



# ADR for Managers & Supervisors

Army ADR Program  
Office of the Army General Counsel

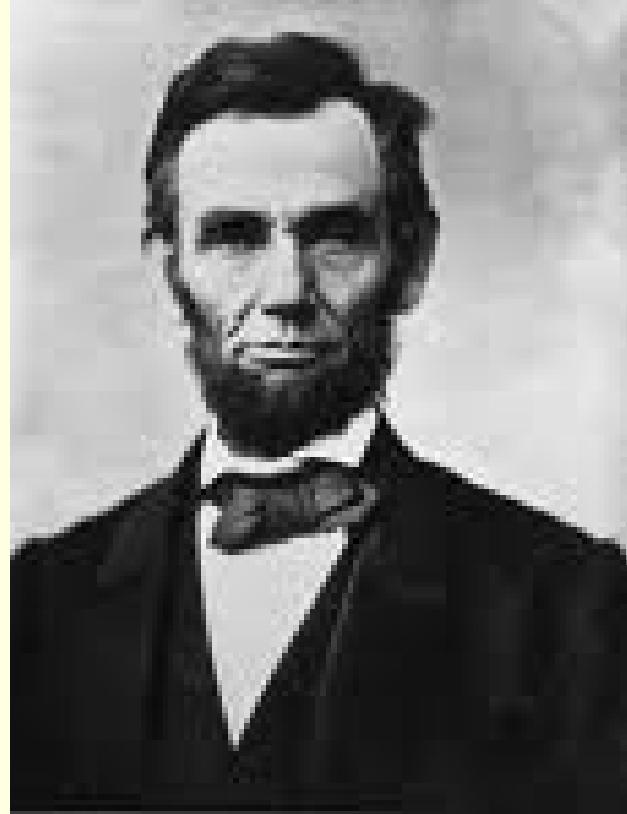
# Dispute Resolution— Differing Points of View

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One Man's View—

“Discourage litigation.  
Persuade your neighbors to  
compromise whenever you  
can...the nominal winner is  
often a real loser...in fees,  
expenses and waste of time.  
As a peacemaker, the lawyer  
has a superior opportunity of  
being a good man. There will  
be business enough.”

Abraham Lincoln, 1850



# Dispute Resolution— Differing Points of View

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Another Man's View—

“The greatest joy a man can know is to conquer his enemies...To ride their horses and take away their possessions. To see the faces of those who were dear to them bedewed with tears...”

Genghis Khan,  
12<sup>th</sup> Century



# Which are You?

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- Abraham Lincoln

- Cooperation
- Compromise
- Collaboration



- Genghis Khan

- Power
- Punishment
- Victory





# Litigation Facts

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- A lawsuit is filed every 2 seconds = 16 million cases each year
- Litigation costs = approximately 2.2% of U.S. GDP every year (over \$350 BILLION)
- Litigation costs often exceed case value
- Yet we still sue over everything, and anything...

# “Lawsuits ‘R US”

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- A Utah woman sued Google for \$100,000, claiming “Google Maps” erroneously led her to walk on a busy highway without sidewalks, where she was hit by a car and injured.
- A disabled man sued a Florida strip club because they did not provide him an equal-access view of the stage.
- A woman sued McDonalds for injuries caused by a spilled cup of hot coffee, won \$2.9 Million (including \$2.7 million in punitive damages). Case eventually settled for < \$500K.
- A man purchased food to go from McDonald’s. He placed a milkshake between his legs and took off. As he leaned over for a french fry, the milkshake popped its lid and spilled, causing him to lose control of his car and hit someone. The driver of the second car sued McDonald’s, claiming that it should have cautioned the man who hit him against eating while driving.

# “Lawsuits ‘R US”

- A man sued Anheuser-Busch for \$10,000, claiming false advertising for a beer commercial promising that anyone drinking it would be popular with the ladies. He wasn't. His case was dismissed.
- Plaintiff won \$873,000 for gender discrimination; jury then ordered her employer, AutoZone, to pay her \$185 *million* in punitive damages.
- A class-action against Hooters for sex discrimination settled for \$3.75 million. The lawyers got \$1.75 million.
- Exxon-Mobil sued Kellogg's, claiming “Tony the Tiger” was too similar to Exxon's tiger, which could cause confusion in children between gasoline and frosted corn flakes. Case was dismissed because Exxon waited too long—over 30 years—to sue.
- A student at the University of Idaho unsuccessfully sued that institution over his fall from a third-floor dorm window. He'd been mooning other students when the window gave way. It was contended the University failed to provide a safe environment for students or to properly warn them of the dangers inherent to upper-story windows.

