

10-15-1993

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Recommended Citation

Victor Lawrence, *Adapting Alternate Dispute Resolution for use in Administrative Proceedings*, 13 J. Nat'l Ass'n Admin. L. Judges. (1993)
available at <https://digitalcommons.pepperdine.edu/naalj/vol13/iss2/4>

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Adapting Alternate Dispute Resolution for use in Administrative Proceedings

by Victor Lawrence¹

*Suits at court are like winter nights, long and wearisome.*²

Introduction

A growing, but controversial trend in administrative law involves the use of alternative dispute resolution (ADR) to promote expedient, less costly resolution of agency cases.³ The trend has either been embraced or criticized by many administrative law scholars.⁴ Recently, two noted scholars, Arthur E. Bonfield and Michael Asimow were found to be at fault for their near avoidance of the issue in their otherwise much acclaimed text, *State and Federal Administrative Law*.⁵ Writing in a Book Review for the Cornell Law Review, Edward Brunet noted that the book "devotes scant attention"⁶ to this important topic

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²Thomas Deloney in *Jack of Newburg*, 1597.

³See *Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, February 1992 Rep. 3-4. The Administrative Conference of the United States (ACUS) has taken a leading role in the last several years by promoting ADR practice in federal agencies. See S. REP. NO. 543, 101st Cong., 2d Sess. 2-3 (providing background information on ACUS's role in ADR development). The ACUS report is the latest of many disseminated from that agency that describe initiatives and goals that may enhance agency resolution of cases. See also ADMINISTRATIVE CONFERENCE OF THE U.S. SOURCEBOOK: *FEDERAL AGENCY USE OF ALTERNATE MEANS OF DISPUTE RESOLUTION* 701-860 (1987) (listing and describing increasing agency use of ADR techniques).

⁴Walter Gellhorn, a professor of law at Columbia University, strongly favors use of ADR techniques in federal agencies. He notes that the language of the Administrative Procedure Act (APA) in § 554 necessitating an agency hearing only, "to the extent that the parties are unable so to determine a controversy by consent," demonstrates that the drafters of the APA were willing to have agencies forego formal procedures when informal devices such as ADR could be used. See Walter Gellhorn, *Testimony Before the Senate Judiciary Committee on the Administrative Dispute Resolution Act of 1988*, 43 ARB. J. at 30. Conversely, other scholars fear that such informal techniques are in derogation of the APA and contribute to a negative trend which moves agency cases further out of the public arena to be resolved behind closed doors without the benefit of public participation. See 43 ARB. J. at 38-39.

⁵ARTHUR E. BONFIELD & MICHAEL ASIMOW, *STATE AND FEDERAL ADMINISTRATIVE LAW* (1989) (This recent casebook has been adopted for use at many law schools. Other widely used textbooks were written before ADR processes were as commonly used as they are now.).

⁶Edward Brunet, *Blending State and Federal Administrative Law*, 75 Cornell L. Rev. 366 (1990) (reviewing ARTHUR E. BONFIELD & MICHAEL ASIMOW, *STATE AND FEDERAL ADMINISTRATIVE LAW* (1989)).

and criticized the authors for not devoting a distinct section in the text to acknowledge the strength of this movement.⁷

This paper examines the current trend of using ADR in administrative proceedings and focuses on the additional cautionary measures that should be implemented in the process to ensure that the administration of justice prevails over the risk of unfair, arbitrary decisions. Although the Administrative Dispute Resolution Act⁸ has provided some guidance in this area, the Act did not go far enough. Additional safeguards are necessary to satisfy public concern that compliance with statutory ideals are achieved without sacrifice throughout the arbitration process.

