you in this mediation? Why?
What do you hope to accomplish today?
How would you like to see this matter resolved?
What do you think [other party] wants to accomplish? Why?
What bothers you most about this dispute?
What will it take for you to resolve this matter?
What is most important to you in terms of how to resolve this matter?
What do you think [other party] will accept to resolve this matter?

When you're in the early stages of caucus:

Is there anything else I need to know that you did not want to discuss while we were in the joint session?
What other things are important to you that I need to understand better?
Is there other information that will help you both in getting this matter resolved?

When you need to do a "reality check:"

Can you think of any drawbacks to that approach?
Can you give me some examples of that idea?
Where do you think that would lead?
What could you do to implement that idea?
What would you need to make that happen?
What other consequences could result from that approach?
How do you think [someone else] might view that proposal?
Have you discussed this idea with anyone, and what did they say?
If you do not resolve this today, what will you do?
How long will it take to get a final ruling?
How will waiting that long affect you and your relationship with...?
If things do not turn out as you hope, how will that affect you?
What are your alternatives if this matter isn't resolved here?
How would you value a resolution today compared to what might happen in the future?

When you're not confident you have a good understanding:

Do I understand you to say...
Are you saying...
Is it possible that...
I'm not sure I'm following you correctly...
Correct me if I'm wrong, but...
My impression is that...
Help me understand...
Here's what I hear you saying...
Does it sound reasonable to you that...
Is it conceivable that...
From my vantage point, what I hear is...

I get the sense you feel...
Could this be what's going on...
Perhaps you feel...
Could you clarify for me...

When you want to generate options:

What options have you considered?
What do you like about that idea?
What would you do to solve this problem?
What would you like to see happen?
What other possibilities are there?
What if you were to...?
How would you react to...?
If [other party] were to..., how would you feel about that?

Rephrasing and Reframing

Rephrasing and **Reframing** are two important active listening techniques that promote constructive dialogue between parties attempting to negotiate a resolution to a dispute, or any other issue, for that matter. They are indispensable tools in the mediator's toolbox. Both techniques can be especially useful when mediating disputes involving multiple parties or groups.

Rephrasing (or paraphrasing) lets a person know that he or she has been heard and, more importantly, correctly understood by the listener. It is used to prevent misunderstandings. Rephrasing is not simply a restatement. It does at least the following three things:

- ✓ For the speaker, rephrasing reinforces your expectation that others are actually listening to what you have to say, while providing you the opportunity to clarify your intent.
- ✓ For the listener, rephrasing validates what you have heard by checking your understanding, either reinforcing it or modifying it based on the speaker's agreement or disagreement and clarification.
- ✓ Rephrasing defuses "loaded" terms or connotations by demonstrating an understanding and validation of the (often negative) emotions behind the statement, yet casting the statement in a much more positive, less emotional fashion.

Examples:

Validating emotions:

"Sounds like you felt attacked."
"This seems to have made you angry."
"Seems like you felt ignored or unappreciated."

Conveying that you understand what is being said:

“You were upset when ...”
"You believe that..."
“You seem to be saying...”

Revealing a concern, worry or desire:

“If I understand you correctly, you want...”
"You seem to be concerned that..."
"What seems most important to you is..."

Reframing is more complex than rephrasing and is a much greater challenge for the mediator. Reframing is the arrangement or rearrangement of a collection of ideas, feelings, facts, and/or concerns into a single common theme, often moving the parties in a more constructive direction. As the word implies, *reframing* involves changing the narrative of a conflict from a negative theme to a more positive one. Reframing often gives the parties a common, perhaps previously unrecognized, focus or theme, preferably a more positive, or at least less negative theme, thereby enabling the parties to move forward. Reframing is often necessary to shift the focus from positions to interests.

Examples:

In the examples below, a type of reframing is illustrated which identifies the issue as a mutual one and states it in such a fashion that it can be a springboard or transition into creative ideas, options, and solutions. The frame of reference shifts away from blame for past failures toward a testing of commitment for future joint initiatives.

"Based upon various concerns that have been raised so far, you seem to be looking for new ways for labor and management to work together instead of opposing each other."

“From what I have heard so far, you both appear to be interested in improving communication, increasing opportunities for feedback, and accomplishing your unit’s mission more efficiently.”

“From what has been said thus far, would it be fair to say that you both would like to see improvement in your day-to-day working relationship?”

REMEMBER Whenever you reframe or rephrase, you are taking one or more statements and changing them in some form or fashion. Always remember to **validate!** *Never assume* that your rephrasing or reframing is accurate until it is confirmed by the speaker. In group conflict scenarios, other members of the group may be able to rephrase and reframe because of greater familiarity with the work situation and the speakers.

COMMON INTERESTS OF THE PARTIES IN EEO COMPLAINTS

There are many personnel actions or other workplace conditions that can generate EEO complaints, but these six are the most common: disciplinary actions, appraisals & evaluations, promotion & selection actions, harassment (both sexual and non-sexual), performance-based actions, and reasonable accommodation. Within each area, there are underlying interests commonly expressed by the Complainant and management.

The charts in this appendix can assist you in identifying the potential interests of the parties in an EEO complaint. These charts are not meant to provide an exhaustive listing of all potential interests that the parties may have. However, they can assist you in identifying common underlying interests and help the parties identify possible areas that may help them resolve their dispute. Readers are encouraged to add interests to those already listed.

Identifying the interests of the parties is a key factor in helping the parties reach a mutually acceptable resolution of their dispute. Success or failure to identify the correct interests at issue can mean the difference between a successful mediation and an unsuccessful mediation.

A. Disciplinary Actions

Possible Interests of the Complainant	Possible Interests of Management
<ul style="list-style-type: none"> ◆ Pride/Shame/Embarrassment ◆ Loss of Money ◆ Future Adverse Career Impact ◆ Perception of Fairness/Equality ◆ Reputation ◆ Fear of Losing Job ◆ Future Relationship ◆ Vindication ◆ Benefits (Health, Life, Retirement) ◆ Saving Face ◆ Desire not to appear Weak ◆ Time ◆ Hidden Personal Agenda ◆ Dignity/Self Esteem ◆ Trust ◆ Monetary Enrichment ◆ Resolve the complaint on favorable terms 	<ul style="list-style-type: none"> ◆ Need to Control Work Environment ◆ Need to Correct Behavior ◆ Impact on Morale ◆ Equality ◆ Reputation ◆ Future Relationship ◆ Retribution ◆ Saving Face ◆ Setting a Precedent ◆ Need to Minimize Workplace Disruption ◆ Desire not to appear Weak ◆ Time ◆ Desire to Minimize Hassle ◆ Desire to Comply with all Relevant Laws & Regulations ◆ Desire to be a Model Employer ◆ Hidden Personal Agenda ◆ Desire to Contain Costs ◆ Resolve the complaint on favorable terms

B. Appraisal/Evaluations

Possible Interests of the Complainant	Possible Interests of Management
<ul style="list-style-type: none">◆ Pride/Shame/Embarrassment◆ Loss of Award Money◆ Future Adverse Career Impact (Promotions/RIF)◆ Perception of Fairness/Equality◆ Ensuring Accurate Ratings◆ Ensuring Accurate Work Plan◆ Lack of Training◆ Reputation◆ Desire for Praise/Approval/Acknowledgment◆ Saving Face◆ Desire Not to Look Weak/ or Back Down◆ Time◆ Hidden Personal Agenda◆ Respect◆ Vindication◆ Recognition for Performance of Related Duty◆ Future Relationship◆ Resolve the complaint on favorable terms	<ul style="list-style-type: none">◆ Motivation of Employees◆ Desire to be Fair◆ Setting a Precedent◆ Not Appearing Weak to Subordinates and/or Supervisor◆ Retribution◆ Saving Face◆ Time◆ Desire to Minimize Hassle◆ Hidden Personal Agenda◆ Desire to Comply with all Relevant Laws & Regulations◆ Desire to be a Model Employer◆ Save the Government Money◆ Desire to Reward Only the Most Deserving Employees◆ Desire to Build an Adverse Action Case◆ Future Relationship◆ Resolve the complaint on favorable terms

C. Promotion/Selection Actions

Possible Interests of the Complainant	Possible Interests of Management
<ul style="list-style-type: none">◆ Pride/Shame/Embarrassment◆ Loss of Future Earnings◆ Future Adverse Career Impact◆ Perception of Fairness/Equality◆ Loss of Potential Career Experience◆ Loss of Potential Training◆ Reputation◆ Saving Face◆ Desire Not to Look Weak/ or Back Down◆ Time◆ Hidden personal agenda◆ Needs Money◆ Self-Worth◆ Desire to Stay Even Or Surpass Peer Group◆ Future Relationship◆ Resolve the complaint on favorable terms	<ul style="list-style-type: none">◆ Getting the Best Person for the Job◆ Meeting Mission Requirements◆ Rewarding Good Performance◆ Building Career Ladder◆ Desire to be Fair◆ Adequate Representation in the Workplace◆ Personality issues◆ Saving Face◆ Desire Not to Look Weak/ or Back Down◆ Setting a Precedent◆ Time◆ Desire to Minimize Hassle◆ Hidden Personal Agenda◆ Desire to Comply with all Relevant Laws & Regulations◆ Desire to be a Model Employer◆ Future Relationship◆ Resolve the complaint on favorable terms

D. Harassment Complaints

Possible Interests of the Complainant	Possible Interests of Management
<ul style="list-style-type: none">◆ Perception of Equality/Fairness◆ Fear/Embarrassment◆ Desire to Have Harassment Stop◆ Adverse Career Impact◆ Reputation◆ Health Issues (Physical, Mental, Emotional)◆ Personal Like or Dislike for Supervisor◆ Saving Face◆ Desire Not to Appear Weak/ or Back Down◆ Time◆ Hidden Personal Agenda◆ Revenge◆ Future Relationship◆ Resolve the complaint on favorable terms	<ul style="list-style-type: none">◆ Harassment Free Workplace◆ Improved Morale◆ Control Over Work Environment◆ Reputation◆ Adverse Career Impact◆ Impact on the Mission◆ Pride◆ Setting a Precedent◆ Saving Face◆ Desire Not to Appear Weak/ or Back Down◆ Time◆ Desire to Minimize Hassle◆ Personal Like or Dislike for Subordinate◆ Hidden Personal Agenda◆ Desire to Comply with all Relevant Laws & Regulations◆ Desire to be a Model Employer◆ Future Relationship◆ Resolve the complaint on favorable terms

E. Performance-Based Actions

Possible Interests of the Complainant	Possible Interests of Management
<ul style="list-style-type: none"> ◆ Perception of Equality/Fairness ◆ Pride/Shame/Embarrassment ◆ Fear of Losing Job ◆ Loss of Money (Change to Lower Grade) ◆ Future Adverse Career Impact ◆ Reputation ◆ Benefits (Health, Life, Retirement) ◆ Saving Face ◆ Desire Not to Appear Weak/ or Back Down ◆ Time ◆ Hidden Personal Agenda ◆ Future Relationship ◆ Resolve the complaint on favorable terms 	<ul style="list-style-type: none"> ◆ Need to Control Work Environment ◆ Need to Improve Performance ◆ Obligation to Ensure Employee is Meeting Job Requirements ◆ Impact on Morale ◆ Equality ◆ Reputation ◆ Desire to Minimize Disruption in the Workplace ◆ Not Appearing Weak to Subordinates and/or Supervisor ◆ Saving Face ◆ Setting a Precedent ◆ Time ◆ Desire to Minimize Hassle ◆ Hidden Personal Agenda ◆ Desire to Comply with all Relevant Laws & Regulations ◆ Desire to be a model employer ◆ Future Relationship ◆ Resolve the complaint on favorable terms

F. Reasonable Accommodation

Possible Interests of the Complainant	Possible Interests of Management
<ul style="list-style-type: none">◆ Perception of Equality/Fairness◆ Pride/Shame/Embarrassment◆ Fear of Losing Job◆ Future Adverse Career Impact◆ Reputation◆ Benefits (Health, Life, Retirement)◆ Desire to Work◆ Desire to Minimize Discomfort (Physical and/or Mental)◆ Saving Face◆ Hidden Personal Agenda◆ Future Relationship◆ Equal Access and Participation◆ Career Development and Advancement◆ Resolve the complaint on favorable terms	<ul style="list-style-type: none">◆ Need to control Work Environment◆ Obligation to Ensure Employee is Meeting Job Requirements◆ Impact on Morale◆ Genuine Misunderstanding◆ Equality◆ Reputation◆ Desire to Minimize Disruption in the Workplace◆ Saving Face◆ Setting a Precedent◆ Time◆ Desire to Minimize Hassle◆ Hidden Personal Agenda◆ Desire to Comply with all Relevant Laws & Regulations◆ Desire to be a Model Employer◆ Future Relationship◆ Verification of Disability◆ Resolve the complaint on favorable terms

POINTS ON CAUCUS

Purpose--The caucus provides the mediator with an opportunity to meet individually with each party to determine what additional information is needed; what private information, if any, can be discussed; and what areas of settlement can be negotiated. Parties are often so suspicious or distrustful of each other that they will not talk openly in front of each other, and will not give ideas a fair examination if they know the idea came from the other side. The caucus is the parties' opportunity to share information freely, and to float ideas for consideration that might otherwise be immediately discounted. Caucus is also useful for dialing down emotions and doing a reality check.

