Frequently Asked Questions about ADR

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The following are the questions most frequently asked about ADR, along with answers.

What are good cases for ADR?

ADR is appropriate for most cases, but the following are particularly good cases for ADR:

Unassisted negotiation is not working. Obviously, if you are successfully negotiating without a mediator, don't bother with ADR. If negotiations are breaking down, though, consider it.

Your opponent needs a reality check. For example, if you have a plaintiff who believes he's going to retire rich at age 25 off the settlement from his soft tissue injury, a mediator can be helpful in convincing him otherwise. Often opposing parties do not believe things you say because they think you are biased. If they hear it from the mediator, they are more likely to negotiate seriously.

Opposing counsel is not passing along your settlement offers. Perhaps counsel is conveying your offer to the client in a way to make it sound unappealing. Mediation gives you an opportunity to talk directly to the other side's client, ethically, and explain why the offer is a good one.

The client on the other side needs to vent. Many times clients in litigation with the United States have emotions they need to express before they are ready to settle. Mediation gives them an opportunity to have something like a "day in court" where they can say whatever they need to say.

There will be a continuing relationship between the parties after the case. Mediation tends to be more effective than litigation in leading to a resolution with which both sides are more satisfied. When a court issues a ruling, often one or both sides are upset with the result. After a mediation where both parties have worked together in fashioning a settlement and voluntarily signed the agreement, relations are often better for the future. This is particularly valuable when the parties must continue to work together after the case, such as in workplace cases.

Confidentiality is valuable for either side. Sometimes either the government or the other side wants to avoid a public trial. In mediation, parties can agree to preserve confidentiality for everything that is said.

What are bad cases for ADR?

You need a precedent. Sometimes you need an appellate court to issue a precedent in a case, perhaps because you have dozens more just like it coming along and you need a court to determine what the law is. Mediation obviously won't help you in this situation.

Court will be quick and cheap. This is rare these days, but sometimes you will have a strong dispositive motion that can avoid the need for a trial. If so, go forward and file the motion.

Settlement of any kind is impossible because it would encourage frivolous litigation. If office policy is not to negotiate certain kinds of cases, mediation is inappropriate. However, you still may want to consider it if you are authorized to offer even nuisance value. Some people seem to think mediation is akin to offering a blank check from the government, but this is not the case. In fact, mediation may offer you a most effective tool for communicating directly to the other client why you cannot offer more than a certain amount.

When in the case should you conduct ADR?

Before or after extensive discovery. The answer to this question depends on the case. Sometimes extensive discovery is necessary in order to properly value the case. Other times, using ADR to settle a case early on can save extensive discovery costs. It is also worthwhile to remember that ADR can help show you what discovery is critical. You may learn from the negotiations what facts are vital to develop in order to settle the case, and then you can conduct limited discovery on those issues.

Before or after motions. Here too, the answer depends on the case. If you have a sure winner, as discussed above, the best approach is probably to file it and dispose of the case. However, if you are not certain how the court will rule, another approach is to file the motion and then conduct ADR while it is pending. The motion may then provide leverage for you to get the other party to agree to your settlement requests rather than face having the case dismissed.

Who should you choose for the mediator?

Federal Magistrate Judges. Some magistrate judges are fine mediators, and they all have the advantage of being free. Further, they have the imprimatur of the court, which can be valuable in certain cases to persuade the other side to settle. However, magistrate judges can also have significant disadvantages. They often have limited time available for settlement work. They often handle discovery and other motions later if the case does not settle, which can make it difficult for you to talk candidly with them during mediation. Similarly, your candor may be limited because of concerns that the magistrate will talk to the district judge about what the parties said in mediation. You also generally cannot choose which magistrate you get, and some of them may be biased against the government. Finally, experience has shown that some magistrates use "arm-twisting" methods to coerce the parties into settlement rather than a more facilitative approach based on exploring the interests of the parties.

Retired state court judges. While these mediators also have the imprimatur of a former judgeship, we have often found they use strong-arm tactics as well. They may lack knowledge of federal defenses that are helpful to our cases. Further, they may be accustomed to state juries, who sometimes award larger damages than most federal courts.

Court-sponsored volunteer mediators. These mediators are free and can be effective, but you have no control over who is assigned to your case, and sometimes quality is mixed. Some court-sponsored programs also limit the amount of time that the mediator will work with you for free.