I. The Benefits of ADR in Administrative Proceedings

Given the success that ADR has had in our court system,⁹ it is indisputable that ADR use in administrative proceedings similarly does have many benefits. Federal agencies, through ADR proceedings, enable parties to "foster creative, acceptable solutions, and to produce expeditious decisions requiring fewer resources than formal litigation."¹⁰ There are many methods of ADR: negotiation, facilitation, conciliation, convening, minitrials,

⁷*Id.*

⁸Pub. L. No. 101-552, 104 Stat. 2736 (1990). The purpose of the ADR Act of 1990 was to "place government-wide emphasis on the use of innovative ADR procedures by agencies and to put in place a statutory framework to foster the effective and sound use of these flexible alternatives to litigation. The goal . . . is to send a clear message to agencies and private parties that the use of ADR to resolve disputes involving the federal government is an accepted practice and to provide support for agency efforts to develop and/or enhance individual ADR programs." S. REP. NO. 543, 101st Cong., 2d Sess. 1-2.

⁹The success of ADR in our court system is well documented. For a good text and overview of the processes used in ADR see STEPHEN B. GOLDBERG, ERIC D. GREEN & FRANK E.A. SANDER, *DISPUTE RESOLUTION* (1990) and LEO KANOWITZ, *CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION* (1986).

¹⁰SEE *IMPLEMENTING THE ADR ACT: GUIDANCE FOR AGENCY DISPUTE RESOLUTION SPECIALISTS*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, February 1992 Rep. at 9.

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mediation, fact-finding, use of settlement judges, and binding and nonbinding arbitration.¹¹ Each of these has been used to cut down the rising costs of litigation by providing a less costly resolution process.¹² The most controversial of the group for use in the administrative process is binding arbitration.¹³

On the federal level, many agencies have had considerable success with ADR in experimental trials over the last few years. The U. S. Merit Systems Protection Board (MSPB) was one of the first agencies to institute an arbitration process in their appeals procedure.¹⁴ MSPB reports show that the instituted procedures have cut the time to obtain a decision in half compared to their more formal procedures.¹⁵ The arbitration process also showed a 40% cost savings compared to similar disputes litigated under formal procedures.¹⁶

Such savings in time and money have encouraged more federal agencies to follow the lead of the MSPB, and the lead of President Bush when he signed Executive Order No. 12778,¹⁷ encouraging ADR use in the Department of Justice.¹⁸ The movement toward

¹¹See *infra* Appendix for explanations of these processes.

¹²See *Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, February 1992 Rep. at 5-7.

¹³See *infra* Part III.

¹⁴See *Expediting Settlement of Employee Grievances in the Federal Sector: An Evaluation of the MSPB's Appeals Arbitration Procedure*, ADMINISTRATIVE CONFERENCE OF THE U.S., January 1985 Rep. 1.

¹⁵*Id.*

¹⁶*Id.* at 1-6. Other agencies such as the Environmental Protection Agency, the Army Corps of Engineers and the Department of Justice have saved time and money from individual programs which utilize ADR methods. S. REP. NO. 543, 101st Cong., 2d Sess. 2-3.

¹⁷Exec. Order No. 12,778, 56 Fed. Reg. 55,195 (1991). Under the President's Civil Justice Reform Plan, President Bush suggested *inter alia* that "litigation counsel should be trained in dispute resolution techniques and skills that can contribute to the prompt, fair, and efficient resolution of claims." *Id.*

ADR in administrative proceedings is not just on the federal level. States that have created dispute resolution offices to promote public awareness and encourage ADR use in state court and administrative proceedings have reported similar benefits.¹⁹

II. The Effect of the ADR Act

The Administrative Dispute Resolution Act amends the Administrative Procedure Act to authorize parties involved in disputes arising under federal administrative programs to agree to use ADR methods.²⁰ At the heart of the Act is the goal that each agency explicitly develop a policy of implementation to enhance the operation of government.²¹ The Act requires agencies to designate a senior official as a dispute resolution specialist who will systematically review all programs offering ADR potential in consultation with the Administrative Conference.²² This ADR specialist will provide training for selected personnel, and review grants and contracts for inclusion of clauses encouraging ADR use.²³

¹⁸*This Executive Order was the driving force behind the publication discussed infra: Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts*, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, August 1992 Report.