Preparing To Caucus--The mediator should state as clearly as possible to the disputants the procedures that will be followed for caucusing. Refer back to the remarks you made during your opening statement about caucusing. Remind the parties that what is said during caucus is confidential; that you will not disclose anything said to you unless the party authorizes it or the law requires it.

Reasons For Calling A Caucus:

- Gather information that parties may be reluctant to share in joint session
- When the parties are at an impasse
- Regain control if the parties are engaging in a heated discussion
- Generate ideas by asking "what if" questions
- Do a reality check
- Coach the parties on how to approach direct dialogue
- Deliver information to each other that parties are reluctant to give on their own (make sure you have permission to disclose from the party giving the information)
- Find mutual interests to encourage the parties to begin talking to each other
- Find areas of mutual agreement that can build momentum on unresolved issues
- When one or both parties request a caucus

What To Do During Caucus:

- Reemphasize confidentiality and ensure what can and can't be disclosed
- Ask questions to gain additional information
- Float ideas and possible settlement options
- Explore interests of parties in greater depth
- Cultivate your relationship with each party
- Acknowledge and allow venting and other expressions of feelings and emotions
- Be the agent or medium for reality checking
- Allow a change of pace
- Enable the parties to re-examine their positions
- Permit a cooling off if things got a little heated in joint session

Things To Look For: Recognize potential areas of agreement and encourage parties to concentrate on the possible agreements(s). Look into possible solutions that perhaps neither party has considered. Try to find the positive aspects of the situation, concentrating on the feasibility of an agreement. Guide the discussion toward a future based, forward-looking view of the solution set to the issue(s).

Ending The Caucus: Summarize the information conveyed by the party during caucus. This step is important for two reasons. First, summarizing the information gives the mediator the chance to confirm the information, and his or her understanding of the information, that was conveyed during the caucus; second, summarizing gives the party an opportunity to correct and/or add information prior to finishing the caucus. Finally, the mediator must ask what information, if any, shared during caucus is confidential and cannot be shared with the other party. In the alternative, the mediator might ask what information, if any, *can* be shared with the other party. Either approach is acceptable, but the former is favored because it results in sharing more, not less information discussed in caucus. Why does this matter? Because mediation usually works better when more information is shared between the parties rather than less. The mediator is often the ideal medium for conveying information disclosed and discussed during caucus.

Transition: This is now the time for reconvening the parties after the caucuses. At this time the mediator's transition statement might be, "I'd like to thank each of you for meeting with me privately. I now have a clearer understanding of the issues. At this time I would like us to review some of the possibilities that have been discussed in caucus." Or the mediator might say, "I'd like to thank each of you for meeting with me privately. I'm concerned that there seems to be no areas about which you can agree. We need to decide where to go from here. Do either of you have any suggestions?"

TIPS FOR GETTING PAST IMPASSE

1. **Start gently and with generalities** - don't get too specific too early. Use your active listening skills and build into problem-solving. For example: *"So it sounds like you need a redefinition of your job and a fresh start. Is that something you want to pursue here?"* At the beginning of problem-solving, you are still in the mode of listening much and saying little.
2. As you begin to get into problem-solving, look for opportunities to **emphasize the future and de-emphasize the past**. This provides a nice transition into more active problem-solving, and allows the parties to recognize and affirm the change. Examples (in ascending order of directness):
 - At some convenient point, perhaps after a break, say something like: *"We've spent a lot of time exploring where you are and how you got here, and that's important to help me - and you as well - understand what the problems and concerns are. I'd like to suggest we now begin to focus on the future: Where you'd like to be six months from now and how we can get there. Is that OK with you?"*
 - If one or both parties seem stuck in the past like a broken record, try being a little more directive (first, of course, do a "self-check" to make sure your party feels heard). You might pause, and say something like: *"It's clear to me how strongly you feel about what happened here. I think I've got a pretty good understanding of the problem. At this point in the mediation, I'd like to suggest that we kind of change direction and commit to finding ways to solve the problem. And what this means is that we'll need to keep focused on the future - not the past. That may not always be easy. Would you like to try it this way?"*
 - If a party commits in principle to "the future" but continues reflexively to wallow in the past, you might remind him/her of the agreement, and suggest a "ground rule" that will allow you to quickly bring them back to the present and future.
3. **Follow the parties**. It's their dispute, and your job is to help them negotiate and communicate so they can find a solution, not for you to give them the solution. If you find yourself frustrated because the parties don't seem to be going in the direction you think would be best, there may be a good reason you shouldn't be trying to go there either. However, if the frustration persists, you might consider exploring this in caucus with each side, using open-ended questions.
4. Remember that (a) parties will resist moving to closure too fast, and (b) parties faced with a potential settlement option may like the general idea, but have discomfort about details and the unknown. For them, the "in principle" technique can be very effective to move the conversation forward. For example, you might say something like: *"Now, I know there are a lot of important considerations and details to work through, but IN PRINCIPLE, if you could get a good job in the other division, do you think that might work for you?"*
5. Also, resolve issues involving complex details "in principle" and move on. For example, the parties might agree in principle that the employer will raise the employee's performance appraisal and supply new language to support the changed rating. You can come back to the exact wording of the new appraisal later.

6. Help the parties **convert their statements** of interests and their ideas, and even their objections, into things that you can work with. To do this, look for opportunities to use transformations like the following:

- *"Would you like to propose that idea as a solution?" or "can I take that to [other party] as an offer?"*
- *"So you would like [x]. Is there a way we can develop that into a plan?" or "How can you get from here to there?"*

7. An **easel or whiteboard** is a powerful tool - a way to display information and options visually, get the parties focusing together on the same "page," and let you organize how information is translated and displayed.

8. Where there's an absence of ideas, consider using "**brainstorming**" (in caucus or joint session). This means the parties are encouraged to suggest as many ideas as they can create, without any criticism or interruption; later, they return to the ideas and eliminate or develop them. As the mediator, you can help with option generation; just remember it's their dispute, and the solution must be theirs too.

9. Help a party find ways to deal with his/her discomfort or caution in reacting to a proposal by saying something like *"I see that the proposal doesn't appear to meet your needs, but let me ask, what would it take to make that proposal into something you could accept?"*

10. Use the opposite of 9 above to help a party reality-check his/her own idea: *"What do you think it would take for [other party] to accept your proposal?"*

11. Hypothetical scenarios are a non-threatening and non-coercive way for you to introduce ideas for parties to consider, and can be an entry to brainstorming. The classic hypothetical is the "**what if**." Say something like, *"I'm just wondering - what if they were to provide a retroactive QSI - might that be an option in lieu of promotion to meet them half-way?"* Be careful not to so overuse "what ifs" that the parties stop being creative themselves and look only to you.

12. A party may be anxious about displaying an offer in development to the other side, but it would be nice to know whether it's possible. You can ask if it's OK for you to take implied ownership of the idea and test it with the other party, e.g., *"I have an option that I'd like to float for consideration; what if you . . .?"* Obviously, this discussion should occur in caucus.

13. Particularly in cases where the issue is money and valuation is imprecise, parties may be anxious about "going first." You might offer both parties the opportunity to have you simultaneously disclose a mid-point or range between them. This may also be more appropriate for discussion in caucus.

14. Where there is a substantial difference between the parties' demands (or lack of clarity about valuation), try "**decision analysis**." Although details of this technique are beyond the scope of this list of tips, briefly it works this way: In caucus, emphasizing confidentiality, you work with each party to develop "best case" and "worst case" scenarios, both in terms of dollar valuations and

percentage likelihood of outcomes on motions for summary judgment, etc. These extremes will bracket reality. Generally, the analysis will cause the parties' positional demands to move toward each other, sometimes quite substantially. Then, discuss with the parties how they would like you to use the information you've developed (for example, by disclosing overlapping valuations or a midpoint). Helping the parties see the issues from the perspective of a timeline may also help to focus the discussion on the areas for which a monetary solution is appropriate. Considerations such as duration, frequency, and severity are important factors in developing a mutually understood valuation of the case.

15. **Precedents:** Settlements achieved through mediation have no precedential value and can only bind the parties who sign the agreement. Nevertheless, sometimes a party (typically management) is concerned about setting a precedent. If explaining the non-precedential nature of settlements is not enough to allay these concerns, there are some other options you can try: a clause in the settlement agreement specifying the agreement's non-precedential nature (very common); a confidentiality clause in the agreement itself; narrowing, isolating or removing the issue creating anxiety from the agreement; writing the agreement to make the case unique; reality-checking to see if a precedent is really such a big deal; or contrasting the risk of no agreement.

16. Psychologists say that people tend to react negatively to any offer or information presented by an adversary, regardless of its merit ("reactive devaluation"). Couple this with "selective perception" and "confirmation bias" (the tendency to screen out data that does not fit preconceived views, and to accept uncritically information that confirms pre-existing beliefs) and you can see why disputants need mediators. You, as the trusted neutral, can carry exactly the same messages without the same negative burden. In practical terms, this means you can introduce and reexamine ideas that the parties on their own would reject or have already rejected.

17. Impatience is always your enemy. In fact, as you grow more experienced as a mediator and become more able to predict outcomes, impatience becomes an ever more subtle enemy. Be on guard.

18. The overall mediation should be a "**settlement event**," meaning that everyone should develop the expectation that they've come to work on resolving the matter and that it *can* happen. During problem-solving, reinforce the psychology of the "settlement event" by keeping the momentum going, keeping things positive, reminding them of the time constraints, focusing them on the investment of their time thus far, and reinforcing the agreements so far. The parties will begin to believe a settlement should and will happen, which is powerful motivation for resolution.

POSSIBLE SETTLEMENT OPTIONS TO OVERCOME IMPASSE

Disciplinary Actions

Generally, ADR may not be appropriate for disciplinary actions that are at the *proposal* stage, although the decision official may feel otherwise. Each case can be judged on its own merits. Even if not used to decide punishment, ADR is usually appropriate to resolve a grievance or appeal challenging the final decision. If the action is one that may be appealed to the Merit Systems Protection Board (e.g., removals, suspensions greater than 14 days), MSPB rules allow an additional 30 days for the employee to file the appeal if the parties attempt ADR. 5 C.F.R. 1201(b)(1). The MSPB also offers mediation in cases already in appeal through its Mediation Appeals Program. See www.mspb.gov/appeals/mediationappeals.htm.

1. Holding the penalty in abeyance

Holding the penalty in abeyance for a period of time (generally not more than three years) on the condition the Complainant either admits to the misconduct and/or agrees not to engage in misconduct (specificity as to *what type of misconduct* as defined by the parties) during the abeyance period as evidence of rehabilitation. This is not an escape from *discipline*, but rather a conditional reprieve from the *punishment*. It promotes the underlying premise of discipline, which is rehabilitation. This can be accomplished through a last chance agreement. The servicing labor counselor should have more information on the use of last chance agreements.

2. Reducing Severity of the Penalty (either proposed or imposed)

This means to reduce the severity of the penalty, such as reducing a 14-day suspension to a 10- or 5-day suspension, either as a result of mitigating or extenuating factors or in exchange for the employee admitting to the misconduct and/or agreeing not to engage in misconduct in the future. “Last Chance” agreements can also bring about the desired behavior modification and provide for the retention of an employee who would otherwise be removed. The servicing labor counselor has more information on the requirements of engaging in last chance arrangements.

3. Change Removal/Termination to Voluntary Resignation

Changing a removal/termination to a voluntary resignation means to replace the annotation on the SF-50 (Notification of Personnel Action) under the block marked ‘reason for action’ from removal to resignation.

4. Recommendations to future employers

A letter either recommending an employee for future employment or providing a neutral recommendation may be issued when the employee has been separated from employment. Conversely, the parties may also agree that the Complainant will not seek a recommendation.

5. Rescind the action

Rescinding the action is to terminate the process and expunge the record. This can be done at a time after a decision has been made.

Performance-Based Actions

Mediations of performance-based actions will most likely be at the stage between placement on a performance improvement plan and action by the deciding official. Therefore, the mediator must be mindful as to whether the parties are attempting to settle the *underlying reasons for the performance improvement plan*, or the *actual decision reached*.

1. Reassignment

The permanent movement of an employee from one position to another position without promotion or demotion, at the same pay plan and grade, but not necessarily the same occupational series.

2. Voluntary Change to Lower Grade

An employee-requested action to be reduced in grade.

3. Voluntary Resignation

A voluntary resignation is when an employee voluntarily agrees to quit.

4. Extend Performance Improvement Period

An extension of the employee's performance improvement period (opportunity period).

5. Training

Management provides the Complainant with additional instruction to help performance reach an acceptable level.

6. Retroactive Step Increase

This provides the employee the within-grade increase otherwise denied due to less than acceptable performance.

