



## Alternative Dispute Resolution (ADR) Policy and Procedures

The OIG is fully committed to resolving complaints of discrimination at the lowest possible level, with the intent to resolve workplace disputes and maintain the harmony of the workplace and improving communication and morale.

Throughout the Equal Employment Opportunity (EEO) process, Alternative Dispute Resolution (ADR) will be offered for complainants who feel they may be able to resolve their complaints through meetings with management, facilitated by a neutral third party.

### Federal EEO and ADR statutes and regulations:

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e

<http://www.eeoc.gov/policy/vii.html>

Rehabilitation Act, 29 U.S.C. §791

<http://www.eeoc.gov/policy/rehab.html>

Age Discrimination in Employment Act, 29 U.S.C. §621

<http://www.eeoc.gov/policy/adea.html>

Equal Pay Act, 29 U.S.C. § 206(d)

<http://http://www.eeoc.gov/policy/epa.html>

Administrative Dispute Resolution Act of 1996, 5 U.S.C. §571

<http://www4.law.cornell.edu/uscode/5/571.html>

Alternative Dispute Resolution Act of 1998, 28 U.S.C. §651

<http://www4.law.cornell.edu/uscode/28/651.html>

29 C.F.R. Part 1614

<http://www.eeoc.gov/federal/1614-final.html>

MD 715

<http://www.eeoc.gov/federal/eeomd715.html>

MD 110

<http://www.eeoc.gov/federal/md110/chapter3.html>

### **What is Alternative Dispute Resolution (ADR)?**

ADR is a process in which a *neutral third party* assists the parties of a dispute 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 (litigation, hearings, and appeals) while at the same time improving workplace communication and morale.

### **How many types of ADR are there, and which ones are available to OIG employees?**

Numerous types of ADR techniques exist, including mediation, facilitation, fact finding, early neutral evaluation, the use of an Ombudsman, settlement conferences, minitrials, and peer review. [Management Directive \(MD\) 110, Chapter 3](#) explains in detail the types of ADR available.

The OIG uses *transformational mediation*, which is intended to allow the best opportunity for the complainant and the alleged party to discuss the situation and come to a satisfactory resolution to the complaint. The hope is this will transform the work environment and the relationship between the two parties.

Management Directive MD 110 (MD 110) defines mediation as:

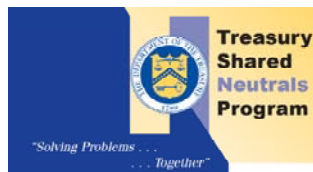
- **Mediation**  
Mediation is presently the most popular form of ADR in use by agencies in employment related disputes. Mediation is the intervention in a dispute or negotiation of an acceptable, impartial and neutral third party, who has no decision-making authority. The objective of this intervention is to assist the parties to voluntarily reach an acceptable resolution of the issues in dispute.

A mediator, like a facilitator, makes primarily procedural suggestions regarding how parties can reach agreement. Occasionally, a mediator may suggest some substantive options as a means of encouraging the parties to expand the range of possible resolutions under consideration. A mediator often works with the parties individually, in caucuses, to explore acceptable resolution options or to develop proposals that might move the parties closer to resolution. Mediators differ in their degree of directness or control in their assistance in disputing parties. Some mediators set the stage for bargaining, make minimal procedural suggestions, and intervene in the negotiations only to avoid or overcome a deadlock. Other mediators are much more involved in forging the details of a resolution. Regardless of how direct the mediator is, the mediator performs the role of catalyst that enables the parties to initiate progress toward their own resolution of issues in dispute.

### **Who conducts the mediation for OIG?**

The OIG uses mediators from the Treasury Shared Neutrals (TSN) Program. The TSN has a cadre of highly qualified and certified mediators, who are able to enter the OIG and provide mediation services. These individuals are not employed by the OIG, and they are able to provide an unbiased and objective view to the parties' situations.

[TSN Brochure](#)



### **TSN Objectives:**

- Develop a nationwide cadre of highly trained certified neutrals (also known as mediators).
- Assist organizations in resolving all types of workplace disputes at the earliest stages of conflict management and resolution processes through mediation, facilitation, and coaching.

TSN mediators maintain their skills through annual training and mediation participation after they meet the certification standards to become a Treasury Shared Neutral (TSN). These skilled mediators are accessible nationwide within the Treasury and former Treasury organizations.