¹⁹See Lawrence Susskind, *NIDR's State Office of Mediation Experiment*, NEGOTIATION JOURNAL 323 (Oct. 1986) At that time, six states had offices: Florida, Hawaii, Massachusetts, New Jersey, Ohio, and Oregon.

²⁰Marshall J. Breger, Amendments to Procedure Act Encourage Agencies to Use ADR, NAT'L L.J., Mar. 4, 1991 at 28. See also *Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, February 1992 Rep. at (i).

²¹Marshall J. Breger, Amendments to Procedure Act Encourage Agencies to Use ADR, NAT'L L.J., Mar. 4, 1991 at 28.

²²*Id.*

²³*Id.*

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Under the Act, a basic condition for invoking ADR proceedings in a case is that all parties agree to its use.²⁴ If ADR is used, a neutral decider serves at the will of the parties,²⁵ and he/she can be either a government employee or any other individual to which the parties agree.²⁶ The Administrative Conference of the United States establishes standards for the neutrals,²⁷ and maintains a roster of qualified candidates.²⁸ There are strict confidentiality guidelines to which neutrals must abide.²⁹

If the parties decide to use arbitration,³⁰ the Act allows the traditional opportunities to be heard, presentations of evidence and cross examination of witnesses.³¹ The traditional prohibitions against ex parte communications are similarly guarded against in arbitration proceedings.³² The arbitral award, unless otherwise provided by agency rule, need only include "a brief, informal discussion of the factual and legal basis for the

²⁴5 U.S.C. § 572(a)(1992). Note that Pub. L. No. 102-354, 106 Stat. 946 (1992), The Administrative Procedure Technical Amendments Act of 1991 recently changed the numbering of the sections in this area of the code. The section numbers listed reflect the updated redesignations in the code.

²⁵*Id.* at § 573(b).

²⁶*Id.* at § 573(a).

²⁷*Id.* at § 573(c)(1).

²⁸*Id.* at § 573(c)(2).

²⁹*Id.* at § 574.

³⁰Under § 575, all parties must consent before arbitration is allowed.

³¹5 U.S.C. § 579(c)(1).

³²*Id.* at § 579(d).

award,"³³ but does not need to include formal findings of fact or conclusions of law.³⁴ After thirty days the award becomes final after it is served on all parties.³⁵ However, the agency head has the power to terminate the arbitration proceeding or vacate any award prior to this thirty day period.³⁶

III. Constitutional/Legal Concerns

A. Judicial Review

One note that is repeated throughout articles discussing ADR proceedings is that "ADR is not appropriate for all cases involving the government."³⁷ But among the cases suggested for ADR use, the most controversial are those that choose the resolution process of arbitration.³⁸ Arbitration cases raise policy, practical and constitutional concerns that are not present in private sector ADR proceedings.³⁹ Even the Department of Justice, although

³³Id. at § 580(a)(1).

³⁴Id.

³⁵Id. at § 580(b).

³⁶Id. at § 580(c).

³⁷Senator Charles E. Grassley & Charles Pou, Jr., Congress, The Executive Branch, & The Dispute Resolution Process, CONGRESSIONAL FORUM (1991) at 11. See also, *Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, February 1992 Rep. at (i), "In many cases . . . formal procedure is quite valuable, even necessary; in many others, it is inefficient and potentially detrimental." *Id.*

³⁸For a good article describing arbitration process, See generally, Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239 (1987).

³⁹Id.

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supportive of ADR expansion in the federal government,⁴⁰ had expressed concerns about the use of binding arbitration by agencies which do not already have specific statutory authorization to do so. Indeed, the Justice Department argued that it could be unconstitutional.⁴¹ Other scholars have disputed this claim, however, and have upheld the

⁴⁰See *Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts*, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, August 1992 Rep. at 1. "The Department of Justice views ADR as another tool in its arsenal for achieving success in litigation." *Id.*

⁴¹The Department of Justice had voiced these constitutional concerns:

(1) that the appointment of individuals to be arbitrators may interfere with the Article II Appointments Clause, since arbitrators will oftentimes not be federal employees;

(2) that a separations-of-powers question would arise due to the fact that Congress, through the ADR Act is authorizing private parties to perform agency decision-making powers;

(3) that judicial responsibility and authority would be removed from constitutionally established Article III courts; and

(4) that arbitration may interfere with due process.