Private mediators. We have generally found that this is the best source of mediators for government cases. You can choose whom you want, they have plenty of time to work with you, and, because they work full time on settling cases, they are often the most effective mediators.

What should you consider when hiring a mediator?

Experience. Check whether the mediator has been in practice for a long time and has handled many cases. If your case involves a technical area of the law, you may want to ensure you hire someone with subject-matter expertise. However, we have generally found that someone who is talented at mediation can pick up necessary expertise and will do a better job than someone who knows the subject matter but is not as skilled at mediating.

Education and training. Ask for the mediator's resume and review these areas before making a decision.

Possible bias. Ensure that the mediator is not biased against the government. Some former plaintiff's lawyers, for example, may favor plaintiffs when acting as a mediator. Others, however, may be able to put their past experience behind them.

Fee. Generally, we have not been precluded from hiring a mediator because of the fee, but it is worth examining. Most private mediators charge between $150 and $350 per hour, and this cost is split equally between the parties. This means that the United States' share is often not much more

than the cost of hiring a court reporter for a deposition. Some private mediators charge exorbitant fees, but we have not generally found they are worth the money. You can often negotiate with a mediator to bring the cost down or ask if the mediator offers a government rate, particularly if the case has significance or can be presented as public service.

Evaluative or facilitative. Some mediators are evaluative, meaning they take an active role in the negotiation and offer their own evaluations of the case throughout the mediation. They may suggest an appropriate settlement figure and even present arguments to the parties that they should accept it. If you are going to hire an evaluative mediator, it may be important that the mediator have expertise in the subject matter of the litigation. Facilitative mediators, on the other hand, take more of a back seat to the desires of the parties and serve mainly to ensure that discussions stay on track. You may want a mediator with a different approach depending on the type of case involved. If the parties want someone to come in and tell them what the case is worth, hire an evaluative mediator. If the parties would not respond well to that approach and need someone with a softer touch, hire a facilitative mediator.

How do you initiate ADR?

Some people are concerned that offering ADR to the other side is equivalent to confessing that your case is weak. Whether or not this was the case earlier, it is not generally the case now, as ADR becomes more common and, indeed, is mandated in many jurisdictions. However, if you are concerned about this impression, you can refer to the Attorney General's order that we are expected to use ADR in appropriate cases and merely state you are acting pursuant to this directive.

How do you write a mediation statement?

A mediation statement should include the following:

A summary of the facts and law on which the parties agree.

A summary of disputed facts and law.

A description of damages claimed and the United States' position on this claim.

A description of the posture of the case, the status of discovery, and any pending motions.

A description of the status of settlement, including the nature of previous discussions. It is often helpful to the mediator if you describe in this section any personality issues of the parties that are interfering with settlement.

Note that mediators have different policies on the confidentiality of these statements, and you should feel free to request whatever procedure you wish. Sometimes the statements are given only to the mediator and other times they are also exchanged between the parties. You may also agree to have some portions of the statements exchanged but have a section that is for the mediator's eyes only.

What should you discuss with the mediator before the mediation?

Note that ex parte contact with a mediator in advance of the mediation is not only ethical, it is often vital to the success of the mediation. Good mediators will usually talk to both sides beforehand, but you should initiate contact if you have not heard from the mediator. Discuss the substance of the case as well as the personalities of the parties. This is the time to mention your fears that opposing counsel is not passing along your settlement offers or that you have client control problems. Tell the mediator what you think he or she should do in order to be most effective. Feel free to make specific suggestions and requests. Learn about the mediator's background and preferences. This information can be helpful to you as you proceed with the mediation.

Who should attend the mediation?

If you are the defendant, bringing the alleged bad actor can sometimes help settlement. Some plaintiffs want to meet personally with the person who allegedly harmed them, and this can help them agree to settle the case. Sometimes the person can offer an apology that will lead the plaintiff to significantly reduce the damages requested, saving the United States considerable money. Other times

you are better off proceeding without this person, however.

If you are the plaintiff, bringing the victim can sometimes humanize the case and increase the amount of the settlement. There can be power in having the person who was harmed present in the room while negotiations are taking place.

A bad witness is worse than none at all. If either the plaintiff or the alleged bad actor will act unproductively in the mediation, you should leave them at home. A plaintiff who is overemotional or a defendant who gets defensive and counterattacks can hurt far more than help. If you do decide to bring someone, prepare the person carefully.

What should you do about settlement authority?

