

Alternative Dispute Resolution

Frequently Asked Questions

What are the benefits of mediation?

Mediation can resolve disputes quickly and effectively. If successful, both parties often come away from mediation understanding each other better. This is especially important when the parties have to continue to work together or have some other type of on-going relationship. Also, because of the informal nature of mediation, it is less costly than other adversarial methods of resolution. Finally, mediation is a process that the parties have full control over. The mediator is not a judge. Resolutions are not imposed on the parties; the parties determine the terms of any resolution agreement. That resolution may be elaborate, or it may involve something as simple as an apology. The unique opportunity offered by mediation is the opportunity to truly listen to the other party to a dispute, to be heard by that party, and to work together to find a mutually acceptable solution.

What are the risks involved with engaging in mediation?

If the parties agree to mediate during the early stages of the dispute, the risks are minimal, if any. "Risks" are associated with "winning" and "losing" a dispute. The point of mediation is to get out of the adversarial win/lose forum and to begin to negotiate an agreement that will be the best solution the parties could hope for given their situation. However, with that said, it is important to note that there are parties that may find themselves in a court-ordered mediation. Such mediation would likely be taking place after the parties have spent significant resources on trial preparation and strategy. In this case, the frank and open discussions encouraged during mediation would be perceived as risky, i.e., the fear of saying something during the mediation that may jeopardize a person's case. However, even in this situation, mediation can be conducted successfully. A skilled mediator and supportive attorneys can create a virtually risk-free environment in which the parties effectively communicate with one another.

When should a manager consider mediation?

Whenever the manager sees that there is a problem between employees or, if the manager is having a problem with an employee, mediation should be the first step toward resolution. The earlier the problem is addressed the more likely it will be resolved.

Isn't mediation just another hoop an employee must go through before bringing an official action against the agency?

No. Mediation is independent of any traditional complaint process such as litigation, EEO, MSPB, or any other formal complaint process. This is an important point to understand because if you engage in mediation you still must meet all of the filing requirements and timeframes established by the forum you choose. Also, mediation does not have to take place before you file a complaint. You can mediate your dispute at any point in time as long as all the parties agree to mediate.

Doesn't mediation pressure the parties into settling a dispute?

No. The process is voluntary and any party can terminate the mediation at any time. However, it is easy to confuse the agency's interests in mediation with an interest to settle. The Federal Government is encouraging employees to mediate disputes before engaging in formal resolution processes. But it is important not to confuse the emphases on mediation with pressure to settle. Engaging people in the process of mediation is sometimes more important than coming out of the mediation with a resolution. At the FAA, as well as many other Federal and private organizations, the goal is often to get the parties talking to each other in a constructive manner. If this takes place, with or without a resolution, the goal has been achieved.

What are the consequences to managers and/or employees if they choose not to mediate?

There are no consequences if you choose not to mediate. However, Federal agencies are mandated by both Congress and the President to develop and implement ADR programs; therefore, many agencies, including the FAA, are expecting managers to attempt alternative dispute resolution methods in cases where ADR is appropriate.

What are the ramifications to managers and/or employees if the dispute is not resolved during mediation?

There are no ramifications whatsoever if a dispute is not resolved during mediation. For example, if an EEO pre-complaint is not resolved during mediation, the case continues in the administrative process.

Who picks the mediator(s)?

Different mediation programs may have different procedures for choosing mediators. Generally, the ADR program manager will choose the mediator and provide the parties with the mediator's name and background to make sure the parties have no objections to the program manager's choice. If one or both of the parties do not agree to use the mediator, another mediator will be chosen.

Can I bring my lawyer with me to the mediation?

Yes. You may bring an attorney or any other representative with you to mediation.

Can I mediate if I belong to a union?

Employees represented by a labor organization must use the dispute resolution processes available to them pursuant to their union agreements. Some unions in the FAA have included mediation and other ADR processes in their agreements.

What about confidentiality?

The rules that apply to confidentiality can be found in 5 U.S.C. Chapter 5 Subchapter IV *Alternative Means of Dispute Resolution in the Administrative Process*. (5 U.S.C. § 574), otherwise known as the Administrative Dispute Resolution Act of 1996 [ADRA]. A short summary of the confidentiality provisions follows this response.

Generally speaking, dispute resolution communications are confidential and may not be disclosed either by the parties or by the mediator, but there are important exceptions to this. "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 non-party participant. The written agreement to enter into a dispute resolution proceeding, or the final written agreement reached as a result of a dispute resolution proceeding, is not considered a dispute resolution communication, and therefore, they are not confidential. Communications made "in confidence" to the mediator are also protected.

It is important to note that the involvement of the mediator in the communication is necessary for the confidentiality provisions to apply. For example, if a party (or non-party) communicates with the mediator either orally or in writing, then the communication will be protected (subject to the exceptions below). Further, if a party indicates that a specific communication to the mediator is made "in confidence," it cannot be disclosed by the mediator even to another party to the mediation process. Also protected are oral or written communications prepared by the mediator for one or more of the parties.

The legislation does not protect communications prepared by one party and made available to all other parties to the mediation. For example, if a party makes an oral or written communication intended to be available to

everyone participating in the proceeding, such a communication will not be subject to the Act's protections.