The Department also suggests that two statutory barriers may prevent arbitration use by federal agencies:

(1) 31 U.S.C. § 1346 prohibits the use of federal funds to pay, "the pay or expenses of a commission, council, board, or similar group, or a member of that group, or expenses related to the work or results of work or action of that group" unless authorized by law.

(2) 31 U.S.C. § 3702 provides that "the Comptroller General shall settle all claims of or against the United States Government."

See S. REP. NO. 543, 101st Cong., 2d Sess. 5.

See also Testimony of Asst. Attorney General William P. Barr, Office of Legal Counsel (Jan. 31, 1990), *Administrative Dispute Resolution Act: Hearing Before the House Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary*, H. REP. NO. 67, 101st Cong., 2d Sess. 43-47.

constitutionality of binding arbitration use in federal agencies as long as there are adequate procedural safeguards.⁴²

Harold Bruff and other scholars believe that any possible constitutional infraction is partially offset by the compromise in the Act which allows the agency head thirty days to vacate an arbitral award.⁴³ Accepting the premise, for now, that no explicit constitutional or statutory barriers have been pierced because of the addition of this provision, one must still wonder whether the very nature of conducting confidential arbitration proceedings infringes upon the public's right to an established precedent in administrative law.⁴⁴

Although the Act outlines several areas where the agency should not use ADR such as where "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,"⁴⁵ there are no rigid controls on the agency's dispute resolution specialist to abide by this rule. The public must trust that this agency official has the foresight to recognize an area that may have significant precedential value and to act responsibly when the situation arises. The decision by an agency to use or not to use ADR is committed to the discretion of

⁴²See Harold Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441 (1989).

⁴³5 U.S.C. § 580(B),(C) (1992). THE DEPARTMENT OF JUSTICE STRESSES THAT "ARBITRATION IS APPROPRIATE ONLY WHERE, BY AGREEMENT OR LOCAL RULE, THE UNITED STATES IS NOT BOUND BY THE ARBITRATOR'S DECISION. ARBITRATION MAY AID IN RESOLVING DISPUTES ARISING IN AREAS OF THE LAW THAT REQUIRE TECHNICAL EXPERTISE AND THAT ARE USUALLY SUBMITTED TO THE COURTS OR ADMINISTRATIVE LAW JUDGES." SEE GUIDANCE ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION FOR LITIGATION IN THE FEDERAL COURTS, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, August 1992 Rep. at 5

⁴⁴Danger exists if important cases with strong precedential value are routinely handed over to arbitrators for decision. If the practice becomes too widespread, administrative law would become increasingly more uncertain. This is analogous, in a sense, to the ongoing controversy that occurs after formal adjudication in some cases where the decisions are designated not to be published. The same "public right to precedent" argument occurs in both situations.

⁴⁵5 U.S.C. § 572(b)(1) (1992).

the agency and is subject to a very limited form of judicial review.⁴⁶ Judicial review by the district court is authorized to vacate awards only if the use of arbitration is "clearly inconsistent" with the guidelines set forth in 5 U.S.C. 572.⁴⁷

B. Congressional Delegation

The constitutionality of delegating adjudicative power to federal agencies has been firm precedent since *Crowell v. Benson*.⁴⁸ But, Congress, through the ADR Act, is taking this one step further. Congress is delegating the power to decide government issues to private citizens.⁴⁹ The Supreme Court has, through the years, examined whether Congress can make such a broad delegation of power. The most famous case on point was *Schechter Poultry Corp. v. United States*.⁵⁰ This case considered whether the National Industrial Recovery Act (NIRA), essentially allowing private trade groups to enact their own laws for fair competition (subject to President's approval), was too broad a delegation of legislative power.⁵¹ The Court found that the Act was unconstitutional, in part because the Act allowed for non-government workers to do work which should have been reserved for the government.⁵²

⁴⁶Id. at § 581(b)(1).

