



Recommendation 88-11

Encouraging Settlements by Protecting Mediator Confidentiality

(Adopted December 9, 1988)

The resolution of issues through negotiations among the affected parties has long been recognized as an essential ingredient of the administrative process.¹ Settlements bring to bear parties' experience, foster creative solutions, and result in faster decisions requiring fewer resources than formal litigation. Most settlements now occur simply through ad hoc negotiations among the lawyers for the parties, generally on the eve of hearing. The Administrative Conference has recommended that agencies adopt alternative means of dispute resolution ("ADR") to enhance negotiations and stimulate the possibility of reaching agreement expeditiously within the confines of the agency's authority and policy.²

This recommendation seeks to encourage agency use of alternative means of dispute resolution by affording appropriate protection to communications between the parties and the neutral in settlement negotiations. The Conference, of course, recognizes the principle that decisions affecting the public welfare ought to be made in the open and subject to public and judicial scrutiny. Nevertheless, since settlements are essential to administrative agencies, a careful balance must be struck between the openness required for the legitimacy of many agency agreements and the confidentiality that is critical if sensitive negotiations are to yield agreements. This recommendation attempts to strike that balance, without thwarting open decisionmaking.

¹ As the influential Attorney General's *Manual on the Administrative Procedure Act* explained in 1947, [t]he settlement of cases and issues by informal methods is nothing new in Federal administrative procedure. In its Final Report, the Attorney General's Committee on Administrative Procedure pointed out * * * that "even where formal proceedings are fully available, informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process."

² The Conference has repeatedly recommended that agencies employ ADR. Recommendation 86-3 calls on agencies to make greater use of mediation, facilitation, negotiation, minitrials, and other "ADR" methods to reduce the delay and contentiousness that accompany many agency decisions. *E.g.*, *Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR 305.86-3; *Alternatives for Resolving Government Contract Disputes*, 1 CFR 305.87-11; *Procedures for Negotiating Proposed Regulations*, 1 CFR 305.82-4, 85-5; *Negotiated Cleanup of Hazardous Waste Sites Under CERCLA*, 1 CFR 305.84-4; *Resolving Disputes under Federal Grant Programs*, 1 CFR 305.82-2.



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Most ADR techniques, including mediation, non-binding arbitration, factfinding and minitrials,³ involve a neutral third party who aids the parties in reaching agreement that resolves the issues in controversy. A skillful mediator can speed negotiations and increase chances for agreement by holding separate confidential meetings with the parties, where each party may give the mediator a relatively full and candid account of its own interests (rather than its litigating position), discuss what it would be willing to accept, and consider alternative approaches. The mediator, armed with this information but avoiding premature disclosure of its details, can then help to shape the negotiations in such a way that they will proceed most directly to their goal. The mediator may also carry messages between the parties, launch "trial balloons," and act as an agent of reality to reduce the likelihood of miscalculation. This structure can make it safe for the parties to talk candidly and to raise sensitive issues and creative ideas. In non-binding arbitration, minitrials and factfinding, the neutral may play a different role from that of a mediator, because he may issue a tentative decision that is then used as a basis for negotiations, but all of these neutrals have the common characteristic of helping the parties negotiate an agreement.

With all of these neutrals, many of the benefits of ADR can be achieved only if the proceedings are held confidential. Confidentiality assures the parties that what is said in the discussions will be limited to the negotiations alone so they can be free to be forthcoming. This need extends to the neutral's materials, such as notes and reports, which are produced solely to assist the neutral in the negotiation process and which others could misconstrue as indicating a bias against some party or interest. This is why many mediators routinely destroy their personal notes and drafts and return all other materials to the parties. Moreover, if the neutral were to testify in a subsequent proceeding as to what went on during the negotiations, his neutrality might be destroyed. The ADR process could be jeopardized because one party or another is likely to feel disadvantaged. Also, the parties could justifiably feel their confidences might be threatened. All this would certainly inhibit future participation by parties and neutrals.

