

Chapter 4. Alternative Dispute Resolution Options.

A. ADR in General.

ADR is a term widely used to describe methods and techniques of facilitating settlement of disputes without resort to formal court proceedings. Entry into any type of ADR proceeding is always voluntary, although a special master may strongly encourage the parties to consider ADR because it has been highly successful in resolving Vaccine Act cases. Generally, ADR methods assist the parties in understanding the strengths of both sides of the case, in assessing their chances of prevailing in formal litigation, and in viewing their case objectively from different perspectives. The success of any ADR techniques depends to a great extent on the parties themselves. ADR techniques rely on collaborative discussion rather than adversarial proceedings. When ADR is successful, a voluntary settlement is reached quickly and efficiently. Even if a settlement is not achieved, the parties' understanding of the case is greatly enhanced, resulting in a more focused presentation to the special master and ultimately a quicker resolution.

The ADR techniques available in vaccine cases and the role of the special masters in facilitating the process are discussed below. The parties themselves, subject to the special master's approval, may choose the ADR procedure they believe most appropriate in their case. If one option is unsuccessful, the mediator may suggest another option, or a blending of options, to break a logjam. The parties are not limited to the options listed below and should feel free to suggest others.

B. Preparation for ADR.

The success of any ADR proceeding depends to a great extent on the parties themselves and their preparation for and desire to enter into collaborative discussions. To maximize the potential for success, prior to a negotiation session, the mediator may hold a preliminary conference with counsel for both sides, either separately or together, or both. The mediator may ask the parties to be prepared to discuss certain issues, and may require the submission of a mediation statement or other information. Prior to the initial session with the mediator, the parties should review the file and become familiar with the factual and procedural history of the case, negotiations to date, any key factual or legal disputes, areas of agreement, possible areas of compromise or settlement, and any nonnegotiable areas or items.

C. Types of ADR Options Available.

1. Mediation.

Mediation involves a third party working with respondent and petitioner to facilitate settlement negotiations. The mediator attempts to help the parties improve their communication with one another, identify the key interests of each side, and determine areas of each party's position in which there is enough flexibility to allow for

compromise. The mediator usually has an initial meeting with both parties together, including the petitioners themselves, followed by meetings with each side separately in what has sometimes been called “shuttle diplomacy.” Mediation may consist of a single session lasting from a couple of hours to a full day, or may consist of more than one session with time periods in between the sessions.

Prior to beginning mediation, the mediator may require the submission of a mediation statement. Even if no mediation statement is required, the parties should review the file and become familiar with and be prepared to discuss the history of the claim and response, the negotiations to date, any key factual or legal disputes, areas of agreement, possible areas of settlement, and any nonnegotiable areas or items.

2. Neutral Evaluation.

In neutral evaluation, a third party evaluates the substance of the case and the parties’ respective positions, and then gives each side a frank assessment of the strengths and weaknesses of that party’s case. Neutral evaluation can often break a logjam in settlement negotiations, particularly when a client or client agency has an overly optimistic assessment of the strength of the case or of the defense.

3. Early Neutral Evaluation.

Early neutral evaluation involves the evaluation of the case by a special master other than the one to whom the case is assigned. Early neutral evaluation occurs as soon as possible after the petition is filed, once sufficient medical records are filed so that a special master may assess the strength of petitioner’s case. After meeting with the parties together (telephonically or in person) to hear their respective assessments of the case, the early neutral evaluation special master then meets separately with each party, and provides a candid assessment of the likelihood of prevailing on the merits and the probable range of any damages award, should the petitioner prevail.

The advantage of early neutral evaluation is that each party has an opportunity to hear how the other side assesses its own case, but the evaluation by the neutral special master is heard in private. Although additional negotiations are often necessary to reach a settlement of the case, the parties enter into mediation armed with information about how an experienced special master would evaluate the case.

4. Mini-trials.

In a mini-trial, the parties present an abbreviated form of their case with an agreed-on time limit for case presentation. This procedure may be particularly useful when the record as it stands does not yet contain enough information for either side to appreciate fully the strengths of its case. The mini-trial can be conducted as informally as the parties prefer. The parties may choose the person to preside at the mini-trial—*i.e.*, the presiding special master, another special master, or someone else—and to what extent (if any) they wish the presiding official to offer an evaluation of the evidence after

the presentation. The basic theory of the mini-trial is that it will give the parties in a short period of time a great deal of insight as to the strengths of each side's case, thus facilitating settlement. Typically, the parties retain their right to put on their entire case before the presiding special master at a later date if settlement fails.

D. Mediator or Evaluator.

Most ADR efforts within the Vaccine Program have involved the use of a special master other than the one to whom the case is assigned. This "settlement master" may engage in mediation, neutral evaluation, or a combination of the two, as dictated by the preferences of the parties, to help the parties reach a settlement. However, the assigned special master may also assist the parties in reaching settlement. The Rule 5 status conference, discussed in Section IV, Chapter 4, above, is, in effect, a neutral evaluation of the case and is often responsible for settlement thereafter. However, the parties may elect to request that a judge of the Court of Federal Claims serve as a mediator or neutral evaluator, or may opt to hire an outside professional mediator. Each option has advantages and disadvantages, as discussed below.