Some mediators will request that someone with full settlement authority attend the mediation. This can present a problem if the dollar value of the proposed settlement exceeds the delegated authority of the attorney who is litigating the case. Generally, a private mediator will agree to have someone with authority available by telephone. You can require that a private mediator agree to this term as a condition of employment. Several judges, however, have ordered that high-level officials from the Department personally attend mediations. We have opposed these requirements in a number of cases, and you should contact the Office of Dispute Resolution if presented with this situation.

How do you prepare the client?

Review the case. You should have detailed settlement discussions with the client/agency counsel prior to a mediation. Review the facts, the law, and the strengths and weaknesses of the case. Explore your underlying interests. Speculate as to the other side's underlying interests. Brainstorm creative settlement options that might meet both sides' interests. Evaluate your best alternative to a negotiated agreement, as well as the worst thing that could happen if you fail to reach a settlement.

Explain the process. Explain the process of mediation to the client, especially if the client has not participated in mediation before. Note that the mediator is not a judge and has no power to decide the case. Parties who are inexperienced in mediation often do not understand this. Explain that the process is entirely voluntarily, and either side can withdraw at any time for any reason. Describe how the mediation will proceed, first with a joint session where everyone is in the room at the same time, and then usually with separate sessions, where each side will meet privately with the mediator. Explain that the process is confidential, and that no one may testify outside the mediation about what was said in the proceeding. Finally, it is worth pointing out that you may not act as aggressively as you would in court. Parties sometimes anticipate that their lawyers will be forceful and aggressive in any legal proceeding. You should explain that, in a mediation, it is often best to adopt a more conciliatory tone and it can be counterproductive to come on too strong. The client may be advised that if the case does not settle and proceeds to trial, you will be more aggressive at that point.

What should the client's role be in a mediation?

Clients often participate in the opening statement. If you decide to bring your client, it is often helpful to have the person participate at some point in the opening statement. A victim can express hurt and personalize the case. A defendant can express an apology for what happened (while not admitting legal liability). As discussed above, the client must be well prepared to be sympathetic and avoid counterproductive anger.

After the opening, clients generally stay in the background. As the lawyer, you are usually better trained and prepared to handle the rest of the mediation. You should tell the client that you will be doing most of the talking.

An unusually sophisticated client can participate more actively. If you have a strong client, you may consider a coordinated strategy. For example, one of you can be aggressive while the other is more conciliatory.

How should you handle your opening statement?

Do not poison the well from which you must drink for settlement. This is the single most

common error made in opening statements. Accustomed to fiery opening statements to juries, trial lawyers too often come on aggressively in their opening statements. Calling the other side “ridiculous,” “greedy,” or “ignorant,” all of which we have heard in mediation opening statements, is counterproductive. If you watch the eyes of the other side as they are called these names, you will see that they become much less likely, not more, to settle.

Direct it primarily to the other side. The other party, and not the mediator, is the one who must agree to the settlement. Parties often mistakenly give their opening statements to the mediator, as if the mediator were the judge. Remember, it is the opposing side that has the power to determine whether mediation is successful.

Offer a non-apology apology. Counter to many litigators’ instincts, it is often far more effective to begin with a conciliatory tone. As defendant, for example, you might begin by looking into the plaintiff’s eyes and saying, “Thanks for coming today. I know this is stressful. I can see how hard this has been for you and your family. No one should have to go through what you have.” Note that you have not admitted liability in any legal sense, nor have you even conceded that the United States has done anything wrong. However, you have expressed sympathy for the plaintiff’s condition, which is often the first time anyone in the government has done so in the several years since the claim was filed. This opening can be enormously powerful in making the other side much more amenable to settlement.

Have an iron fist inside the velvet glove. While it is beneficial to be warm and conciliatory, there is a place for firmness in the opening statement as well. For example, a plaintiff should believe that even though you are sympathetic, you will do your job and ensure that the United States does not pay any more than the claim is worth. Somewhere in the opening it is worth saying something like, “You should know that, if necessary, we are fully prepared to litigate this case. While it is not our preference to go to trial, we would offer the following defenses and we expect they would prevail. . . .” This statement is often best placed in the middle of the opening, surrounded at the beginning and the end by more conciliatory statements.

Bring a few exhibits and visual aids. As in trial, it is often helpful to bring visuals to make your point. If there are a couple of key documents that illustrate your case powerfully, be sure to bring copies for the mediator.