# The Case Against Litigation

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- High costs
  - Attorney fees
  - Discovery expenses
  - Witness fees
  - Increased settlement value
- Takes too long to resolve dispute
  - 2-3 years for EEO cases is typical; 5+ years is not uncommon
- Parties lose control over outcome
- Adversarial: undermines teamwork and corrodes working relationships
- Diverts resources away from mission
- Remedies may be too limited to address the problem



# The Case Against Litigation

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“I have been ruined only twice in my life: once when I lost a lawsuit, and once when I won.”

Voltaire



# The Case Against Litigation

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“Litigation is a machine which you go into as a pig and come out as a sausage.”

Ambrose Bierce



# Alternative Dispute Resolution

## The “Alternative” to Litigation

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“ADR is a process in which a third party neutral assists the disputants in reaching an amicable resolution through the use of various techniques. ADR describes a variety of approaches to resolve conflict which avoid the cost, delay, and unpredictability of the traditional adjudicatory processes while at the same time improving workplace communication and morale.”

U.S. Equal Employment Opportunity Commission

<http://www.eeoc.gov/federal/adr/index.cfm>

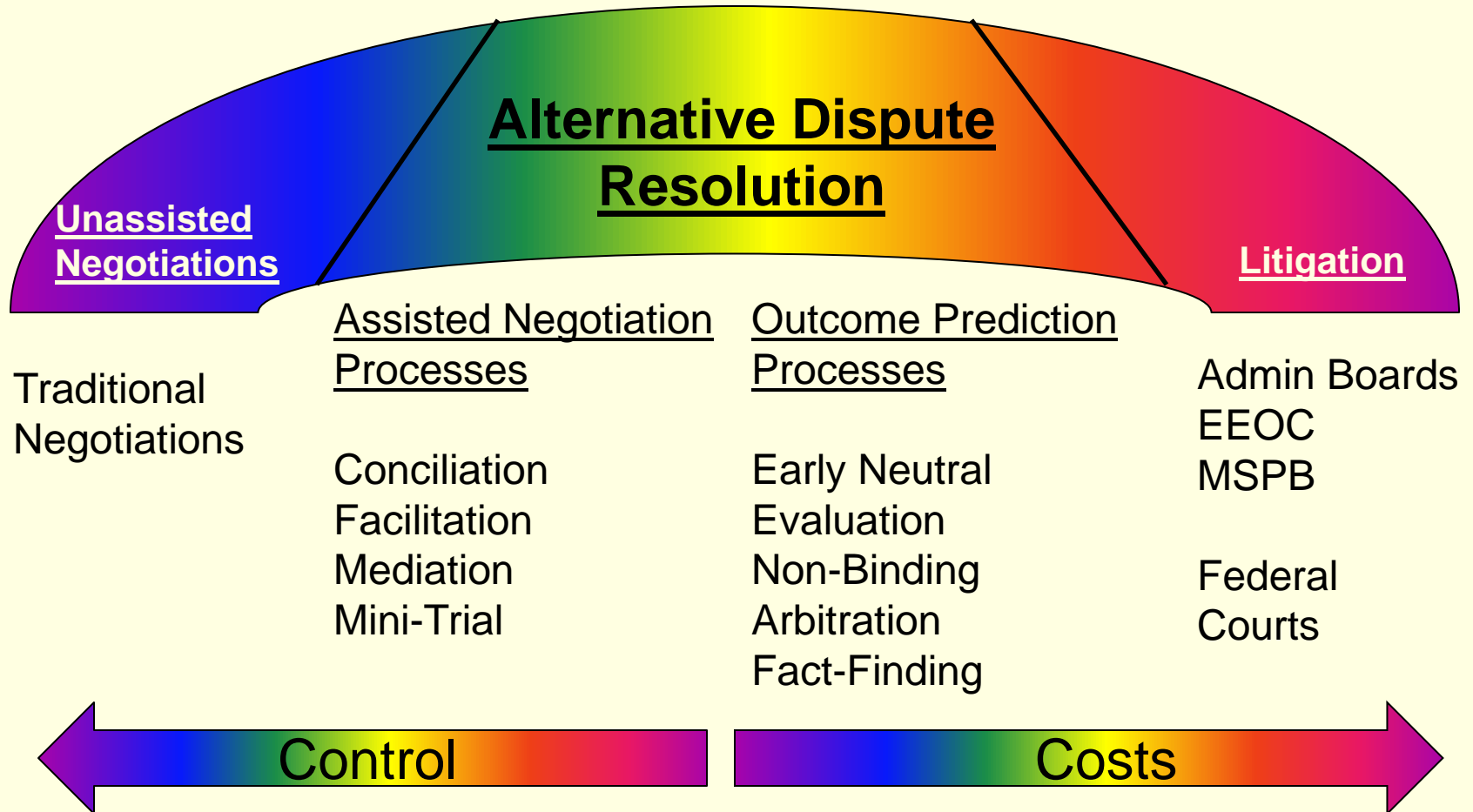
# Alternative Dispute Resolution

## The “Alternative” to Litigation

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- Late 19<sup>th</sup> century: Arbitration (“private litigation”) entered business and labor disputes
- 1960s: Mediation (assisted negotiation) began its explosive growth as the ADR process of choice
- Today: ADR includes many processes designed to resolve disputes faster, cheaper, and more informally than litigation

# ADR in the Dispute Resolution Spectrum



# ADR vs. Litigation

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## **ADR is—**

- Collaborative
- Confidential
- Informal, few rules
- Flexible
- Inexpensive
- Fast
- Party-controlled
- Final, if successful
- Easy on relationships
- Non-disruptive

## **Litigation is—**

- Adversarial
- Public
- Formal, lots of rules
- Inflexible and rule-bound
- Expensive
- Time-consuming
- Court/board controlled
- Not necessarily final
- Hard on relationships
- Disruptive/divisive

# Overcoming Resistance to ADR

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- ADR is *voluntary*, so parties to a dispute have to be convinced that using it is in their interests
- Many of us have a natural resistance to ADR
  - ADR goes against our notions of adversarial justice (think “Perry Mason” or “Matlock”)
  - When there’s a disagreement, we tend to think we’re right, and don’t want to admit otherwise
  - We find compromise to be hard
- We buy into certain “myths” as reasons to reject ADR as a dispute resolution option

# ADR Myths and Realities

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Myth: ADR is an “ATM machine” for disgruntled employees

Reality: Monetary benefits are less, on average, in ADR settlements