### **When can I engage the ADR process?**

At OIG, you can participate in ADR during the informal (Pre-complaint) counseling process, or you may be asked if you would like to participate during the formal (EEO Investigation) phase of the process.

Detailed information on the OIG EEO Policy and Procedures can be found [here](#).

### **Informal**

If you agree to participate in ADR (mediation) during the informal process, you will be required to sign an “Agreement to extend EEO Counseling” form. This allows the EEO Counselor the opportunity to set up the mediation, go through the process and hopefully both parties will come to a resolution. The 30-day counseling period may be extended for an additional 60 days: (1) when the parties(s?) (complainant?) agrees to such extension in writing; or (2) when the complainant chooses to participate in an ADR procedure. If the claim is not resolved before the 90th (what is the start date?) day, the EEO Counselor will issue a Notice of Final Interview to the individual explaining how to file a formal EEO Complaint. 29 C.F.R. Section 1614.105(e), (f).<sup>1</sup>

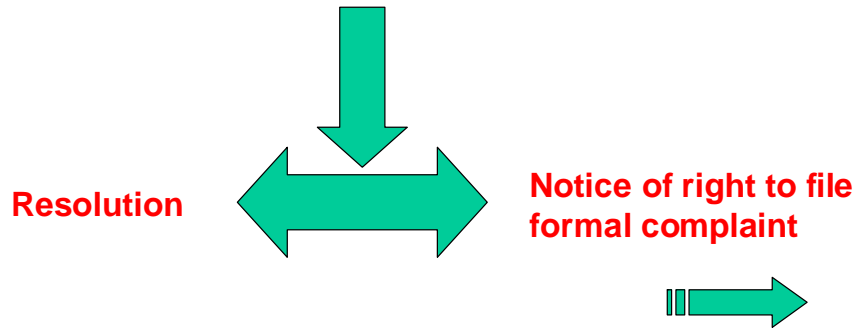


## **EEO Informal (Counseling) Complaint Process**



EEO Counselor has 30-Days\* to attempt to resolve the complaint informally.

*\*Attempts at mediation can extend an additional 60-days (90 days total)*



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### **Formal**

An employee of the OIG may participate in ADR during a formal EEO investigation. If the EEO Investigator uncovers information that may not have been known to one party or another, and they feel it could make a difference in the complaint and may allow for an amicable settlement agreement, the EEO Investigator may offer ADR to the complainant. It is up to the complainant to decide if they would like to participate in ADR in light of the new information/evidence presented.

<sup>1</sup> Adapted from <http://www.eeoc.gov/federal/md110/chapter2.html>

If the complainant agrees to participate in mediation, the EEO Investigator will make the arrangements for the mediation event.

Should a resolution be reached during the formal ADR event, a settlement agreement will be drafted and the complainant will also be presented with a "Withdrawal of EEO Complaint" form, to finalize the EEO Investigation.

### **Why is ADR beneficial?**

Agencies and complainants have realized that utilizing ADR during the EEO process has many advantages. ADR offers the parties the opportunity for an early, informal resolution of disputes in a mutually-satisfactory fashion. Rather than receiving a decision from an unknown third party, such as an administrative judge, the parties have the opportunity to write their own agreement in a manner which satisfies both of their needs. Not only does ADR provide a Win-Win resolution for the parties, but usually costs less and uses fewer resources than traditional administrative or adjudicative processes. For example, complainants could avoid costly attorney's fees and the agency could minimize the use of investigators, legal staff, official time, and court reporter fees. Moreover, since the parties are using ADR during the earliest stages of the EEO process, a resolution will avoid numerous years of litigation in administrative and court proceedings. As a result, the complainant's working relationship can improve rather than deteriorate due to ongoing legal battles, and the overall employee morale can be enhanced when the agency is viewed as open-minded and cooperative in seeking to resolve EEO disputes.

### **How does the ADR process work?**

The revised regulations do not require federal agencies to conduct ADR in every EEO case; rather, agencies have the discretion as to which EEO cases are offered ADR. Complainants may not file a new complaint based on the agency's refusal to offer ADR in their particular case.

If the agency offers ADR during the pre-complaint or the informal stage of the EEO process, the complainant may choose between participating in the ADR program or the traditional EEO counseling activities. Once the complainant elects to participate in the ADR program, all EEO counseling activities will end. It is also important to note that electing ADR increases the EEO pre-complaint processing period from 30 to 90 days. In the event that there is no resolution after 90 days, the EEO Counselor will conduct a final interview, and issue a notice of right to file a formal complaint to the complainant.