Limited protection for settlement negotiations and work product developed in preparation for litigation is provided by Rule 408 of the Federal Rules of Evidence and Rule 26(b)(3) of the Federal Rules of Civil Procedure. However, uncertainties as to their application—not to mention the effects on confidentiality of the Freedom of Information Act—may raise obstacles to protecting communications with ADR neutrals in federal agencies' disputes. As a result, many

³ For brief definitions of these terms, see the Appendix to Conference Recommendation 86-3, *supra*.



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statutes, rules, and guidelines have explicitly provided for some degree of confidentiality of mediation and similar materials.

The Administrative Conference takes the view that maintaining confidentiality of settlement discussions is consistent with the principles underlying the FOIA, Rule 408 of the FRE, Rule 26(b)(3) of the FRCP, and the work product doctrine. To encourage the use of ADR in negotiations, the recommendation contains a model rule seeking to protect the communications between the neutral and the parties or other participants in the course of the negotiations as well as the neutral's own notes and impressions. It does so in recognition that the mediator will virtually *never* have information or evidence that is not shared by at least one other person, excepting of course the neutral's own notes, recollections, and judgments. The rule does not address (1) when meetings or negotiations should be held in public session, (2) what justification should be prepared to support any agreement reached, or (3) what information should be available from a party to the negotiations. The rule covers oral communications or actions that are related to a settlement proceeding, as well as documents that are created specifically for the negotiations or other, previously existing documents that are furnished to the neutral in confidence by a participant in the negotiation. The restrictions on the neutral's disclosing information from the negotiation are not categorically absolute, being subject to several narrow exceptions that deal with extraordinary cases. Finally, the model rule does not attempt to impose its terms on all parties for all issues; they would be free to vary the terms for their particular negotiations.

Recommendation

1. Agencies that use the services of neutrals in settlement proceedings:

(a) Should explicitly indicate that as a matter of policy they will not seek to discover or otherwise force disclosure of a neutral's notes, memoranda or recollections or of documents provided to the neutral in confidence in the course of settlement negotiations;

(b) In arranging with an individual or organization to serve as a neutral in settlement proceedings, should include a provision in any agreement with the neutral that (i) the agency makes no claim to the neutral's notes, memoranda or recollections or to documents provided to the neutral in confidence in the course of the settlement negotiations and (ii) that such



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material is outside the scope of the agency's right to any data developed pursuant to the agreement; and

(c) Should adopt a procedural rule, consistent with the model rule contained in the appendix below, for all cases where the agency itself is a party to the negotiations or where private parties are negotiating the resolution of an issue in controversy concerning a statute, regulation, or policy administered by the agency.

2. The neutral, including a neutral (as defined in the model rule) who serves as a presiding officer,⁴ should carefully segregate, and identify as settlement documents, all materials received or developed during the course of a settlement proceeding, including any retained following its conclusion, so they will be used solely to assist the neutral in working to settle the issues in controversy.

3. Agencies should interpret the FOIA, Rule 408 of the Federal Rules of Evidence, Rule 26(b)(3) of the Federal Rules of Civil Procedure, and the work product doctrine to avoid disclosure of settlement communications by neutrals serving in administrative settlement proceedings.

Appendix

Model Rule

§ xxx.1 Introduction; Encouraging Settlement; ADR Techniques.

(a) To facilitate a vigorous enforcement program and expeditious administrative decisionmaking, [the agency] encourages the resolution of issues in controversy through negotiations among the affected parties. Voluntary settlement processes within [the agency's] statutory mandates and existing policies can produce decisions more efficiently than traditional procedures, and often yield decisions that are more effective than those reached without the concurrence of persons with firsthand involvement. Settlement agreements thereby enable the agency and the parties to accomplish their goals with expenditure of fewer resources.