Evaluations/Appraisals

1. Change the Overall Appraisal rating, Performance Objectives/Responsibilities

Change an appraisal rating, and/or replace the current rating with an amended overall rating, an amended rating and/or changed objectives/responsibilities.

2. Grant Award

Grant the requested cash and/or time-off award in exchange for rescinding the complaint.

3. Out-of-Cycle Replacement Rating

An employee's performance is re-evaluated after a specified amount of time to record any demonstrated improvement. Performance ratings are normally given only during the annual rating cycle. There are, however, instances when a rating may be given outside the normal rating cycle. The rating from the re-evaluated performance rating then replaces the previous annual rating.

4. Develop a New Performance Plan

Rewrite the performance standards to clarify performance expectations for the employee, thereby permitting the supervisor to accurately evaluate job performance. The newly developed plan should reflect current, relevant requirements of the employee's position.

5. Performance Counseling Schedule

Planned systematic discussion between the rating official and employee during the rating period regarding employee performance. During these sessions the employee is able to discuss the feedback and use it to improve performance, if necessary, to achieve the desired rating.

6. Performance-Related Training

The offer of job-related training to improve performance potentially impacting the next year's appraisal rating. The Complainant is authorized attendance at job related training that he believes will enhance performance and potentially impact future performance ratings.

7. High Visibility Project

Placing an employee on a project with more visibility offers an opportunity for the employee to shine and show their ability to rise to greater performance levels.

Promotion/Selection

1. Placement in Next Vacancy

Mandatory selection for the next occurring vacancy for which the Complainant is qualified or the next like position. This is a non-competitive action.

Note: A number of legal and policy concerns are implicated by this proposed solution. Consultation with the local Army labor counselor or LMER specialist is highly recommended before the parties agree to this course of action.

2. Priority Consideration for Next Vacancy

Complainant's name will be forwarded to the selecting official for selection consideration before other names of eligible candidates, for the next position vacancy for which the Complainant qualifies. **[Note: Ensure parties don't confuse priority consideration with priority referral or placement. Priority consideration opportunities should be time and scope limited, e.g., x-number of opportunities in y location or organization for z period of time. If priority consideration is chosen, include language defining it, e.g., "The parties agree that for the purpose of this agreement, priority consideration means _____."]**

3. Training

An offer of training made to supplement, improve, or add to an employee's skills, knowledge, and abilities in a current or related field of work.

4. Career Counseling

Career counseling is a meeting between an employee and a qualified official to review the employee's experience, education, training and personal development. The counseling typically includes suggestions on self-development, on-the-job training, and job-related, government-sponsored training opportunities for career growth.

5. Desk Audit

An interview for fact-gathering purposes conducted by a person competent in the classification process to verify or gather information about the current duties and responsibilities of a position, and the accuracy of the description of those duties and responsibilities.

6. Grant the Promotion

The Complainant is non-competitively promoted into the contested or similar position. An over-hire position may be created for settlement purposes. **[Note: See # 1 above for additional guidance regarding non-competitive actions.]**

7. High Visibility Project

Placing an employee on a project with more visibility offers an opportunity for the employee to shine and demonstrate the ability to rise to greater performance levels.

Harassment

1. Sensitivity Training

Training designed to facilitate an understanding of human diversity based on culture, gender, and ethnicity. It helps one cope with workplace conflicts and communication differences that may result from workforce diversity.

2. Reassignment

Reassignment is the permanent movement of an employee from one position to another position without promotion or demotion, at the same pay plan and grade, but not necessarily the same occupational series. Note: The EEOC does not look on reassignment for the Complainant favorably, *unless the Complainant specifically requests it.*

3. Apology

An expression of one's regret for having injured, insulted or wronged another individual. The injury, insult or wrong may be real or perceived. The apology can be oral or written. Treat an apology with great care. In mediation there is never a finding or admission of liability on the part of management, so while an apology must be sincere and heartfelt to have any meaning, it should never specifically admit legal fault, guilt, or liability. Public apologies are not favored.

Reasonable Accommodation

1. Provide Accommodation

Accommodation is a modification of an employee's environment or duties to allow performance of the essential functions of the job. Some examples of accommodation are employer purchased equipment and/or services such as voice-activated computers or interpreters and readers, office relocation or modification, or modified work schedules to include alternative work schedules or flexible leave policies.

1. Reassignment

Reassignment is usually thought of as the permanent movement of an employee from one position to another position without promotion or demotion at the same pay plan and grade, but not necessarily the same occupational series; in other words, a "lateral" move. However, a reassignment does not necessarily have to be in the same series or grade.

2. Voluntary Change to Lower Grade

An employee requested action to be reduced in grade.

EEO CASE ELEMENTS FOR USE IN REALITY CHECKING

I. GENERAL PRINCIPLES

In a discrimination case, a Complainant must present a sufficient “threshold” of evidence to meet the burden of proof. In analyzing a case for potential litigation risk and possible settlement, it is necessary to determine whether the Complainant has met or is likely to meet this minimum threshold. There are three categories of discrimination with which you may be involved: (1) disparate treatment, (2) disparate impact, and (3) failure to make reasonable accommodation in religious discrimination or disability claims.

Disparate treatment is probably the most common form of discrimination--that is, different treatment because of race, color, sex, religion, national origin, age, or disability. Disparate impact means that a policy or program may appear, on its face, to treat everyone equally, but in application it actually discriminates. Examples of disparate impact are general intelligence tests or educational requirements that disproportionately disqualify members of certain protected groups and are not job-related. Examples of a reasonable accommodation may be making a jobsite readily accessible or restructuring a job for the disabled employee or modifying work schedules for religious accommodation.

The Complainant may prove the discriminatory intent by either direct or indirect evidence. Direct evidence is rare--for example, is there a memorandum written by the selecting official stating that he did not select the Complainant because she is a female, or because he is a Hindu or because she is a Hispanic? Doubtful. Indirect evidence is circumstantial in nature. The evidence does not by itself prove a motivation, but rather it allows one to infer the existence of a fact from other facts. For example, agency records demonstrate that the selecting official, although provided numerous opportunities to do so, has never hired a woman, a Hindu, or a Hispanic. In most cases, there will not be that “smoking gun” of direct evidence; thus, the Complainant will need to prove discrimination indirectly by inference, using circumstantial evidence.

The adjudication of a complaint of discrimination by indirect evidence follows a three-step evidentiary analysis adopted by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973). This three-step process has been applied in cases brought under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Rehabilitation Act.

A Complainant must first present a *prima facie* case of discrimination. A *prima facie* case is that minimum amount of evidence necessary to raise a legitimate question of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973). Section II and III below explain the specific elements required in particular types of cases.

Second, if the Complainant meets the burden of presenting a *prima facie* case, then management has a burden of production to articulate some legitimate, nondiscriminatory reason for its actions. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 25 FEP Cases 113 (1981). The evidence presented by management need not establish management's actual motivation, but must be sufficient to raise a genuine issue of material fact as to whether management discriminated against the Complainant. If management meets this burden of production, the presumption of discrimination raised by the *prima facie* case is rebutted and drops from the case

altogether. Examples of this second step include lesser comparative qualifications, inability to get along with supervisors or co-workers, or poor performance.

Third, in order to prevail, the Complainant must show by a preponderance of the evidence¹¹⁵ that management's stated reason is pretext for discrimination. The Complainant may show pretext by evidence that a discriminatory reason more likely than not motivated management, that management's articulated reasons are unworthy of belief, that management has a policy or practice disfavoring the Complainant's protected class, that management has discriminated against the Complainant in the past, or that management has traditionally reacted improperly to legitimate civil rights activities. The Complainant must prove *both* that the reasons given were false, *and* that the real reason was discrimination (i.e., *pretext*). However, the Complainant need not prove that discriminatory intent was the sole motivating factor, so long as it was a motivating factor. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). See 42 U.S.C. §§ 2000e-2(m); 2000e-5(g)(2)(B).

Finally, two terms need to be explained. First, a “protected class” or “protected group” represents a group that is recognized *by the law* to have protection against discrimination. Second, “similarly situated employees” has been defined to mean a person or group of persons who are of the same GS rating, occupation, or office for the purposes of comparing the treatment received. These terms of art should be discussed with your labor counsel when reviewing a case for possible settlement or litigation.

The elements that make up the *prima facie* cases discussed below address only the first prong of the *McDonnell Douglas* test, i.e., what must be shown to support an inference of discriminatory treatment.

II. PROTECTED CLASSES

A. Race, Color, and National Origin

Regardless of whether the claim is discrimination by race, color, or national origin, the elements are the same. The Complainant must prove that:

1. He/she is a member of a protected class;
2. He/she was subjected to an adverse personnel action, or was denied a favorable personnel action; and
3. He/she was treated differently than similarly situated individuals not in his/her protected class under similar circumstances.

B. Sex Discrimination

Sex discrimination complaints may be filed as one or more of the three types of discrimination claims: (1) disparate treatment, (2) disparate impact, and (3) sexual harassment.

The *prima facie* elements for **disparate treatment** (treating someone differently based on gender) are the same as for race, color, or national origin discrimination. To make a *prima facie* case

¹¹⁵ Preponderance of the evidence is that degree of proof which is more probable than not; it does not necessarily mean the greater number of witnesses or the greater amount of documentary evidence.

of **disparate impact discrimination**, the Complainant must show that a challenged practice or policy disproportionately impacted members of his/her protected class. Specifically, the Complainant must:

1. Identify the specific practice or policy challenged;
2. Show a statistical disparity; and
3. Show that the disparity is linked to the challenged policy or practice.

Sexual harassment may be seen as either *quid pro quo* harassment or **hostile environment**. *Quid pro quo* harassment is a case where favorable treatment or punishment is promised for, or conditioned upon, the Complainant providing sexual favors. A Complainant makes a *prima facie* case of *quid pro quo* harassment by proving:

1. The harassment occurred in an employment context;
2. The promised or threatened action was work related; and
3. The harasser was in a position, or was reasonably perceived as being in a position, to carry out the promised or threatened action.

The second type of sexual harassment is known as **hostile environment** harassment. A Complainant makes a *prima facie* case in this area by proving:

1. He or she is a member of a protected class;
2. He/she was subjected to unwelcome sexual advances, requests for favors, or other verbal or physical contact of a sexual nature;
3. “But for” Complainant’s gender, he/she would not be subject to the harassment;
4. The harassment affected a term or condition of employment, and/or had the purpose or effect of unreasonably interfering with the work environment, and/or created an intimidating, hostile, or offensive work environment; **and**
5. The employer knew or should have known about the harassment, and failed to take prompt remedial action.

C. Religious Discrimination

The elements of a *prima facie* case of discrimination based upon religion are the same as those for race, color, or national origin.

D. Age Discrimination

While the elements of a *prima facie* case are the same for age as for race, color, and national origin, the protected group is specifically identified as people 40 years of age and older.

E. Disability Discrimination

A Complainant must prove:

1. He or she has a permanent disability.¹¹⁶ There are detailed requirements and recently developed modifications of those requirements from the United States Supreme Court on this point, so check with an attorney on this element. A physician's statement as to the disability should suffice in matters where the disability is obvious (e.g. amputee, blindness, or deafness).
2. The Agency knew of the disability or request for accommodation;
3. The Complainant was qualified to fill the position with or without reasonable accommodation of the disability; and
4. The Complainant was treated differently because of the disability, or because the Agency failed to accommodate the disability (depending on what is alleged.)

F. Genetic Information Discrimination

In 2008, Congress passed and the president signed the Genetic Information Nondiscrimination Act (GINA). Under Title II of this Act, 42 U.S.C. § 2000ff, *et seq.*, it is unlawful for an employer to discriminate against an individual on the basis of the individual's genetic information in regard to hiring, discharge, compensation, terms, conditions, or privileges of employment. EEOC enforces GINA with respect to employers (including the federal government), unions, and employment agencies. *See* 29 C.F.R. Part 1635 (2010). We can expect to see an increase in GINA-related claims filed against agencies (including the Army) in the future.

GINA expressly disallows *disparate impact* claims, 42 U.S.C. § 2000ff-7(a). Otherwise, there is little case law interpreting GINA's application or identifying the elements for a *prima facie* case of *disparate treatment* discrimination. It is very likely that courts will employ the *McDonnell-Douglas* three-prong analysis to such claims. One emerging factor is the nature of the information. Genetic information is not information regarding a current condition or disability, but is information suggesting a genetic predisposition to develop a disease or condition in the future. Accordingly, asserting that the employer misused information about a current condition to support a disability discrimination claim would likely not support a GINA claim.

Consult the labor counselor or EEO officer for additional information on GINA.

G. Reprisal/Retaliation

Reprisal cases may be the one type of complaint in which you are more likely to see direct evidence. To make a *prima facie* case of reprisal:

1. Proof by **direct evidence** of the intent to punish the Complainant for engaging in some protected activity (such as involvement in the EEO process or whistleblowing).

¹¹⁶ Even if the Complainant does not have an *actual* disability, if he or she is *regarded as* having a disability by the employer, or has a *record* of a disability, it is tantamount to having the disability. However, reasonable accommodation is not required for an employee who is only regarded as disabled.