If the complainant files a formal complaint, the OIG may choose to offer ADR to the complainant. The 180-day processing period for the formal complaint stage may be increased by an additional 90 days in order to conduct ADR, if the parties agree to do so in writing.

Core principles have been established which require all ADR programs are fair which have been incorporated into our ADR program. Fairness requires voluntariness, neutrality, confidentiality, and enforceability.

1. Voluntariness means that the parties knowingly and willingly enter into an ADR proceeding and that they have the opportunity to end the proceeding at any time. In this regard, once the ADR proceeding ends, complainants may re-enter the traditional EEO complaint process in order to pursue their claim. Any agreement between the parties must be reached without coercion or duress.
2. Neutrality means that the ADR proceeding is impartial and independent of control by either party. A neutral third party who assists the parties in reaching an agreement must not have any stake in the outcome of the proceeding.

3. Confidentiality of the ADR proceedings must be maintained by the parties and the neutral third party. This means that information concerning the underlying facts of an ADR proceeding and records generated as part of that proceeding may not be made part of the EEO complaint record. The Alternative Dispute Resolution Act of 1996, 5 U.S.C. § 574, provides that neutrals in ADR proceedings may not voluntarily disclose or be required to disclose dispute resolution communications, with certain statutory exceptions. For additional information regarding confidentiality, please consult with the guidance developed by the Department of Justice Interagency Alternative Dispute Resolution Working Group at <http://www.usdoj.gov/adr/>.
4. In order to have an enforceable settlement agreement, the agreement must be in writing and signed by both parties. The revised regulations at 29 C.F.R. 1614.504 set forth specific procedures by which the EEOC enforces all settlement agreements.<sup>2</sup>

### **Do I need an attorney or other representative?**

No. You have the right to representation or you have the right to represent yourself. Complainants have the right to representation throughout the complaint process, including during any ADR process. While the purpose of ADR is to allow the parties to fashion their own agreement to a dispute, it is important that our dispute resolution procedures provide all parties the opportunity to bring a representative to ADR if they desire to do so.

### **What can I expect in the mediation process?**

While conflict is a normal part of our lives, it can be an uncomfortable experience, especially in the workplace. If you find yourself in a dispute with an employee, manager, or other colleague, mediation can help you resolve issues in a private, confidential and timely manner.

Mediation is an informal process that uses a neutral third party to facilitate the parties' resolution of the dispute. The mediator has no power to make a decision or force one on any party; instead, the mediator works with all parties to reach a voluntary agreement of their own making.

There are three things each party entering into mediation should do to prepare:

(1) Bring only relevant information about the case. Don't get distracted by or bogged down in unnecessary details. (2) Come to mediation with an open mind and focus on your interests, not your position. Taking a position will not help but, working toward your interests will. (3) Have your ideas (several of them) ready that will meet your interests, and be able to articulate why/how they will meet your interests. Also consider what may be of interest to the other party and try to work toward an agreement that will be a mutual benefit.

Though it can differ slightly for any given case, the process usually moves through the following phases: Mediator's Opening Comments, Brief Opening Comments by Participant, Joint Discussion to explore issues and ask questions, Caucus (separate, private meeting with each party, and has a confidential component), Reconvene to explore everyone's options, and Resolution and Closure.

## **Mediation Model**

### **Mediator's Opening Comments**

The process begins with all participants present. During the first meeting, the mediator will explain

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<sup>2</sup> Information obtained from <http://www.eeoc.gov/federal/adr/facts.html>

the process and answer any questions the parties may have. The parties may be asked to sign a Consent to Mediate form.

### Opening Comments by Participants

Each party has a chance to briefly present concerns without interruption.