Myth: The relief demanded is the only available option

Reality: ADR processes contemplate a range of options, not just one

Myth: ADR is best when your case is weak

Reality: ADR is actually *more* effective when your case is strong

Myth: ADR undermines management authority

Reality: Not so. ADR is a process for resolving a problem, a key goal of any manager

Myth: ADR sets a bad precedent

Reality: Negotiated settlements have no precedential value

Myth: Settling is a tacit admission of management fault or wrongdoing

Reality: All settlements are “no fault”



# ADR: A Business Approach to a Business Problem

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- Most workplace disputes (e.g., EEO complaints, grievances) are *business*, not *legal*, problems
- Most EEO complaints don't result in a finding of discrimination
  - Fiscal Year 2012 (most recent data):
    - 15,706 formal complaints were closed (Government-wide)
    - 6,758 merit decisions were issued (Government-wide)
    - Total findings of discrimination: 214 (3.1%)
    - Previous years: 2009 (2.9%); 2010 (3.3%); 2011 (3.0%)
- Many do allege legitimate workplace issues
  - Poor communication, personality conflicts, bad management practices, weak leadership, *BULLYING*...
- Investigate the facts, discuss with counsel, supervisory chain and EEO officer as to how best to resolve the issue

# Good Cases for ADR

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- Relationship between the parties is important
- Case involves no unique questions of law
- Unassisted negotiations aren't going anywhere
- Confidentiality is desired
- Parties want resolution sooner than later
- Parties want control over process and outcome
- Parties need a reality check
- Emotions are running high
- Transaction costs exceed likely case value

# Bad Cases for ADR

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- Authoritative decision is needed for precedent
- Public record of proceedings is needed
- Case significantly affects non-parties
- ADR would undermine development or consistent application of Government policy
- Case involves significant issues of criminal misconduct, fraud waste or abuse, or threats to health or safety
- Significant operational limitations make ADR impossible or impractical

# ADR Policy in EEO Complaints

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- DoD and Army policy: ADR should be used to the maximum extent practicable and appropriate, by the least expensive means possible, at the lowest possible organizational level
- EEOC policy: Agencies must make ADR available at both the informal precomplaint stage and the formal complaint stage
- ADR must be:
  - Voluntary
  - Neutral
  - Confidential
  - Enforceable
- ADR is appropriate to resolve most, but not all, disputes
- Mediation is the most common ADR process for EEO cases

# Mediation

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“[A] private, informal dispute resolution process in which a neutral third person, the mediator, helps disputing parties to reach an agreement. The mediator has no power to impose a decision on the parties.”