2. Proof by **indirect evidence**, which requires the Complainant to show:
 - a. The Complainant engaged in a protected activity;
 - b. The responsible management officials knew about the activity;
 - c. The Complainant was subjected to an adverse employment action within a reasonable amount of time following the protected activity; and
 - d. There is a causal connection between the action and the protected activity, i.e., that “but for” the protected activity, the adverse personnel action would not have been taken. For a discussion of the “but for” causation standard to prove retaliation under Title VII, see *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. _____ (2013).

III. PRIMA FACIE ELEMENTS FOR COMMON ISSUES IN DISCRIMINATION COMPLAINTS

A. Not Selected For Promotion

1. The Complainant meets the basic qualification standard for the job;
2. The Complainant is a member of a protected class;
3. There was a vacancy for which the Agency sought applicants and the Complainant applied (or was referred);
4. The Complainant was not selected; and
5. The Agency continued to seek applicants with similar qualifications and selected someone not in the Complainant’s protected group.

B. Disciplinary Actions

1. The Complainant is a member of a protected class;
2. The Complainant was subjected to a disciplinary action; and
3. The Agency treated him/her more harshly than similarly situated employees who were not part of the protected group.

C. Appraisals

1. The Complainant is a member of a protected class;
2. He/she is similarly situated to employees outside his protected class; and
3. The Complainant got a lower performance rating.

D. Harassment

Harassment may be based on any of the protected bases--race, color, national, origin, religion, sex, age, or disability. Most frequently, Complainants allege harassment based on race or sex. In order to establish a prima facie case of harassment, the Complainant must show:

1. The existence of a pattern of harassment or intimidation. The harassment must be “sufficiently pervasive” so as to alter a condition of the victim’s employment and create an abusive working environment;
2. That the employer or agency knew or should have known of the illegal conduct; and
3. That the employer or agency failed to take reasonable steps to cure the harassment.

E. Failure to Provide a Reasonable Accommodation to a Qualified Disabled Person

In order to establish a prima facie case of disability discrimination under a reasonable accommodation theory, the Complainant must show:

1. That he/she is an "individual with a disability;"
2. That he/she is a "qualified individual with a disability;" and
3. That the agency failed to reasonably accommodate his/her disability.

A “*disability*” means, with respect to an individual, “(i) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (ii) A record of such an impairment; or (iii) Being regarded as having such an impairment...This means that the individual has been subjected to an action prohibited by the [Americans with Disabilities Act] as amended because of an actual or perceived impairment that is not both “transitory and minor.” 29 C.F.R. § 1630.2(g)(1).

“*Major life activities*” include, but are not limited to: “(i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and (ii) The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.” 29 C.F.R. § 1630.2(i).

The term “*qualified*,” with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position.” 29 C.F.R. § 1630.2(m). Exceptions are in 29 C.F.R. § 1630.3.

EXAMPLE ONLY – NOT FOR ACTUAL USE

**NEGOTIATED SETTLEMENT AGREEMENT IN EEO COMPLAINT
(INCLUDING NOTICE PROVISION FOR ADEA CLAIMS)**

Complainant)	EEOC No.
v.)	Agency No.
Secretary,)	Agency No.
Department of the Army,)	Agency No.
Agency)	Date:

1. In the interest of promoting the principles of the Equal Employment Opportunity (EEO) Program, and to avoid protracted litigation, the Parties, _____, (Complainant), and the Department of the Army (Agency), agree to settle Complainant’s formal complaints of discrimination, identified as _____ on the terms described below.

2. By entering into this negotiated settlement agreement (Agreement), the Agency does not admit that it, or any Agency official or employee, has violated Title VII of the Civil Rights Act of 1964, as amended, the Rehabilitation Act of 1973, as amended, the Age Discrimination in Employment Act, as amended, the Equal Pay Act, or any other Federal or State statute or regulation.

3. The Parties agree that the following is a complete statement of the terms of this Agreement, reached freely and in good faith, and in complete resolution of Complainant’s formal complaints of discrimination, and that no other representation, either oral or written, presently modifies the terms of this Agreement.

4. The Agency agrees:
 - a. _____
 - b. _____

5. *[Use when settlement requires DFAS involvement.]* The Defense Finance and Accounting Service (DFAS) is a Department of Defense Agency. As such, the Department of the Army cannot guarantee a date when DFAS will issue the above payment to the Complainant. However, if Complainant has not received payment within 90 days of the date of this Agreement, upon notice from the Complainant or his Representative, the Department of the Army will contact DFAS and make reasonable attempts to facilitate and expedite the payment.

a. The following information is provided to assist DFAS in completing payment.

b. The Agency makes no representation as to the tax consequences of this payment. Complainant and his Representative acknowledge that the _____ payment may be subject to applicable federal, state or local income taxes. Further, Complainant and his Representative agree that any tax obligation arising from this payment shall be the obligation of Complainant and not the Agency or any component of the United States.

6. In exchange for the consideration described in paragraph 4, Complainant agrees that:

a. _____

b. He will refrain from instituting or pursuing administrative or judicial action in any forum concerning the issues, claims, or facts contained in his informal or formal complaints, and that they will not be made the subject of future litigation. This provision precludes initiation of any administrative or judicial action against the Agency or its current or former employees, in their official or individual capacities, regarding the matters in his complaint, including but not limited to, filing appeals, grievances, or petitions for review to the Merit Systems Protection Board, Equal Employment Opportunity Commission (EEOC), Office of Personnel Management, Office of Special Counsel, Federal Labor Relations Authority, and lawsuits in federal or state court. This provision, however, does not preclude either Party from taking action before the EEOC to enforce the terms of this Agreement.

[NOTE: If the NSA waives claims of age discrimination, insert the following, or similar, paragraph and renumber succeeding paragraphs]: The Complainant knowingly and voluntarily waives all rights under the Age Discrimination in Employment Act of 1967 (ADEA) which pertain to allegations of age discrimination as specified in the complaint. Federal law provides that this waiver is written in language calculated to be understandable by the Complainant, or an individual similarly situated to the Complainant, and that it is supported by adequate consideration in addition to other consideration to which the Complainant may be entitled. Federal law further requires that this waiver does not extend to rights or claims arising after the date of execution of this Agreement. Federal law provides that the Complainant may have a reasonable period, which is hereby agreed to be 21 (or other agreed number) calendar days, from receipt of this Agreement in which to review and consider this Agreement before signing it. The Complainant further understands that he/she may use as much of this 21-day period as he/she wishes prior to signing and delivering this Agreement. Federal law also requires us to advise the Complainant to consult with an attorney before signing this Agreement. Having been informed of these rights, and after consultation *[or opportunity for consultation]* with his/her counsel, the Complainant hereby waives these rights.

COMPLAINANT

DATE

[Reference 29 U.S.C. § 626(f)(1)(A)-(E) and 29 U.S.C. § 626(f)(2)]

7. Complainant's signature on this Agreement constitutes full and complete settlement of any and all issues and/or claims arising from the circumstances of the aforementioned informal or formal EEO complaints. This includes, but is not limited to, any additional compensatory damages, attorney's fees, and costs arising from or related to the aforementioned formal complaints.

8. If the Complainant believes that the Agency has failed to comply with the terms of this Agreement, he shall notify the Department of the Army, Director, Equal Employment Opportunity Compliance and Complaints Review (EEOCCR), ATTN: SAMR-EO-CCR, 5825 21st Street, Building 214, Room 129, Fort Belvoir, VA 22060-5921, in writing, of the alleged non-compliance within 30 calendar days of when he knew or should have known of the alleged non-compliance. A copy of this notice should also be sent to the activity EEO office. The Complainant may request that the terms of the Agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased. If the Director, EEOCCR, has not responded to the Complainant in writing, or if the Complainant is not satisfied with the attempts to resolve the matter, the Complainant may appeal to the Equal Employment Opportunity Commission (EEOC), Office of Federal Operations, P.O. Box 77960, Washington, D.C. 20013 for a determination as to whether the Agency has complied with the terms of this Agreement. The Complainant may file such an appeal to the EEOC 35 calendar days after service of the allegation of noncompliance upon EEOCCR but no later than 30 calendar days after receipt of the Agency's determination.

9. The terms of this Agreement will not establish any precedent nor will this Agreement be used as a basis by the Complainant or any representative organization as justification for similar terms in any subsequent complaint.

10. For purposes of this Agreement, the terms "date of execution" and "effective date of this Agreement" mean the last date any of the Parties sign this Agreement.

11. The Complainant and the Agency acknowledge that they have carefully read this Agreement, understand the contents contained herein, and have signed this Agreement as their own voluntary acts.

FOR THE COMPLAINANT:

FOR THE AGENCY:

Complainant's Representative

Agency Representative

[NOTE] Where the settlement effects a waiver or potential waiver of an age discrimination claim, the Complainant may voluntarily sign the agreement sooner than the number of days provided for review and consideration (using sample language in paragraph 6b above). The day after the Complainant signs the notice of waiver provision above serves as the first day of the reasonable review and consideration provision.]

EXAMPLE ONLY – NOT FOR ACTUAL USE

NEGOTIATED SETTLEMENT AGREEMENT (NON-EEO)

_____)	
)	
Employee)	
)	
v.)	No.
)	
)	
Activity)	
)	
_____)	Date:

1. In the interest of avoiding protracted litigation, the Parties, _____, (Employee, Appellant, etc.), and the Activity (Agency) _____, agree to settle Employee’s (grievance(s), MSPB appeal, etc.) identified as _____ on the terms described below.

2. By entering into this negotiated settlement agreement (Agreement), the Activity does not admit that it, or any Activity official or employee, has violated the Civil Service Reform Act of 1978, as amended, the Master Labor Agreement, the local collective bargaining agreement (CBA), Title VII of the Civil Rights Act of 1964, as amended, the Rehabilitation Act of 1973, as amended, the Age Discrimination in Employment Act, as amended, the Equal Pay Act, or any other Federal or State statute or regulation.

3. The Parties agree that the following is a complete statement of the terms of this Agreement, reached freely and in good faith, and in complete resolution of Employee’s grievances and that no other representation, either oral or written, presently modifies the terms of this Agreement.

4. The Activity agrees:

- a. _____
- b. _____

5. *[Use when settlement requires DFAS involvement]*. The Defense Finance and Accounting Service (DFAS) is a Department of Defense Agency. As such, the Department of the Army cannot guarantee a date when DFAS will issue the above payment to the Employee. However, if Employee has not received payment within 90 days of the date of this Agreement, upon notice from the Employee or his Representative, the Activity will contact DFAS and make reasonable attempts to facilitate and expedite the payment.

- a. The following information is provided to assist DFAS in completing payment.

_____.

6. In exchange for the consideration described in paragraph_____, Employee agrees to:

a. _____

b. The Employee will refrain from instituting or pursuing administrative or judicial action in any forum concerning the issues, claims, or facts contained in his grievances, and that they will not be made the subject of future litigation. This provision precludes initiation of any administrative or judicial action against the Agency or its current or former employees, in their official or individual capacities, regarding the matters in his grievance, including but not limited to, arbitration, filing appeals, grievances, or petitions for review to the Merit Systems Protection Board, Equal Employment Opportunity Commission (EEOC), Office of Personnel Management, Office of Special Counsel, Federal Labor Relations Authority, and lawsuits in federal or state court.

7. Employee's signature on this Agreement constitutes full and complete settlement of any and all issues and/or claims arising from the circumstances of the aforementioned grievances.

8. If the Employee believes that the Activity has failed to comply with the terms of this Agreement, he shall notify (for administrative grievances) the head of Employee's organization, (for Negotiated Grievances), check the CBA (for the MSPB), the MSPB, in writing, of the alleged non-compliance within ___ calendar days of when he knew or should have known of the alleged non-compliance.

9. The terms of this Agreement will not establish any precedent nor will this Agreement be used as a basis by the Employee or any representative organization as justification for similar terms in any subsequent complaint.

10. For purposes of this Agreement, the terms "date of execution" and "effective date of this Agreement" mean the last date any of the Parties sign this Agreement.

11. The Employee and the Activity acknowledge that they have carefully read this Agreement, understand the contents contained herein, and have signed this Agreement as their own voluntary acts.

FOR THE EMPLOYEE:

FOR THE ACTIVITY:

Employee's Representative

Activity Representative

LESSONS LEARNED CLOSEOUT BY MEDIATOR

Date:	Length of Session:	Mediator:	
Complainant Office Symbol:		Co-Mediator:	
Was an agreement reached?	<input type="checkbox"/> YES	<input type="checkbox"/> NO	
Was this a CBA violation?	<input type="checkbox"/> YES	<input type="checkbox"/> NO	
Main issue(s) to overcome:			
Root cause(s):			
Do you think mediation was an effective technique for this case?	<input type="checkbox"/> YES	<input type="checkbox"/> NO	
If not, why not? What might have been more appropriate?			
Please evaluate the following features of COMPLAINANT:			
	<input type="checkbox"/> YES	<input type="checkbox"/> NO	<input type="checkbox"/> N/A
Identified root cause(s) related to dispute			
Proposed more than one option for resolution			
Actively participated in mediation			
NOTES:			
Please evaluate the following features of the MANAGEMENT REP:			
	<input type="checkbox"/> YES	<input type="checkbox"/> NO	<input type="checkbox"/> N/A
Identified root cause(s) related to dispute			
Proposed more than one option for resolution			
Actively [anticipated] in mediation			
LESSONS LEARNED:			

SECTION 3

TOOLS FOR ANYONE

**SELECTED PROVISIONS OF THE
ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996**

Pub. Law 104-320 (amending Pub. Law 101-552 and Pub. Law 102-354)

Sec. 1. Short Title

This Act may be cited as the “Administrative Dispute Resolution Act of 1996.”