⁴⁷See 9 U.S.C. § 10(b). Section 572 of Title 5 outlines the general authority of agencies to use ADR proceedings.

⁴⁸285 U.S. 22 (1932).

⁴⁹5 U.S.C. § 573 allows the parties to an ADR proceeding to use "any . . . individual who is acceptable to the parties," regardless of whether they are a government employee, to decide these cases.

⁵⁰295 U.S. 495 (1935)

⁵¹Id.

⁵²Id.

Although the rule from *Schechter* can be interpreted broadly to outlaw congressional delegation of power to non-government officials under the ADR Act, subsequent Supreme Court cases leave this area of the law uncertain. For instance, in *Currin v. Wallace*,⁵³ the Court upheld the Tobacco Inspection Act in which a two-thirds vote by tobacco growers could regulate the tobacco market. Similarly, in *United States v. Rock Royal Co-op.*,⁵⁴ the Court upheld a provision of the Agricultural Marketing Agreement Act which allowed private producers, upon a two-thirds vote, to, in effect, issue various government orders. Without clear Supreme Court precedent as a mandate, Congress may have overstepped its delegation authority by allowing non-government, private citizens to participate in government functions in the administrative process.⁵⁵ The power placed in the hands of one arbitrator to decide a government issue under the ADR Act appears more violative than the group-delegated authority present in *Currin* and *Rock-Royal* allowing trade groups and tobacco growers to decide government issues.

C. Limited Requirements on the Arbitrator

Under section 580(a)(1), unless otherwise provided by agency rule, the arbitrator need only include "a brief, informal discussion of the factual and legal basis for the award," but does not need to include formal findings of fact or conclusions of law.⁵⁶ Although I can think of no constitutional limitation restricting this provision, I believe that such minimal requirements on the arbitrator lead to short cuts that may be detrimental in the broader

⁵³306 U.S. 1 (1939).

⁵⁴307 U.S. 533 (1939).

⁵⁵This is not to say that Congress needs clear Supreme Court precedent as guidance for every Act it passes; but, in areas of significant importance such as these, perhaps Congress may have moved too hastily when it could have limited the neutrals to be, at least, government employees.

⁵⁶See *supra* notes 32-33 and accompanying text.

scheme. With such loose guidelines, these decisions might eventually come down to a simple "Yes" or "No" as the exclusive basis for a reasoned decision.

If an arbitrator were not empowered to hear the case, an administrative law judge would have the responsibility. Although administrative law judges are rarely held to rigid analyses of law in their opinions, this may be partially offset by the formality of their procedures. Perhaps to offset the informality of ADR arbitration decisions, a more rigid analysis of facts and law should be included and required in decisions by the third party neutrals.

IV. Suggestions for Change

A good way to combat the problem of allowing agency discretion to designate which cases are appropriate for ADR purposes is to enact a scheme whereby the parties have to get judicial approval before ADR processes can begin. At first glance, this may seem like an unnecessary step which defeats one of the purposes of ADR of saving time and efficiency. But, the system can be established with minimal obstacles.

Two parties interested in using arbitration as a resolution process could go to an administrative law judge (ALJ) and briefly summarize the issue at dispute. The ALJ would consider whether the issue involves important precedential concerns, technical expertise or other factors which would mandate a full hearing. The ALJ, optimally, would have significantly more experience than the agency dispute resolution specialist in determining whether a particular case should be tried instead of arbitrated. Under such a system, the total expenditure of time would be no more than the situation where a police officer convinces a judge to issue a search warrant in a criminal case. The latter situation protects the individual's fourth amendment rights; the former situation protects the public's right to a precedent in administrative issues. Both are minimal procedural requirements.

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In any case, there should be broader opportunity for judicial review of the agency's decision to use ADR. Third parties that are damaged by an arbitrator's decision should not have to rely on the "clearly inconsistent" standard to try and convince the district court to vacate an arbitral award. Instead, third parties should only need to show a "harmful effect"⁵⁷ that would not have otherwise occurred had arbitration not been used. If third parties can establish this "harmful effect," the arbitral award should be vacated.