- Black's Law Dictionary (6<sup>th</sup> Ed. 1990)

# Mediation History

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- Dates back to ancient Greece
- Emerged in the U.S. as a popular alternative to litigation in mid-20<sup>th</sup> century
- Now the most widely-used ADR process
- Mediation ***IS NOT*** arbitration!
  - Arbitration is adversarial, mediation is not
  - An arbitrator is a decision-maker, a mediator is not
  - Arbitration is usually binding—parties must abide by the arbitrator's decision whether they agree or not; mediated outcomes are strictly consensual
  - Arbitration awards are reported, mediated outcomes are not
  - Arbitration awards can be appealed, mediated outcomes can't

# Mediation Methods



- **Assesses** the strengths and weaknesses for the claim or probes the parties' interest
- **Predicts** courts outcomes or the impact of not settling
- **Develops and proposes** settlement terms
- **Urges/pushes** parties to accept settlement terms
- Requires a mediator who is a subject-matter expert

Evaluative

- **Facilitates** positive discussion between parties
- **Helps** parties identify their interests and goals for resolution
- **Assists** parties develop options and proposals
- **Asks** probing questions to test parties' assumptions about strengths and weaknesses of their claims or likely outcome if case goes to litigation
- Favored method in workplace disputes



Facilitative

Regardless of method used, the parties **ALWAYS** control the outcome of mediation

# Mediation Features

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- Voluntary
- Collaborative
- Highly adaptable
- Interest-based
- Confidential
- Mediator
  - Impartial
  - Special training in mediation skills
  - May or may not be a subject matter expert
  - Not a judge or decision-maker: can't impose a solution
- Outcome is based on mutual agreement

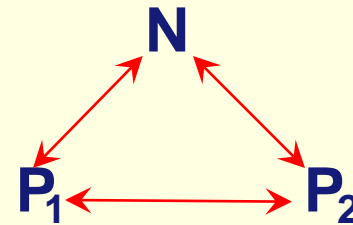




# Mediation Process

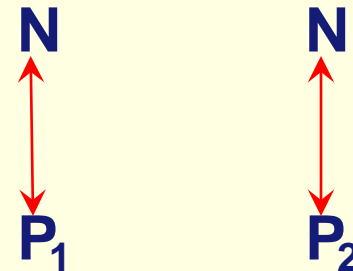
## Process Dynamics:

Third-party assisted negotiations



## Unique Feature:

Confidential caucuses



## Decisionmakers:

The parties



# Making Mediation Work for You

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## Points to Remember—

- Mediation is not an adversarial proceeding
- Parties take active role in resolving their dispute
- Be prepared to compromise, even if just a little
- Do not expect the outcome to turn on legal issues
- If you're required to participate in mediation, remember:
  - Good faith is required of all participants
  - Reaching settlement is NOT required (but is the goal)
- Don't think of the mediator as a judge
- Always remember: mediation is YOUR process

# Making Mediation Work for You

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- Be prepared—know your case!
- Set aside time for mediation without distraction
- Focus on the interests behind the positions
  - Your interests – what do you want to accomplish?
  - The other side's interests
  - What options are available to satisfy those interests?
- Mediate in good faith—keep an open mind
- Don't take the dispute personally—it's not about you!
- Pay attention to the settlement agreement
- Maintain confidentiality
- If mediation does not lead to resolution, fear not!
  - All other legal remedies are still available
  - Mediation can be attempted again at any time
  - Open communications can benefit working relationships

# Making Mediation Work for You

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- Manage conflicts to avoid third-party intervention
  - Address early and directly: keep conflicts from escalating into disputes
  - Communicate with your employees regularly
  - Learn and hone collaborative problem solving skills
- Don't take the dispute personally; it's not about you!
- Set aside sufficient time for mediation without distraction
- Management official must have sufficient authority to *bind* the agency
  - If you don't, know who does have authority and make sure he or she is available
  - Otherwise, don't waste everyone's time
- If you supervise collateral duty mediators, support them!

# BLFTS\*

Mediation is often better than litigation because...

- It's much faster
- It's much cheaper
- It's collaborative, not adversarial
- Parties are in control of the outcome
- It can fix problems—not just the “legal” issues
- If successful, it's final
  - Settlement terminates the dispute
  - Claimant waives all appeals & further actions over subject matter of dispute

\* Bottom Line For The Supervisor

# Army ADR Program Office

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