Sec. 2. Findings

The Congress finds that--

- (1) administrative procedure, as embodied in chapter 5 of title 5, United States Code, and other statutes, is intended to offer a prompt, expert, and inexpensive means of resolving disputes as an alternative to litigation in the Federal courts;
- (2) administrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes;
- (3) alternative means of dispute resolution have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious;
- (4) such alternative means can lead to more creative, efficient, and sensible outcomes;
- (5) such alternative means may be used advantageously in a wide variety of administrative programs;
- (6) explicit authorization of the use of well-tested dispute resolution techniques will eliminate ambiguity of agency authority under existing law;
- (7) Federal agencies may not only receive the benefit of techniques that were developed in the private sector, but may also take the lead in the further development and refinement of such techniques; and
- (8) the availability of a wide range of dispute resolution procedures, and an increased understanding of the most effective use of such procedures, will enhance the operation of the Government and better serve the public.

Sec. 3. Promotion of Alternative Means of Dispute Resolution

- (a) Promulgation of Agency Policy.--Each agency shall adopt a policy that addresses the use of alternative means of dispute resolution and case management. In developing such a policy, each agency shall--
- (1) consult with the agency designated by, or the interagency committee designated or established by, the President under section 573 of title 5, United States Code, to facilitate and encourage agency use of alternative dispute resolution under subchapter IV of chapter 5 of such title; and
 - (2) examine alternative means of resolving disputes in connection with--
 - (A) formal and informal adjudications;
 - (B) rulemakings;
 - (C) enforcement actions;
 - (D) issuing and revoking licenses or permits;
 - (E) contract administration;
 - (F) litigation brought by or against the agency; and
 - (G) other agency actions.
- (b) Dispute Resolution Specialists.--The head of each agency shall designate a senior official to be the dispute resolution specialist of the agency. Such official shall be responsible for the implementation of--
- (1) the provisions of this Act and the amendments made by this Act; and

(2) the agency policy developed under subsection (a).

(c) Training.--Each agency shall provide for training on a regular basis for the dispute resolution specialist of the agency and other employees involved in implementing the policy of the agency developed under subsection (a). Such training should encompass the theory and practice of negotiation, mediation, arbitration, or related techniques. The dispute resolution specialist shall periodically recommend to the agency head agency employees who would benefit from similar training.

(d) Procedures for Grants and Contracts.

(1) Each agency shall review each of its standard agreements for contracts, grants, and other assistance and shall determine whether to amend any such standard agreements to authorize and encourage the use of alternative means of dispute resolution.

(2) (A) Within 1 year after the date of the enactment of this Act [Nov. 15, 1990], the Federal Acquisition Regulation shall be amended, as necessary, to carry out this Act and the amendments made by this Act.

(B) For purposes of this section, the term 'Federal Acquisition Regulation' means the single system of Government-wide procurement regulation referred to in section 6(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 405(a)).

Sec. 4. Administrative Procedures.

(a) Administrative Hearings.--Section 556(c) of title 5, United States Code, is amended--

(1) in paragraph (6) by inserting before the semicolon at the end thereof the following: "or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter"; and

(2) by redesignating paragraphs (7) through (9) as paragraphs (9) through (11), respectively, and inserting after paragraph (6) the following new paragraphs:

"(7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;

"(8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;"

(b) Alternative Means of Dispute Resolution.--Chapter 5 of title 5, United States Code, is amended by adding at the end the following new subchapter:

“Subchapter IV Alternative Means of Dispute Resolution in the Administrative Process

§571. Definitions.

§572. General authority.

§573. Neutrals.

§574. Confidentiality.

§575. Authorization of arbitration.

§576. Enforcement of arbitration agreements.

§577. Arbitrators.

§578. Authority of the arbitrator.

§579. Arbitration proceedings.

§580. Arbitration awards.

§581. Judicial review.

§582. Compilation of Information (Repealed).

§583. Support services.

§584. Authorization of appropriations (New).”

§571. Definitions

For the purposes of this subchapter, the term--

(1) "agency" has the same meaning as in section 551(1) of this title;

(2) "administrative program" includes a Federal function which involves protection of the public

interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation, as those terms are used in subchapter II of this chapter;

- (3) "alternative means of dispute resolution" means any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact finding, minitrials, arbitration, and use of ombuds, or any combination thereof;
- (4) "award" means any decision by an arbitrator resolving the issues in controversy;
- (5) "dispute resolution communication" means any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication;
- (6) "dispute resolution proceeding" means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate;
- (7) "in confidence" means, with respect to information, that the information is provided--
 - (A) with the expressed intent of the source that it not be disclosed; or
 - (B) under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed;
- (8) "issue in controversy" means an issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement--
 - (A) between an agency and persons who would be substantially affected by the decision; or
 - (B) between persons who would be substantially affected by the decision;
- (9) "neutral" means an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy;
- (10) "party" means--
 - (A) for a proceeding with named parties, the same as in section 551(3) of this title; and
 - (B) for a proceeding without named parties, a person who will be significantly affected by the decision in the proceeding and who participates in the proceeding;
- (11) "person" has the same meaning as in section 551(2) of this title; and
- (12) "roster" means a list of persons qualified to provide services as neutrals.

§572. General authority

- (a) An agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding.
- (b) An agency shall consider not using a dispute resolution proceeding if--
 - (1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;
 - (2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;
 - (3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;
 - (4) the matter significantly affects persons or organizations who are not parties to the proceeding;
 - (5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and
 - (6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.
- (c) Alternative means of dispute resolution authorized under this subchapter are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques.

§573. Neutrals

- (a) A neutral may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.
- (b) A neutral who serves as a conciliator, facilitator, or mediator serves at the will of the parties.
- (c) The President shall designate an agency or designate or establish an interagency committee to facilitate and encourage agency use of dispute resolution under this subchapter. Such agency or interagency committee, in consultation with other appropriate Federal agencies and professional organizations experienced in matters concerning dispute resolution, shall--
- (1) encourage and facilitate agency use of alternative means of dispute resolution; and
 - (2) develop procedures that permit agencies to obtain the services of neutrals on an expedited basis.
- (d) An agency may use the services of one or more employees of other agencies to serve as neutrals in dispute resolution proceedings. The agencies may enter into an interagency agreement that provides for the reimbursement by the user agency or the parties of the full or partial cost of the services of such an employee.
- (e) Any agency may enter into a contract with any person for services as a neutral, or for training in connection with alternative means of dispute resolution. The parties in a dispute resolution proceeding shall agree on compensation for the neutral that is fair and reasonable to the Government.

§574. Confidentiality

- (a) Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral, unless--
- (1) all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;
 - (2) the dispute resolution communication has already been made public;
 - (3) the dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or
 - (4) a court determines that such testimony or disclosure is necessary to--
 - (A) prevent a manifest injustice;
 - (B) help establish a violation of law; or
 - (C) prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential;
- (b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication, unless--
- (1) the communication was prepared by the party seeking disclosure;
 - (2) all parties to the dispute resolution proceeding consent in writing;
 - (3) the dispute resolution communication has already been made public;
 - (4) the dispute resolution communication is required by statute to be made public;
 - (5) a court determines that such testimony or disclosure is necessary to--
 - (A) prevent a manifest injustice;
 - (B) help establish a violation of law; or
 - (C) prevent harm to the public health and safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential;
 - (6) the dispute resolution communication is relevant to determining the existence or meaning of

an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or

(7) except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

(c) Any dispute resolution communication that is disclosed in violation of subsection (a) or (b), shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.

(d) (1) The parties may agree to alternative confidential procedures for disclosures by a neutral.

Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding. If the parties do not so inform the neutral, subsection (a) shall apply.

(2) To qualify for the exemption established under subsection (j), an alternative confidential procedure under this subsection may not provide for less disclosure than the confidential procedures otherwise provided under this section.

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a neutral regarding a dispute resolution communication, the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants of the demand. Any party or affected nonparty participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.

(f) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.

(g) Subsections (a) and (b) shall have no effect on the information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.

(h) Subsections (a) and (b) shall not prevent the gathering of information for research or educational purposes, in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the parties and the specific issues in controversy are not identifiable.

(I) Subsections (a) and (b) shall not prevent use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a party to or participant in such proceeding, so long as such dispute resolution communication is disclosed only to the extent necessary to resolve such dispute.

(j) A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under section 552(b)(3).

§575. Authorization of arbitration

(a) (1) Arbitration may be used as an alternative means of dispute resolution whenever all parties consent. Consent may be obtained either before or after an issue in controversy has arisen. A party may agree to--

(A) submit only certain issues in controversy to arbitration; or

(B) arbitration on the condition that the award must be within a range of possible outcomes.

(2) The arbitration agreement that sets forth the subject matter submitted to the arbitrator shall be in writing. Each such arbitration agreement shall specify a maximum award that may be issued by the arbitrator and may specify other conditions limiting the range of possible outcomes.

(3) An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit.

(b) An officer or employee of an agency shall not offer to use arbitration for the resolution of issues in controversy unless such officer or employee--

(1) would otherwise have authority to enter into a settlement concerning the matter; or

(2) is otherwise specifically authorized by the agency to consent to the use of arbitration.

(c) Prior to using binding arbitration under this subchapter, the head of an agency, in consultation with the Attorney General and after taking into account the factors in section 572(b), shall issue guidance on the

appropriate use of binding arbitration and when an officer or employee of the agency has authority to settle an issue in controversy through binding arbitration.

§576. Enforcement of arbitration agreements

An agreement to arbitrate a matter to which this subchapter applies is enforceable pursuant to section 4 of title 9, and no action brought to enforce such an agreement shall be dismissed nor shall relief therein be denied on the grounds that it is against the United States or that the United States is an indispensable party.

§577. Arbitrators

- (a) The parties to an arbitration proceeding shall be entitled to participate in the selection of the arbitrator.
- (b) The arbitrator shall be a neutral who meets the criteria of section 573 of this title.

§578. Authority of the arbitrator

An arbitrator to whom a dispute is referred under this subchapter may-

- (1) regulate the course of and conduct arbitral hearings;
- (2) administer oaths and affirmations;
- (3) compel the attendance of witnesses and production of evidence at the hearing under the provisions of section 7 of title 9 only to the extent the agency involved is otherwise authorized by law to do so; and
- (4) make awards.

§579. Arbitration proceedings

- (a) The arbitrator shall set a time and place for the hearing on the dispute and shall notify the parties not less than 5 days before the hearing.
- (b) Any party wishing a record of the hearing shall--
 - (1) be responsible for the preparation of such record other parties and the arbitrator of the preparation of such record;
 - (2) notify the other parties and the arbitrator of the preparation of such record;
 - (3) furnish copies to all identified parties and the arbitrator; and
 - (4) pay all costs for such record, unless the parties agree otherwise or the arbitrator determines that the costs should be apportioned.
- (c)
 - (1) The parties to the arbitration are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.
 - (2) The arbitrator may, with the consent of the parties, conduct all or part of the hearing by telephone, television, computer, or other electronic means, if each party has an opportunity to participate.
 - (3) The hearing shall be conducted expeditiously and in an informal manner.
 - (4) The arbitrator may receive any oral or documentary evidence, except that irrelevant, immaterial, unduly repetitious, or privileged evidence may be excluded by the arbitrator.
 - (5) The arbitrator shall interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives.
- (d) No interested person shall make or knowingly cause to be made to the arbitrator an unauthorized ex parte communication relevant to the merits of the proceeding, unless the parties agree otherwise. If a communication is made in violation of this subsection, the arbitrator shall ensure that a memorandum of the communication is prepared and made a part of the record, and that an opportunity for rebuttal is allowed. Upon receipt of a communication made in violation of this subsection, the arbitrator may, to the extent consistent with the interests of justice and the policies underlying this subchapter, require the offending party to show cause why the claim of such party should not be resolved against such party as a result of the improper conduct.

(e) The arbitrator shall make the award within 30 days after the close of the hearing, or the date of the filing of any briefs authorized by the arbitrator, whichever date is later, unless--

- (1) the parties agree to some other time limit; or
- (2) the agency provides by rule for some other time limit.

§580. Arbitration awards

(a) (1) Unless the agency provides otherwise by rule, the award in an arbitration proceeding under this subchapter shall include a brief, informal discussion of the factual and legal basis for the award, but formal findings of fact or conclusions of law shall not be required.