1. Use of a "Settlement Master."

Use of a "settlement master" has the benefit that if the ADR process fails to produce a full settlement, the settlement master will not be the one to decide the case. Therefore, the settlement master is free to give the parties a candid assessment of their respective cases, and the parties may be more amenable to the special master engaging in separate meetings with each party. Moreover, use of a settlement master may have advantages over ADR proceedings conducted by a professional mediator who is not familiar with Vaccine Act cases. As a judicial officer extensively experienced in hearing and deciding Vaccine Act cases, the settlement master is extremely well qualified to give each party an experienced assessment of the strengths and weaknesses of that party's case. For example, if the dispute concerns the proper amount of compensation, the settlement master will likely have a thorough working knowledge of what amounts special masters have awarded in similar cases—information that could greatly help the parties reach a compromise.

Of course, if ADR by the settlement master fails to produce a settlement, the case will return to the presiding special master for hearing and decision.

2. Use of a Professional Mediator.

Courts nationwide are now using private, professional neutrals in court-sponsored ADR programs with a high rate of success. The chief advantage of this form of ADR is that professional neutrals with practices devoted solely to mediation often have excellent specialized skills in resolving difficult conflicts. They have skills in building trust by remaining neutral at all times and in improving the communications among the parties and counsel.

Professional mediators are often particularly skilled in dealing with emotionally charged cases and in reaching out to the parties. While counsel usually drive legal negotiations, professional neutrals are trained to encourage the clients' direct involvement in settlement discussions to meet the needs and interests of the parties. Further, a professional mediator may bring "a fresh face and look" to a dispute as someone without preconceived notions about the case.

3. Use of the Presiding Special Master.

Using the special master who is already assigned to the case has worked in a number of Program cases. The primary advantage of this option is that the presiding special master already knows much about the substance of the case and can prepare very quickly for the ADR session. Further, to the extent that the special master gives the parties an evaluation of the case, the evaluation will be of considerable weight, since that same special master would be the one to decide the case if settlement efforts fail.

On the other hand, the parties may not wish to discuss their settlement negotiations with the same special master who would decide the case if settlement is not reached. With the presiding special master's approval, the parties could proceed to ADR with the presiding special master, with the agreement that if settlement is not achieved, then the case will be formally transferred to another special master for decision. This option would combine the key feature of the settlement master option (*i.e.*, mediation by a master who will not decide the case if a settlement is not reached) with the advantage of having mediation by a master who is already familiar with the case.

4. Use of a Court of Federal Claims Judge.

The Court of Federal Claims itself has a robust ADR program with judges experienced in conducting ADR. Because the court's judges hear motions for review in Vaccine Act cases, they have some degree of familiarity with the Act's causation and damages provisions and the cases interpreting them. If the parties are interested in a judge of the Court of Federal Claims conducting the mediation, they should so indicate to the presiding special master.

E. Confidentiality.

Consistent with general principles governing settlement negotiations, written and oral communications made in connection with or during any mediation session are confidential. As such, the mediator, all counsel, the parties, and any other person attending or participating in the mediation are prohibited from disclosing information and materials used in the mediation. Information acquired through mediation must not be used for any purpose, including impeachment, in any pending or future proceeding in this or any other forum. However, information obtained through the usual processing of the case does not become confidential by virtue of its use during the mediation.

Nothing prohibits the disclosure of information to persons not directly participating in a mediation, e.g., government officials, supervising attorneys, brokers, and life care planners, whose possession of such information is necessary to further the progress of the ADR proceeding. Individuals given information on this basis are bound by the confidentiality requirements above.

The mediator must not reveal to the presiding special master or others the nature of the discussions or specific offers made during the ADR process. The mediator is not prohibited, however, from providing the presiding special master with a brief general report on the progress of the negotiations and whether a settlement is likely, without disclosing the substance of the negotiations or the positions of the parties.

The parties ordinarily agree that if the ADR proceedings fail to result in settlement, the parties, and any other participants in the proceedings, will be bound by this rule of confidentiality.

In the “shuttle diplomacy” process, the mediator/evaluator will often be required to convey the substance of one party’s position or offer to the other party. If any additional information is to be conveyed, the party should explicitly inform the mediator/evaluator of that information and grant permission to disclose it.

Chapter 5. Post-Settlement Processing.

A. Approval Process Time Constraints.

Once a case is tentatively settled, there is a period of time before the settlement is approved and payment can be made. Because both the client agency (Health and Human Services) and the Department of Justice must review any tentative settlement reached by the parties, the agencies must obtain final approval from the authorized agency personnel. The time frames vary, depending on whether entitlement has been determined prior to settlement. If entitlement has been determined prior to the tentative settlement, a proffer is often used, resulting in faster processing. If entitlement has not been determined, the special master will issue a “15-Week Order,” setting deadlines for finalizing and filing an executed settlement agreement.

B. Issues Regarding the Purchase of Annuities.

The parties may negotiate that the annuity pay a stream of benefits, usually expressed as annual payments of certain amounts for a specific number of years or for the life of the payee. Alternatively, on some occasions, the parties negotiate a sum certain to be used to purchase an annuity. In such instances, the agreed on settlement amount is the sum used to purchase the annuity. The distinction between these two approaches is significant because fluctuations in market conditions between the time of negotiation and the time the annuity is purchased may affect the annuity’s value. If a stream of benefits has been negotiated, then the amount paid to petitioner is certain and any fluctuation will affect the amount the respondent pays for that annuity, increasing or