Mediators often advise parties involved in Federal agency mediations that (with the few exceptions noted below) the mediator will keep any information that is shared with him/her confidential. The mediator also asks that all parties to the mediation act in good faith and keep the discussions confidential as well, however, the mediator cannot actually guarantee the other parties to the mediation will keep all of the discussions confidential.

This is one reason that a *caucus* may be helpful. A *caucus* is a private session in which only a given party and their representative are present with the mediator. If a party has any concerns about discussing certain information in front of other parties to the mediation, that party can choose (at least initially) to present or discuss that information during a private *caucus* with the mediator. By raising sensitive information in a *caucus*, confidentiality can generally be assured. After discussions with the mediator in *caucus*, a party might decide to raise the issue in the general session where all of the parties are present or may allow the mediator to raise the issue with the other party in *caucus* or in a general session. On the other hand, the party may ask that the mediator keep this information confidential and not disclose it to the other party.

In addition to communications prepared by a party and made available to all other parties to the proceeding, there are several other situations in which confidentiality may not apply. For example, the parties may waive their right to confidentiality. If all of the parties, including the mediator, agree in writing that the information can be disclosed, then the information may be made public. Also, some states have laws that require people in traditionally confidential relationships (doctors, lawyers, and mediators) to divulge certain information such as child abuse, if such information comes into their possession. If a mediator discovers such information, he or she will have to disclose the information as required by the state law. In addition, the Act does not 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.

If information is disclosed in violation of the ADRA, it shall not be admissible in any proceeding relating to the issues that were the subject of mediation.

Summary of Confidentiality Provisions

a. The Administrative Dispute Resolution Act of 1996 (ADRA) provides for the confidentiality of the mediation process. Generally speaking, communications during mediation are confidential and may not be disclosed either by the parties or by the mediator unless:

- (1) All parties to the mediation and the mediator agree in writing to the release (if a non-party participant provided confidential information to the mediator, the non-party participant must also agree in writing);*
- (2) the information communicated during mediation has already been made public;*
- (3) the information communicated during mediation is required by statute to be made public; or*
- (4) a court determines that such testimony or disclosure is necessary to:*
 - (a) prevent a manifest injustice;*
 - (b) help establish a violation of the law; or*
 - (c) prevent harm to the public health or safety. (The public harm or injustice must be sufficient to outweigh the need for confidentiality).*

b. Parties may disclose information communicated during mediation if:

- (1) The information was prepared by the party who wants to release it;*
- (2) the information is relevant to finding, understanding, or enforcing a resolution agreement that resulted from the mediation; or*
- (3) the communication was provided to or was available to all parties to the mediation (this does not apply to information generated by the mediator).*

c. If information is disclosed in violation of the ADRA, it shall not be admissible in any administrative (e.g., hearing before EEOC) or judicial (e.g., trial in U.S. District Court) proceeding relating to the issues that were the subject of mediation.

- d. The parties may create their own confidentiality procedures. However, if they do, they must inform the mediator before the mediation begins. If the parties do not inform the mediator of the alternative procedures prior to the mediation, the provisions in the ADRA will apply. In order for information communicated during mediation between a mediator and a party to be exempt from the Freedom of Information Act, the alternative confidentiality provisions cannot provide for less disclosure than what is provided under the ADRA.*
- e. If the neutral receives a request to disclose a dispute resolution communication, in a discovery request or some other legal process, the neutral will make a reasonable effort to notify the parties to the dispute and any non-party participants. If such a notice is received and the persons do not offer to defend a refusal to disclose, the person will have waived any objection to disclosure by the neutral. However, the neutral may still refuse to disclose the communication.*
- f. Information, otherwise discoverable in an administrative or judicial proceeding, is not protected from disclosure merely because the information is presented in the course of mediation.*
- g. Information protected by these provisions may be disclosed as necessary to document an agreement reached during ADR proceedings.*
- h. The ADRA permits the collection or gathering of information concerning the mediation for research or evaluative purposes, so long as the parties and the specific issues in controversy are not identifiable.*
- i. Confidential communications may be used to resolve disputes between the neutral in an ADR proceeding and a party to or participant in an ADR proceeding. However, disclosure is only permitted to the extent needed to resolve the dispute.*
- j. A dispute resolution communication between a neutral and a party that is protected by these provisions is exempt from disclosure under the Freedom of Information Act.*

How do I get more information about ADR?

If you have questions about a specific program in the FAA, you can contact the program manager for the specific program or click on the following links:

Office of Dispute Resolution for Acquisition - Anthony Palladino, (202) 267-3290

FAA Office of Civil Rights EEO Mediation Program – Cheryl Wilkes, (609) 485-6676

ATO Mediation Program – Kathy Randall, (202) 267-9866 - ATO,(202) 493-4607

One DOT Mediation Program: (202) 366-4648

For general information about ADR, if your dispute or concern does not fall under one of the above programs, or if you simply wish to contact someone outside of your program area, contact the -

Alternative Dispute Resolution Staff, AGC-20

Jerry Jones (202) 493-4049

Pat Walenga (202) 267-5269