(2) The prevailing parties shall file the award with all relevant agencies, along with proof of service on all parties.

(b) The award in an arbitration proceeding shall become final 30 days after it is served on all parties. Any agency that is a party to the proceeding may extend this 30-day period for an additional 30-day period by serving a notice of such extension on all other parties before the end of the first 30-day period.

(c) A final award is binding on the parties to the arbitration proceeding, and may be enforced pursuant to sections 9 through 13 of title 9. No action brought to enforce such an award shall be dismissed nor shall relief therein be denied on the grounds that it is against the United States or that the United States is an indispensable party.

(d) An award entered under this subchapter in an arbitration proceeding may not serve as an estoppel in any other proceeding for any issue that was resolved in the proceeding. Such an award also may not be used as precedent or otherwise be considered in any factually unrelated proceeding, whether conducted under this subchapter, by an agency, or in a court, or in any other arbitration proceeding.

§581. Judicial Review

(a) Notwithstanding any other provision of law, any person adversely affected or aggrieved by an award made in an arbitration proceeding conducted under this subchapter may bring an action for review of such award only pursuant to the provisions of sections 9 through 13 of title 9.

(b) A decision by an agency to use or not to use a dispute resolution proceeding under this subchapter shall be committed to the discretion of the agency and shall not be subject to judicial review, except that arbitration shall be subject to judicial review under section 10(b) of title 9.

COMMONLY USED TERMS IN ADR

Agency: Each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include -- (A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia.

Alternative Dispute Resolution (ADR): The Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996) defines ADR as any procedure that is used to resolve issues in controversy, including but not limited to facilitation, mediation, factfinding, minitrials, arbitration, and the use of ombuds, or any combination thereof. Sec. 4(b), § 571(3). An ADR procedure is defined as one in which a neutral is appointed and specified parties participate. *Id.*, § 571(6). The Army ADR Program Office defines these terms as follows:

1. Facilitation: A relatively unstructured and flexible discussion between the disputants, assisted by a neutral facilitator. The primary attribute of facilitation is that the neutral engages the parties in settlement negotiations, using an interest-based problem solving approach to resolve the dispute. Notwithstanding its informal nature, for facilitation to qualify as an “ADR procedure,” the facilitator must be selected and act as a “neutral” for the purpose of assisting the disputants resolve issues in controversy (and for no other purpose).

2. Early Neutral Evaluation: A structured process in which the parties seek the assistance of a subject matter expert to review the dispute and to provide an assessment of the likely outcome if the case is litigated. Often called “Outcome Prediction,” this procedure requires a neutral with sufficient expertise in the law and facts of the case to provide a credible non-binding opinion regarding how an adjudicative body would likely resolve the dispute, with a sufficient degree of confidence that the parties rely on it for further negotiations.

3. Fact-finding: A structured process in which the parties present their cases to a third-party neutral with subject matter expertise, who then finds the facts which are accepted by the parties as the facts of the case upon which to base further settlement negotiations. A fact-finder does not predict or decide the outcome of the dispute if it goes to litigation.

4. Mediation: A structured process in which the parties seek the assistance of a trained, impartial mediator to help them resolve issue(s) in controversy. Mediation employs joint discussions and private, individual caucuses to help the parties resolve their differences through a mutual agreement. The mediator has no power to render a decision or dictate terms of settlement.

5. Mini-Trial: This process is not used to resolve civilian personnel disputes. Mini-trials are used primarily to resolve large-dollar acquisition and other complex disputes.

6. Ombuds: An ombuds (or ombudsman) is an employee of an organization appointed, in writing, by competent authority, for the purpose of accepting and resolving complaints and other disputes against or involving the organization itself. An ombuds often employs many ADR methods to resolve issues as appropriate, and may also exercise an investigative function if authorized by the appointment.

7. Other ADR: Other ADR techniques not covered here include conciliation, arbitration, peer review, and hybrid processes that may combine two or more ADR processes into a single proceeding. Some defining characteristics of “Other ADR” are as follows:

- a) The technique employed involves the assistance of at least one neutral third party and does not fit any of the categories defined above;
- b) The technique employed is considered an ADR technique by the Equal Employment Opportunity Commission, Federal Labor Relations Authority, or the Merit System Protection Board; or
- c) The technique employed is considered an ADR technique by a Federal Court.

Closure. For purposes of mediation, closure occurs when the mediation is terminated by an approved settlement agreement by a declaration of impasse by the mediator and termination of further proceedings.

Confidentiality. Restrictions on disclosure of certain dispute resolution communications or information given in confidence in relation to an ADR proceeding as provided in the Administrative Dispute Resolution Act, 5 U.S.C. § 574.

Dispute: See *workplace dispute*.

Dispute resolution communication: Any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant. A written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitration award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication.

Dispute resolution proceeding: Any process in which an alternative means of dispute resolution is used to resolve an issue in controversy, and in which a neutral is appointed and specified parties participate.

In confidence: Information provided -- (A) with the expressed intent of the source that it not be disclosed; or (B) under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed.

Issue in controversy: An issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement -- (A) between an agency and persons who would be substantially affected by the decision; or (B) between persons who would be substantially affected by the decision.

Neutral: An individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the issue in controversy.

Party: A person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes.

Qualified mediator: An individual who has completed basic mediation training consisting of 30 or more hours of combined classroom training and role-play exercises, and has successfully participated in a minimum three mediations as a co-mediator, and who observes the AAA-ABA-ACR Model

Standards of Conduct for Mediators, as supplemented for federal sector mediators by the *Guide for Federal Employee Mediators*, dated May 9, 2006, published by the Interagency ADR Working Group Steering Committee. www.adr.gov/pdf/final_manual.pdf.

Relief: The whole or a part of an agency -- (A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (B) recognition of a claim, right, immunity, privilege, exemption, or exception; or (C) taking of other action on the application or petition of, and beneficial to, a person.

Settlement. A voluntary agreement entered into by the parties to a dispute finally resolving issues in controversy to which the settlement pertains. A settlement may be written or oral, but should be in writing if it resolves any issue in controversy evidenced by a written claim, complaint, grievance, or other request for relief.

Workplace Dispute: A formal or informal claim or issue in controversy, arising out of an existing or prospective employment relationship between the Army and its civilian appropriated or nonappropriated fund employees, applicants for employment, or military members, for which a remedial process is authorized by law, regulation or policy. A workplace dispute may be written or oral. Common Army workplace disputes include EEO pre-complaints and formal complaints, negotiated grievances, agency grievances, MSPB appeals, labor-management disputes such as Unfair Labor Practice allegations and negotiation impasses, and certain prohibited personnel practice investigations under the jurisdiction of the U.S. Office of Special Counsel.

ARMY ADR POLICY



DEPARTMENT OF THE ARMY
WASHINGTON DC 20310

JUN 22 2007

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Army Alternative Dispute Resolution Policy

1. This memorandum reaffirms the Army's implementation of the Administrative Dispute Resolution Act of 1990 by Secretary of the Army Memorandum, subject: Implementation of the Administrative Dispute Resolution Act of 1990, dated July 25, 1995. That Act, and Congress' renewal of the legislation through the Administrative Dispute Resolution Act of 1996, encourage the use of Alternative Dispute Resolution (ADR) to reduce the time and costs of settling disputes and empower deciding officials to resolve conflicts more creatively and expeditiously.
2. During the past decade, the Army has used ADR to settle thousands of disputes in a variety of areas, ranging from contract claims to personnel matters. This experience has demonstrated that ADR is an effective tool to resolve disputes quickly and with less cost than traditional methods.
3. Army personnel are urged to use ADR procedures in appropriate cases. The use of ADR techniques may resolve all or part of the issue in controversy. The goal is to resolve disputes at the earliest stage feasible, by the fastest and least expensive method possible, and at the lowest possible organizational level. It is essential that personnel involved in the resolution of disputes receive ADR training and consider ADR in each case.
4. The Principal Deputy General Counsel of the Army is the Army's Dispute Resolution Specialist (ADRS). The ADRS shall:
 - a. Serve as the proponent for establishing and implementing Army ADR policy, guidance, and regulations;
 - b. Submit, manage, and execute the Army ADR Program budget;
 - c. Encourage, develop, and implement ADR initiatives, activities, and training throughout the Army;
 - d. Identify and eliminate unnecessary barriers to the use of ADR;
 - e. Ensure Army personnel are aware of and have access to existing ADR resources;
 - f. Ensure appropriate personnel receive ADR briefings and training;

SUBJECT: Army Alternative Dispute Resolution Policy

g. Prepare a summary report to the Secretary of the Army by September 30 of each year regarding progress made in implementing the Army ADR program in the previous year;

h. Develop a five-year plan for the Army ADR Program;

i. Secure resources necessary to implement the Army ADR policy and program;
and,

j. Coordinate with the Assistant Secretaries of the Army for Acquisition, Logistics, and Technology; Civil Works; Manpower and Reserve Affairs; Installations and Environment; and Financial Management and Comptroller; The Judge Advocate General; the Command Counsel of Army Materiel Command; the Chief Counsel of the Corps of Engineers; and other appropriate organizations for the development and implementation of the Army ADR program.

5. To assist the ADRS in performing these responsibilities, I am directing the hiring of an ADR specialist within the Office of the Army General Counsel (OGC). In addition, the Deputy Under Secretary of the Army, in coordination with the Assistant Secretaries of the Army for Manpower and Reserve Affairs and Acquisition, Logistics, and Technology, shall identify appropriate personnel to detail to the OGC, for the purpose of facilitating the application of ADR initiatives in the areas of workplace disputes and acquisition.



Pete Geren
Acting Secretary of the Army

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A GUIDE FOR FEDERAL EMPLOYEE MEDIATORS

**A SUPPLEMENT TO AND ANNOTATION OF THE MODEL STANDARDS OF CONDUCT
FOR MEDIATORS ISSUED BY THE AMERICAN ARBITRATION ASSOCIATION THE
AMERICAN BAR ASSOCIATION AND THE ASSOCIATION FOR CONFLICT RESOLUTION**

FEDERAL INTERAGENCY ADR WORKING GROUP STEERING COMMITTEE

FOREWORD

This Guide, promulgated by the federal Interagency Alternative Dispute Resolution Working Group (“LADRWG”) Steering Committee, builds upon the September 2005 Model Standards of Conduct for Mediators (“Model Standards”) issued by a joint committee of three major nationwide organizations, the American Arbitration Association (“AAA”), the American Bar Association (“ABA”) and the Association for Conflict Resolution (“ACR”) and approved by all three organizations. The Model Standards are set forth in their entirety below. This document provides further explication through a number of Federal Guidance Notes, set out in italics following the Standards to which they apply. This Guide is intended to provide practical ethical guidance for federal employee mediators tailored to mediation practice within the federal government. Non-federal mediators involved in federal mediations may wish to agree to adhere to the Model Standards and to use of this Guide, as part of their mediation employment agreements executed for such federal mediations.

NOTE: *This Guide applies to the internal management of the federal executive branch and is intended to provide helpful advice on potentially difficult questions. **It is not intended to create any new right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person.** Questions regarding interpretations of this Guide should be brought to the Office of the General Counsel or Legal Counsel in each department or agency. In addition, federal employee mediators must look to agency rules, regulations, directives and policies to obtain guidance in conducting proceedings for their agency. Regardless of their status as mediators, as federal employees, they are responsible for being aware of and complying with a variety of statutory and regulatory requirements, including certain reporting requirements. Should they have questions regarding any of these requirements and how they may relate to their obligations as mediators, it is incumbent on them to contact appropriate personnel within their respective agencies to resolve such questions.*

The Model Standards of Conduct for Mediators September 2005

The *Model Standards of Conduct for Mediators* was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution¹. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.² Both the original 1994 version and the 2005 revision have been approved by each participating organization.³

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

The use of the term "shall" in a Standard indicates that the mediator must follow the practice described. The use of the term "should" indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term "mediator" is understood to be inclusive so that it applies to co-mediator models.

¹ The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

² Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

³ The 2005 revisions to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association for Conflict Resolution on August 22, 2005, and the Executive Committee of the American Arbitration Association on September 8, 2005.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority, do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

Federal Guidance Notes:

1. *If, in a federal employee mediator's informed judgment, an agreement desired by the parties will contravene federal law or regulation, the mediator should raise the issue for the parties to consider. If the parties cannot satisfy the mediator's concerns and nevertheless insist on executing such an agreement, the mediator should withdraw from the mediation immediately.*

2. *Certain federal agencies have instituted workplace mediation programs that require managers and supervisors to participate initially in mediation. These programs do not violate this self-determination standard, because the agency, as one of the parties, has elected voluntarily to participate in the mediation, with the manager or supervisor attending as the agency party's representative.*

3. *To the extent it does not interfere with the self-determination of the parties, and so long as the parties and sponsoring agency programs authorize the mediator to do so, a mediator may offer a party his or her evaluation of that party's position as a means of assisting the party realistically to assess the strength of its positions and the risks associated with proceeding with any litigation.*

STANDARD II. IMPARTIALITY

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

1. A mediator should not act with partiality or prejudice based on a participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.