### Joint Discussion

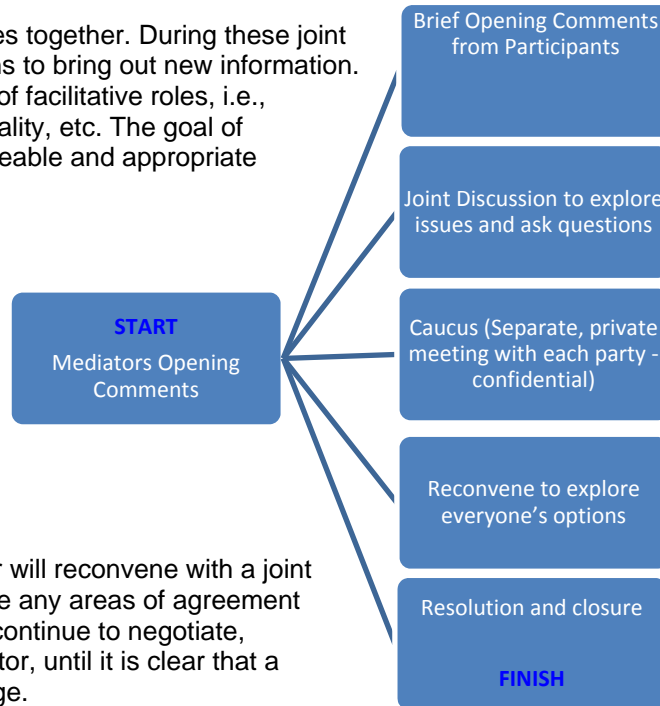
The meeting continues with the parties together. During these joint meetings, everyone can ask questions to bring out new information. The mediator can act in any number of facilitative roles, i.e., communicator, translator, agent of reality, etc. The goal of mediation is to reach a mutually agreeable and appropriate resolution.

### Caucus

After the first joint session, the mediator meets with each party separately (caucus) to discuss the issues and explore options in greater details and to gain a better sense of how the parties would like the issue resolved.

### Reconvene

Following the caucuses, the mediator will reconvene with a joint session and assess whether there are any areas of agreement on any issues. If not, the parties will continue to negotiate, possibly re-caucusing with the mediator, until it is clear that a resolution is, or is not, going to emerge.



### Resolution and Closure

If a resolution is reached, the mediator helps the parties put their agreement in writing for signature. If no resolution is reached, the mediator informs the EEO Counselor, who will then proceed to complete the EEO Counseling process and issue the complainant a Notice of Right to File Complaint of Discrimination.

### Why use Mediation?

Mediation is **confidential**. The mediator will keep all information confidential and will not willingly testify for or against either party in a court of law or an administrative process. No written record will be made of the mediation process.

Mediation is **quick**. A mediation settlement takes much less time to achieve than the more timely (and costly) process of litigation. The rules of evidence do not apply.

Mediation is **voluntary**. You do not give up any of your rights to pursue the matter formally. While mediation is designed to be an informal settlement process, it is entirely voluntary. The parties or the mediator can end the mediation at any time.

### Is Mediation right for me?

To help decide whether mediation is appropriate for your dispute, consider whether any of the following apply:

- a. The dispute involves continuing relationships.
- b. The parties want it settled confidentially and informally.
- c. The parties would like to have a say in shaping an agreement.

Since the mediation process is voluntary any party can end the proceedings at any time. The complainant may then pursue the filing of a formal complaint under 29 C.F.R. Part 1614, provided they meet the requirements.<sup>3</sup>

If an OIG employee requests ADR during the informal/formal phase of a complaint, the OIG EEO Manager will contact TSN to conduct the mediation and make attempts at resolution.

### **Is there ever a time when the OIG will not allow ADR?**

Yes. There are instances when ADR is considered not appropriate and/or feasible which are outlined below:

(1) a definitive or authoritative resolution of the dispute is required 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.<sup>4</sup>

### **Who has settlement authority in ADR agreements?**

OIG management will ensure that the individual representing the agency in an ADR proceeding has the authority and responsibility to negotiate in good faith and/or that a person with authority to approve or enter into a settlement agreement is accessible to the agency's representative.<sup>5</sup>

### **Additional Information**

More information on the Federal Sector ADR process can be found at:

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

For a glimpse into what mediation is and how it works click the following link for an 18 Minute video. "[A Better Way](#)"

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<sup>3</sup> Adapted from [http://adr.navy.mil/training/WhatToExpect\\_Text.htm](http://adr.navy.mil/training/WhatToExpect_Text.htm)

<sup>4</sup> Adapted from [5 U.S.C. § 572](#)

<sup>5</sup> Adapted from [MD-110, Chapter 3 IV, c.](#)

Please feel free to contact [Ray Campbell](#), OIG EEO Manager, 202.927.5023 for more information concerning equal employment opportunity (EEO).