Any arbitrator used in ADR processes in administrative proceedings should be, at very least, a government official. Although *Schechter* and its progeny suggest that in certain situations such broad congressional delegation of power to non-government officials may not be unconstitutional, the delegation of the power to decide government issues by private citizens appears to overstep Congress's delegation authority. Such broad delegation appears especially violative when the power is given to one person rather than the form of delegation given to groups found in *Currin* and *Rock-Royal*. To avoid such a constitutional infraction, it would not be an unreasonable limitation to limit the pool of neutrals to government officials. Given the size of our government, adequate resources should be plentiful.

Finally, to ensure adequate procedures, and to partially offset the informality of ADR, the decisions of the arbitrators should include more than a sketchy factual and legal basis for the decision. A more detailed decision, including factual and legal discussion would help compensate for the relative informality of the process. The ALJ who approves the case for arbitration would monitor the substance of the arbitrators' opinions to ensure that the legal and factual issues were adequately discussed.

⁵⁷Such a "harmful effect" may occur where a third party, previously unaware of the arbitration proceeding, could have testified through amici briefs or otherwise to convince a court to rule in a manner consistent with their interests. As long as the third party can show that he was prejudiced in any manner that could have affected the outcome of the decision, the arbitral award should be vacated.

V. Conclusion

ADR is a very useful tool in resolving legal disputes. The ADR Act is an encouraging demonstration by Congress to promote ADR techniques into administrative proceedings. Although the Act contains many benefits that will facilitate resolution of agency disputes, more procedural safeguards should be added to ensure its constitutionality and to protect other legal concerns. If ALJ's are given the power to approve arbitration in certain cases and judicial review is made broader for third party complainants the system will operate better. Additionally, if arbitrators are limited to government officials and are required to provide a detailed basis in law and fact for their decisions, other constitutional/legal concerns would be alleviated.

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APPENDIX

The Administrative Conference's Recommendation 86-3, 1 C.F.R. § 305.86-3 provides these definitions for each ADR method:

Arbitration - Arbitration is closely akin to adjudication in that a neutral third party decides the submitted issue after reviewing evidence and hearing argument from the parties. It may be binding on the parties, either through agreement or operation of law, or it may be non-binding in that the decision is only advisory. Arbitration may be voluntary, where the parties agree to resolve the issues by means of arbitration, or it may be mandatory, where the process is the exclusive means provided.

Convening - Convening is a technique that helps identify issues in controversy and affected interests. The convener is generally called upon to determine whether direct negotiations among the parties would be suitable means of resolving the issues, and if so, to bring the parties together for that purpose. Convening has proved valuable in negotiated rule making.

Facilitating - Facilitating helps parties reach a decision or a satisfactory resolution of the matter to be addressed. While often used interchangeably with "mediator," a facilitator generally conducts meetings and coordinates discussions, but does not become as involved in the substantive issues as does a mediator.

Fact-finding - A "fact-finding" proceeding entails the appointment of a person or group with technical expertise in the subject matter to evaluate the matter presented and file a report establishing the "facts." The factfinder is not authorized to resolve policy issues. Following

the findings, the parties may then negotiate a settlement, hold further proceedings, or conduct more research.

Mediation - Mediation involves a neutral third party to assist the parties in negotiating an agreement. The mediator has no independent authority and does not render a decision; any decision must be reached by the parties themselves.

Minitrial - A minitrial is a structured settlement process in which each side presents a highly abbreviated summary of its case before senior officials of each party authorized to settle the case. A neutral adviser sometimes presides over the proceeding and will render an advisory opinion if asked to do so. Following the presentations, the officials seek to negotiate a settlement.

Negotiation - Negotiation is simply communication among people or parties in an effort to reach an agreement. It is used so routinely that it is frequently overlooked as a specific means of resolving disputes. In the administrative context, it means procedures and processes for settling matters that would otherwise be resolved by more formal means.

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