3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

Federal Guidance Notes:

1. If a federal employee mediator determines he/she is unable to maintain and exhibit impartiality because of agency efforts to influence inappropriately the mediator's conduct or otherwise compromise the mediator's impartiality, the mediator should withdraw from the mediation.

2. Government ethics regulations prohibit the solicitation and receipt of gifts, and this includes gifts of travel. See, for example, 5 U.S.C. § 7353, 31 U.S.C § 1353, and 5 C.F.R. 2635 Subparts B and C. Executive branch regulations are posted on the Office of Government Ethics (OGE) website which, at the time of this publication, is www.usoge.gov. The term "gifts of travel" is not intended to include the parties' reimbursement to the mediator of travel costs incurred in conjunction with rendering of mediation services.

STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

***Federal Guidance Note:** The Administrative Dispute Resolution Act of 1996 (“ADR Act”) (at 5 U.S.C. § 573(a)) requires federal employee mediators to disclose conflicts of interest in writing and this includes making sure that all parties to a mediation are aware of the precise nature of the mediator’s relationship with any party. A federal employee mediator must limit his/her role to that of mediator and must never assume the role of advocate or advisor of any sort for any party’s interests during the mediation process. Depending on the policies of their sponsoring program and the desires of the parties, federal employee mediators may offer evaluation of, for example, the strengths and weaknesses of positions, the value and cost of alternatives to settlement or the barriers to settlement (collectively referred to as evaluation) only if such evaluation does not interfere with the mediator’s impartiality or the principle of self-determination of the parties. (See Federal Guidance Note 3 following Standard I, Self-Determination.) Under EEOC Management Directive MD-110, an EEO investigator or counselor may not serve as a mediator in an EEO case in which he/she has investigated or counseled the Complainant. In addition, a mediator must not advise, counsel or represent any of the parties in any **future** proceeding concerning the subject matter of the dispute. A federal employee mediator must not serve as an advisor or approving official, for the purpose of approving a settlement agreement for statutory, regulatory or other legal compliance, when the mediator has mediated the dispute that is the subject of the settlement. Finally, mediators might also be subject to other statutes or regulations that prohibit their participation as a neutral regardless of disclosure.*

STANDARD IV. COMPETENCE

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator’s competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator’s knowledge and skills related to mediation.

3. A mediator should have available for the parties’ information relevant to the mediator’s training, education, experience and approach to conducting a mediation.

B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

Federal Guidance Notes:

1. Unless a specific statute controls, the confidentiality standards of the ADR Act, found at 5 U.S.C. § 574, will govern the confidentiality obligations in federal administrative mediations, and federal employee mediators should consider this statute to be the “applicable law” referenced in standard V.A. Similarly, for matters in United States district courts, mediators need to understand the confidentiality standards established by local rules of court required by the Alternative Dispute Resolution Act of 1998, at 28 U.S.C. 652(d). Mediators need to recognize that each district court is distinct, and that the rules in one district might differ significantly from the rules in another district.

2. These statutes do not afford absolute confidentiality protection. Federal employee mediators must refrain from unauthorized disclosure of “dispute resolution communications,” as defined by the ADR Act, 5 U.S.C. 574(a). Federal employee mediators should consult their agency’s guidance, as well as the ADR confidentiality guidance promulgated by the U.S. Attorney General’s Federal ADR Council published at 65 Federal Register 83085 (December 29, 2000) and the LADRWG website (<http://www.adr.gov>). A joint committee of the ABA Dispute Resolution, Administrative Law, and Public Contract Law Sections has developed additional federal ADR confidentiality guidance. The LADRWG Steering Committee’s Confidentiality Subcommittee also has issued a confidentiality guidance handbook for federal workplace mediation, which is available on the LADRWG website.

STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.

3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.

4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.

8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

Federal Guidance Notes:

1. *With respect to Standard VI.A.3, certain individuals may not be excluded from a federal mediation, if their attendance and/or participation is mandated by federal law. For example, the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7114(A)(2)(a), entitles a labor organization representing bargaining unit employees to be represented at any “formal discussion” between one or more representatives of an agency and one or more employees in the unit the union represents. This right has been interpreted by the Federal Labor Relations Authority and the U.S. Court of Appeals for the District of Columbia as applying to mediation of formal EEO complaints when the Complainant is a bargaining unit employee. See, e.g., Dep’t of the Air Force, 436th Airlift Wing, Dover AFB v. FLRA, 316 F.3d 280 (D.C. Cir. 2003); Luke Air Force Base, Ariz., 54 F.L.R.A. 716 (1998), rev’d, 208 F.3d 221 (9th Cir. 1999). Federal employee mediators should consult with the agency’s ADR Program official, a Labor Relations Officer, labor counsel or other appropriate official when confronted with an issue of union attendance in a federal mediation pursuant to its “formal discussion” rights.*

2. *Federal employee mediators should not accept federal mediation assignments unless the assignment is under the auspices of an agency program, including an established multi-agency shared neutrals program, so as to avert the possibility of being charged with abuse of official time or otherwise putting at risk their rights and benefits as federal employees. Federal employee mediators are encouraged to contact their agency’s mediation program administrator or Dispute Resolution Specialist for answers to specific questions related to these Standards, including questions involving potential conflicts of interest or abuse of government positions. If applicable, they may also wish to contact their respective agency’s ethics officer to resolve particular questions, and/or other appropriate official to secure authorization to serve as mediators.*

STANDARD VII. ADVERTISING AND SOLICITATION

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator’s qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.

2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

Federal Guidance Note: *For mediations subject to the ADR Act of 1996, mediators serve at the will of the parties. See 5 U.S.C. § 573(b). When federal employee mediators provide information regarding their experience and qualifications, they should provide meaningful and accurate information sufficient for the parties to make an informed decision to accept the mediator, whether that information is provided to the parties directly, via a roster, or otherwise.*

STANDARD VIII. FEES AND OTHER CHARGES

A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.

1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.

2. A mediator's fee arrangement should be in writing unless the parties request otherwise.

B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.

1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.

2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow fee arrangements that adversely impact the mediator's ability to conduct a mediation in an impartial manner.

Federal Guidance Note: *Although most federal employee mediators do not charge fees or are prohibited from charging fees, the programs for which they work sometimes charge nominal fees or seek cost reimbursement. Federal employee mediators should be prepared to answer questions regarding such arrangements for the mediations that they conduct, and conform to sections A and B above, as applicable.*

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

A. A mediator shall act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.
2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
5. Assisting newer mediators through training, mentoring and networking.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

ADR RESOURCES

Below is a non-exhaustive list of publications and websites that deal with mediation, negotiation, or conflict management. This list is provided for the reader's convenience as a starting point for acquiring additional information. Inclusion of any resource does not imply endorsement. Observe copyright protection for non-governmental sources.

Selected Books and Publications:

Fisher, Ury and Patton, Getting to Yes (Penguin: 3d Ed. 2011)
 Ury, William, Getting Past No (Bantam: 2007 Rev.)
 Fisher & Ertel, Getting Ready to Negotiate: The Getting to Yes Workbook (Penguin: 1995)
 Stone, Patton, and Heen, Difficult Conversations (Penguin: 1999)
 Patterson, Grenny, McMillan, and Switzler, Crucial Conversations: Tools for Talking When the Stakes are High (McGraw-Hill: 2002)
 Kolb and Williams, Everyday Negotiation (Jossey-Bass: 2003)
 Cooley, Mediation Advocacy (NITA: 1996)
 Fisher and Sharp, Getting it Done: How to Lead When You're NOT in Charge (Harper: 1999)
 Mayer, The Dynamics of Conflict Resolution: A Practitioner's Guide (Jossey-Bass: 2000)
 Mnookin, et al., Beyond Winning: Negotiating to Create Value in Deals and Disputes (Belknap Press: 2004)

Publicly Accessible Governmental ADR Websites:

DoD ADR Website (www.dod.mil/dodgc/doha/adr/index.htm)
 Army ADR Website (www.adr.army.mil)
 Air Force ADR Website (www.adr.af.mil)
 Navy ADR Website (www.adr.don.mil)
 Interagency ADR Working Group (IADRWG) Website (www.adr.gov)
 EEOC ADR Webpage (www.eeoc.gov/eeoc/mediation)
 MSPB Mediation Appeals Program (www.mspb.gov/appeals/mediationappeals.htm)
 Federal Mediation and Conciliation Service Webpage (www.fmcs.gov)
 Federal Labor Relations Authority ADR Website (www.flra.gov/FLRA_Training_ADR)
 Defense Equal Opportunity Management Institute (www.deomi.org)
 U.S. Office of Special Counsel ADR webpage: (<https://osc.gov/Pages/ADR.aspx>)

Non-governmental ADR Websites:

Mediate.com (www.mediate.com)
 American Arbitration Association (www.adr.org)
 American Bar Association Section of Dispute Resolution
 (www.americanbar.org/groups/dispute_resolution.htm)
 Association for Conflict Resolution (www.acrnet.org)
 Federal Dispute Resolution (www.fedconferences.com/fdr)
 Justice Center of Atlanta (www.justicecenter.org)
 National Institute for Advanced Conflict Resolution (www.niacr.org)

MEDIATION PRACTICUM Q AND A

Mediators face a lot of situations that make their job harder, or easier. These Practicum Q's and A's are here to suggest some ways to turn a bad news story into a good news story, or to showcase cases that are already good news stories! We welcome submissions and will update this Appendix to include new submissions as they accumulate. Please keep the people in your submissions anonymous, and use the Q and A format used here, if you can. Thanks!

1. Q. Last month I mediated a difficult case that finally resulted in an agreement, or so I thought. Yesterday the ADR case manager told me that the employee had filed a petition to repudiate the settlement agreement, alleging that it was the product of coercion; that I had “badgered” her into accepting management’s offer against her will and better judgment. I am confident that her allegations are false and without merit, but what can I do to defend myself?

A. Under the Administrative Dispute Resolution Act, 5 U.S. Code § 574(I), the mediator may disclose otherwise confidential information in order to resolve a dispute between the neutral and a party, but only as necessary to rebut the party’s charge. In your case, any statements made surrounding the discussion of management’s offer and the events leading up to the signing of the agreement are relevant to the charge and may be disclosed to rebut it. Don’t forget the other party is also free to disclose information bearing on the charge.

2. Q. I have heard the term “med-arb” being mentioned in connection with disputes, especially workplace disputes. What is it and how does it work?

A. “Med-Arb” is shorthand for “Mediation-Arbitration.” It’s a two-step ADR procedure in which the parties agree to mediate their dispute before submitting it to an arbitrator. If the dispute is settled, that’s as far as it goes. If it’s not, the next step is arbitration. The same neutral may serve as both mediator and arbitrator, as determined by the parties. In arbitration, the parties present evidence and make arguments to the arbitrator, who renders a decision, called an award, which has the force of law and is binding on the parties. Med-Arb is useful for resolving disputes because it combines the flexibility of mediation with the certainty of a litigated solution, in less time and at lower cost than litigation in the courts, with limited appeals. Med-Arb is common in private-sector disputes; much less so in disputes involving the Federal Government.

3. Q. I have a mediation pending. About two weeks ago, a draft ADR agreement was sent to both parties explaining the process and the expectations. One provision is for both parties to clear their schedules for the entire day. The employee objected, stating that he could not possibly engage in mediation for more than four hours in one sitting, but would be willing to come back the next day if needed. This objection was passed on to me as the mediator. What should I do?

A. Even though the mediation session hasn’t been commenced, it appears the mediation has been convened, so it’s OK for you to try to resolve this issue. As a voluntary process, mediation allows the parties to determine whether to participate, but once they do so, they are subject to reasonable rules of participation as established by the mediator. When one party attempts to exert control—by dictating the schedule based on personal desires, for example—you are within your rights to assert control over the process. Of course, if there is a medical reason for the employee’s request, reasonable accommodation may require flexibility as to schedule. Let’s assume there is no accommodation issue. It’s possible the party’s objection will be a moot point because the mediation

wraps up in less than four hours, so problem avoided. Otherwise, you might notify both parties that you will assess progress made and time spent in the mediation session, and consider options for continuing at that time. This response maintains your authority as the mediator, ensures flexibility, and makes it a joint decision between the parties, not a unilateral decision by one party alone.

4. Q. Army prefers the facilitative mediation model. What about evaluative, transformative or narrative mediation? Are those techniques prohibited?

A. No. A mediator who is competent in other mediation techniques may use those techniques if, in the mediator's judgment, they are necessary or useful to achieving a voluntary mutual agreement. This will most often be the case with private sector mediators or mediators from other agencies. Army collateral duty mediators should refrain from evaluative mediation at all times unless the mediator is a subject matter expert and the parties have expressly requested an evaluative mediator. Regardless of the technique used, all mediation processes leave decision-making as to resolution of the dispute with the parties.