Include the mediator. While the focus of your opening should be to persuade the other side to settle, it is valuable to reach out to the mediator from time to time as well. At points later during the mediation, having the mediator on your side can be invaluable. Whether they realize it or not, most mediators do apply subtle pressures on parties to settle. If the mediator believes you are right, these pressures will work more in your favor. This is especially important if you have hired a mediator who is evaluative.

How do you advocate in joint session?

Persuade rather than defeat. As described above, litigators often have difficulty making this vital transition. Your goal in mediation is to convince the other side that they should settle. This goal is fundamentally different from your goal in trial, which is to vanquish them. Ensure that your approach is productive in meeting this goal.

Act as if you are in a deposition. It is often helpful to see mediation as more like a deposition than an adversarial evidentiary hearing. In a deposition, your goal is to let the other side talk and learn what their version of the facts is, so that you can counter it. In mediation, you want the other side to talk so you can learn what their underlying interests are, and you can suggest a settlement proposal with which they are likely to agree. You often will get your own interests met by meeting theirs.

Watch their body language. Having watched dozens of mediations, I am amazed by how transparent people can be in their body language. At certain points in the mediation, parties will throw their shoulders back, grunt, or roll their eyes. These actions can be extremely telling in

understanding what they are feeling. Mediations can be as much psychological as legal at times.

How do you advocate in private caucus?

Learn from what the mediator says and doesn't say. The moment a mediator enters the room to talk with you privately, after just meeting with the other side privately, listen carefully for the first things the mediator says. These will often be valuable clues as to what was just discussed with the other side. "The dog that didn't bark," or what the mediator fails to say, can often be equally significant.

Leave yourself room to move. Just because you are meeting confidentially with the mediator does not mean you should confess your bottom line in the first session. Mediators are human beings, and they will feel a conscious or subconscious pressure to move you toward whatever you say is your bottom line, especially if this is necessary in order to settle the case. Do not lie about your bottom line, just avoid revealing it too early.

Give the mediator ammunition to use against the other side. Private caucus sessions often include a period when the mediator argues with each party that its case is weak enough that it should accept settlement. Give the mediator arguments to use with the other side in this session. Armed with your information, the mediator will be more persuasive with your opponents. Indeed, some lawyers don't make their best arguments in joint session, but rather they save them and have the mediators use the arguments on their behalf in private caucus. They know that arguments can be much more effective when delivered by a neutral mediator rather than a self-interested party.

Give the mediator settlement proposals to float anonymously to the other side. Research has shown that when a party hears a settlement offer delivered by the other side, the party instinctively devalues it. Experienced practitioners suggest a settlement proposal to the mediator instead, and ask that the mediator deliver it without divulging its source. When the other party does not know the source of the offer (perhaps it came from the mediator, for example), the other party will not immediately devalue it.

If necessary, use the mediator to reality-test your own client. Sometimes you can solicit the mediator's assistance in educating your own client. If you are having difficulty convincing your client of a certain weakness in your case, for example, hearing the argument from the mediator may be more persuasive. You can even mention beforehand to the mediator on the telephone that you would like the mediator to do this for you.

Ask the mediator how to proceed. If you seem to be at a roadblock or do not know what to do next, it can be helpful to ask the mediator for advice. The mediator is oriented in favor of settlement, is experienced in settling cases, and has access to information from both sides. These factors make the mediator uniquely able to offer helpful advice on negotiation.

Be clear on what you want kept confidential. Mediators will honor your confidentiality requests in private caucus, but you should be clear about what is and is not confidential. Some mediators state that they may repeat anything said in the private session to the other side, unless you make it clear you want it kept confidential. Others have the rule that nothing in private session may be passed along to the other side unless you specifically authorize them to do so. In either case, it is worthwhile at the end of each private caucus to clarify with the mediator exactly what you want said to the other side and what you want confidential. This helps to avoid confusion.

Remember that it's your process. The mediator works for you. Do not feel pressure to disclose anything you do not wish to. Feel free to suggest procedures and even to insist on them if they are important to you. Know that you can walk away at any time if you are not pleased with the way things are going. *Be open-minded and creative*. You will often learn information in the mediation that changes your assessment of the case. Be open to adjusting your position your position if the circumstances warrant. Also, the process fosters creativity and you should always be on the lookout for imaginative ways for both parties to achieve their most important underlying interests. This is one of the greatest strengths of mediation.˜