5. Q. I recently mediated an EEO case in which the complainant was over age 40, but none of her allegations involved age discrimination. I drafted a standard negotiated settlement agreement (NSA) that did not contain any language pertaining to the complainant's waiver of rights under the Age Discrimination in Employment Act (ADEA). In his review, the JAG flagged this and said the agreement had to include the special language relating to waivers of ADEA claims because the complainant is over 40. What about the fact that the case didn't involve an age discrimination claim? Doesn't matter, said the JAG. The management official doesn't understand this, and frankly, neither do I. Can you explain?

A. This is a confusing area. The waiver rules in ADEA (codified at 29 U.S.C. § 626(f)), come from Title II of the Older Workers Benefit Protection Act (OWBPA), passed in 1990. Title II imposes specific procedural requirements to ensure that an employee's waiver of any right or claim under the ADEA is knowing and voluntary. When a protected employee settles an EEO claim that expressly includes an age discrimination allegation, the legal requirements clearly apply, since the employee expressly gives up the right to pursue that particular ADEA claim, now or in the future. The question in your case is whether these procedural requirements kick in when a protected individual (age 40 or older) settles an EEO case that *did not* allege age discrimination. The answer depends on the scope of the waiver language in the settlement agreement. When a protected employee signs a settlement agreement that waives all causes of action, known or unknown, that arose or existed before the agreement was signed, this constitutes a waiver of possible, though unknown, ADEA claims as well. Since a waiver of ADEA claims, however remote, triggers the special "knowing and voluntary" requirements, the JAG is correct, if that's what the waiver in your settlement agreement does. On the other hand, if the waiver is limited only to the actual claim being settled, it should not apply to unknown, unrelated past claims. In your case, assuming the employee is 40 or older, if there are no allegations of age discrimination, and if the complainant waives only those claims actually asserted, the Title II special procedural rules should not apply. Of course, if your JAG says you need it, there's probably no point in insisting that you don't.

6. Q. I was co-mediating a mediation in which the lead mediator said she was a "certified" mediator. During a break I asked her what that meant, and she said the mediation course she took (conducted by a private training firm) "certified" her to be a mediator. Is that true?

A. Probably not. Unless a training program purports to qualify the student to mediate cases upon completion (such as a court-sponsored training program that qualifies someone to mediate small claims court cases), a training certificate typically certifies completion of the training, nothing more.

Most mediation training courses, Army's included, do not train to that level of competency. Additional on-the-job training, such as co-mediation, is needed. When a mediator says she's "certified" as a mediator, it normally conveys a meaning beyond just training; it suggests special skill, experience, advanced training, or all three, plus recognition of those attributes by an external licensing or certifying authority that in your case the lead mediator did not have. That's not to suggest she's a lousy mediator, nor does it suggest she's not qualified to be the lead mediator. She may be a very good mediator, just not "certified."

7. Q. I've been told that mediation is voluntary for the participants, but as a supervisor I am frequently directed ("voluntold") to participate in mediation when I don't want to. That sounds like IN-voluntary to me. Am I free to tell management "no?"

A. Mediation is voluntary for the parties, but keep in mind who the parties are. Your participation in mediation is to represent management, not yourself. The agency is the party in interest. By offering or agreeing to mediation, the agency has already voluntarily exercised its option. You don't have much of a say at that point. Keep in mind that just because you have to participate in mediation doesn't mean you are obligated to settle, unless you or your principal (the organization you represent) voluntarily agrees to it.

8. Q. I recently mediated a formal EEO complaint in which the employee had a lawyer, who insisted on doing all the talking in both joint session and caucus. The lawyer was very argumentative, which made it very difficult to be collaborative. After getting nowhere for over 2 hours, I declared an impasse and terminated the mediation, even though I believed there was a path to settlement. What could I have done to prevent this?

A. Maybe nothing. As a mediator, you set the tone and establish your authority over the process, but in the end your power is limited because the parties and their representatives can always get up and leave. Moreover, whether it's a private lawyer who charges for his or her services, or a JAG or civilian attorney from the post legal office, lawyers are there to advocate for their client, and sometimes they haven't figured out, or have forgotten, that mediation advocacy isn't courtroom advocacy. Sometimes they just aren't interested in settlement, but have other motives for participating in mediation, such as free discovery or maintaining the appearance of collaboration. Since you can't impose sanctions or issue gag orders, or banish the lawyer altogether, the only option you control is to do exactly what you did: declare an impasse and terminate the mediation.

Fortunately, your experience is not typical. In most cases, personal representatives are an asset, not a liability. But there are a couple of things you can do to make this situation less likely to occur. First, make sure you address the presence of personal representatives in your opening remarks, explaining your expectations as to the scope of their participation as well as their clients', and (this is important!) *getting their verbal understanding of, and agreement to, those expectations*. This is especially critical when the representative is a lawyer. While not a guarantee of good behavior, doing this as part of the ground rules for mediation forms a baseline that you can return to if necessary. Second, if it becomes necessary, caucus with the offending representative alone. Remind the representative of the ground rules s/he agreed to, inform him/her that s/he is not abiding by those rules, and inform him/her that his/her behavior is hurting his/her client. Never chastise the representative in the presence of his/her client. If the problem persists, it may be time to wrap things up.

9. Q. I'm still kind of a novice mediator, having done only 6 cases by myself. In three of those cases, the parties were going back and forth, neither really offering any new ideas, and I sort of "froze," not offering any ideas of my own to get the dialogue moving again. Not surprisingly, none of those cases settled. While I realize mediation doesn't always end in settlement, in those three

cases I left the mediation feeling that a lot of good ideas were out there but nobody grabbed them, including me. As a facilitative mediator, is there more I could/should have done to jog the parties back on a more productive path?

A. We all second-guess our actions when the outcome wasn't what we wanted or expected. Your self-examination is healthy, and helpful to avoiding mistakes in the future. Without more specifics, it's impossible to tell what you could or should have done (or shouldn't have done) that would have changed the outcome. Appendix 12 lists several possible interests in various workplace disputes. Identifying interests often suggest possible solutions to meet those interests. Consider using a white board or easel pad to visually capture ideas for discussion. In addition, Appendices 14 and 15 give several ideas and options that might be useful, depending on the specific circumstances. Consulting local subject matter experts, such as the L/MER specialist or post labor counselor, might help too. They may be able to suggest options that you and the parties hadn't thought of. As a facilitative mediator, you are not prohibited from throwing out suggestions when the parties are silent, so long as everyone understands these are ideas for discussion, not recommended settlement terms. You are not a potted plant. You can and should take an active role, so long as it's facilitative, not directive.

10. Q. I mediated a case involving a claim for monetary damages that settled...or so I thought. We had an agreement on the table that had already gotten the thumbs up in the legal review, and I gave a copy to each party to review for a few minutes before signing it. The employee asked if he could run the settlement by his wife, who was in the next room but was not the employee's personal representative. Of course, I said yes. Five minutes later he returned to the mediation room and announced that he wouldn't sign the agreement unless management increased its monetary offer by \$5,000. The management official got angry, accusing the employee of "welshing" on the deal, but the employee was adamant that the extra money was "non-negotiable." I felt further negotiations would be futile so I declared an impasse and terminated the mediation. Now I'm having second thoughts—maybe I acted too fast in declaring an impasse.

A. This is where experience plays a big role, i.e., in gauging whether an apparent stalemate is a permanent condition, or just a temporary setback, made to look worse than it is because emotions are flaring. In the scenario you describe, the parties had already demonstrated their ability and willingness to reach agreement. Perhaps they could do so again. But you didn't test that hypothesis because you immediately declared an impasse and terminated the mediation. The better practice would have been to calm the waters a bit and invite both parties to regroup to discuss the last development. Maybe the additional demand served a legitimate interest of the employee, or maybe it was just a negotiating ploy, or perhaps even a bluff that would be withdrawn if it meant total collapse of the agreement. Or it could end in impasse. The difference is, had you declared an impasse after regrouping the parties, it's likely you did so because there really was no more room for compromise, and you'd sleep better at night. There are two morals to this story. First, don't declare impasse and terminate mediation unless there really is no room for a deal. Take your time to think about it before acting ("go to the balcony"). Second, assume that parties at the table have to answer to someone else ("phantom parties") when considering settlement terms, and ensure that they approve before submitting a draft agreement for review and final signatures.

11. Q. What happens if you fail to ask a party in caucus what information you can share with the other side before going into caucus with the other party or going back into joint session?

A. This is a common error, especially among inexperienced mediators. The mediator should begin each caucus session with a statement (or reminder) that everything the party tells the mediator is confidential and will not be disclosed unless authorized by the party or required by law. At the end of caucus, the mediator asks the party what can or cannot be disclosed to the other side. In your

case, since you hadn't disclosed any confidential information before discovering your mistake, there was time to fix it by going back into caucus to clarify what can and can't be disclosed, then rejoining the other party in joint session. To avoid any embarrassment, just announce that you need further clarification on an unspecified issue before reconvening the joint session (which is true). The other side won't suspect a thing.

12. Q. I know as a facilitative mediator I'm not supposed to evaluate the parties' positions or give my opinions, but what do you do if a party asks you a direct question and you know the answer?

A. The answer depends on the question. Unless it asks you for what is essentially a legal opinion, which you should avoid answering at all times (either because you are not a lawyer, or if you are, you're there as a mediator, not a lawyer), you can answer the question, but preface your answer with the disclaimer that you are not the subject matter expert, and recommend the requesting party consult with the subject matter expert on stand-by before proceeding further. You do not want to become an advocate for either side, and you most certainly are not an expert witness.

13. Q. I mediated a case in which the management official stated in his opening remarks that he was participating in the mediation because he was directed to, and had no intention of settling unless the employee could "prove" she was the victim of sex discrimination. I wanted to correct this misstatement right away, but felt that doing so might be embarrassing, so I decided to wait until we caucused. Unfortunately, the case never got to that point: the employee got up and left. I had to declare an impasse after only 15 minutes. What should I have done?

A. The official's remark demonstrates gross ignorance of the purpose and limitations of mediation and required an *immediate* response from you, either in joint session or in a hastily-called caucus. If you elect to proceed jointly, you must take a neutral tone and reiterate to both parties that you're not a judge and that mediation cannot determine legal liability, so neither party is expected to "prove their case." Then you'll need to get verbal assurances from the parties that they understand and accept that. Such assurance is especially necessary for the management official. If instead of addressing the issue jointly, you go to immediate caucus, you should consider being more directive with the management official, and when you reconvene, make sure the official states clearly his willingness to address the issues in good faith. Whichever approach you take, if you're not satisfied with the sincerity of the official's response, you need to call a recess and contact the administrator. It may be necessary to get another management official who can participate in good faith.

14. Q. What if any restrictions are there on me as a mediator having *ex parte* discussions with each party outside of the mediation session itself?

A. Legal rules generally prohibit judges from having discussions with only one party, whether in session or not. You're a mediator, not a judge, so you are not subject to those rules. Mediators frequently have discussions with each party separately to get background, to establish a rapport, and for other reasons. The main concern is to avoid a conflict of interest or the appearance of a conflict, or the appearance that you are not impartial. *Ex parte* communications that get too "friendly" can threaten the appearance of impartiality that you must maintain at all times. If you have an *ex parte* discussion with only one party, but not the other, there should be an objective mediation-related reason for the discussion, and full disclosure to the other side. Remember, once you lose the appearance of impartiality, you never get it back.

15. Q. What's the difference between conciliation and mediation?

A. The two processes are very similar and the terms are often used interchangeably. Practitioners themselves often have trouble distinguishing the two. Both use a neutral to assist the parties resolve

their differences through a mutually acceptable settlement. Conciliation is most often associated with conflicts affecting multiple individuals in organizations or other groups. Mediation typically is more one-on-one. The analytical focus of each is similar, i.e., identifying interests and options for resolution. The goal of conciliation is to keep a conflict from becoming a dispute; the goal of mediation is to keep a dispute from becoming a lawsuit.

16. Q. As a mediator, I like to have as much information as possible about the case I'm mediating. Other mediators tell me the less they know at the beginning, the better. Who is right?

A. Both. Those who want more information say it helps them understand better where the parties are coming from, the bases for their claims, and the options they might be willing to explore. Those who want less say it avoids prejudging the case and ensures impartiality. Both arguments have merit. The default in Army workplace disputes is that the mediator should not be given more information than the general charge(s) and perhaps the issues supporting the charge(s). As mediators get more experienced, especially if they're subject matter experts, having all the information in advance is either preferred or, in the case of an evaluative mediator, required.

17. Q. Management insists on including a confidentiality clause in settlement agreements. Is that a good idea?

A. It's neither a good idea nor a bad idea. In general, confidentiality clauses in settlement agreements are disfavored due to their uncertain enforceability and lack of utility. Both the Department of Justice and the Army discourage their use. A settlement agreement is not exempt from disclosure under the Freedom of Information Act, there are no useful remedies for breach, at least not for the Government, and enforceability of such clauses is problematic at best. However, there is no legal impediment to including a confidentiality clause if the parties want one. Most parties who sign a settlement that contains a confidentiality clause will abide by it because they signed a legal document obligating them to keep things confidential. If a clause is included, the agency should exclude from its reach those offices or activities that have an official "need to know" the contents of the agreement.