(b) In addition to unassisted negotiations among the affected interests, alternative means of dispute resolution ("ADR") can aid the parties in reaching agreement in appropriate cases. These techniques include facilitation, mediation, minitrials, factfinding, and non-binding

⁴ See, e.g., Recommendation 88-5, *Agency Use of Settlement Judges*, 1 CFR 305.88-5.



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arbitration. In each, a neutral third party helps the parties reach a voluntary agreement. [The agency] encourages the use of these ADR processes as part of its policy favoring settlements.

(c) The voluntary settlement of issues in controversy through a dispute resolution process requires integrity, objectivity, and fairness on the part of the neutral and of the process itself. Moreover, the parties must feel free to discuss the dispute with the neutral without fear of being disadvantaged by the negotiations. [The agency] takes the position that the public policy favoring voluntary resolution of disputes therefore requires that the neutral not reveal, either voluntarily or through legal compulsion, information learned in confidence during the negotiations. To encourage the parties to negotiate, this rule enunciates an agency policy seeking to protect the confidentiality of settlement negotiations involving the neutral.

§ xxx.2 Definitions.

As used in this rule:

(a) "Issue in controversy" means a question that is material to a decision involving a statute, regulation, or policy administered by [the agency] about which persons who would be substantially affected or the agency disagree.

(b) "Settlement proceeding" means any process, such as facilitation, mediation, minitrial, factfinding, or non-binding arbitration, that is used to resolve issues in controversy by agreement of the parties in which a neutral serves, whether or not administrative or judicial proceedings have been instituted.

(c) "Neutral" means an individual who with respect to the issues in controversy—

(1) Is not a party;

(2) Does not have any official, financial, or personal conflict of interest unless such interest has been fully disclosed in writing and all parties agree that the individual may nevertheless serve as a neutral; and

(3) Works to aid the parties in arriving at settlement of the issues in controversy through agreement.

(d) "Settlement communication" means any oral or written communication or conduct made in confidence and in connection with a settlement proceeding by any party, neutral, non-party participant, or other source of information relevant to the proceeding.



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(e) "Settlement document" means any written material that is—

- (1) Prepared for the purpose of, in the course of, or pursuant to a settlement proceeding, including memoranda, notes, and work product of the neutral and the parties, or
- (2) Provided to the neutral in confidence for purposes of the settlement proceeding.

An agreement reached as a result of a settlement proceeding is not a settlement document unless the parties agree in writing, and the law allows, that it shall be regarded as such.

(f) "In confidence" means with the expressed desire of the source that the information be kept confidential or provided under circumstances that would create the reasonable expectation that it will not be disclosed.

(g) "Party" means a person or entity whose dispute is the subject of the settlement proceeding, including representatives of such a party.

(h) "Non-party participant" means a person or entity who is not a party to the dispute but who participates in the settlement proceeding, such as by providing information, analysis, advice, or views.

§ xxx.3 Applicability of the Rule.

(a) This rule applies to any settlement proceeding whether or not [the agency] is a party if the parties communicate with the neutral under circumstances that reasonably imply that the parties expect that the communications will be held confidential. Prior to beginning substantive negotiations, the parties may (1) agree that this rule does not apply to their negotiations or (2) modify the terms of this rule by agreement in which case that agreement will prevail to the extent it is authorized by law or is otherwise consistent with this rule. So that the neutral can decide whether he wishes to serve under those conditions, the parties shall so inform the neutral otherwise prior to commencing settlement proceedings. If they fail to do so, this rule shall apply.

(b) The provisions of the rule take effect when—

(1) A person has been specifically requested or accepted by at least one party to (i) serve as the neutral in the settlement proceeding, or (ii) discuss the potential of conducting a settlement proceeding, or (iii) contact other potential parties to determine whether it would be appropriate to convene a settlement proceeding to resolve the issues in controversy;



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(2) The other parties with whom the neutral has contact know that he or she is occupying the role of a neutral; and

(3) They communicate with the neutral in that capacity.

(c) The rule does not address—

(1) The extent to which a party may disclose settlement documents and communications either voluntarily or in response to discovery or legal process; or,

(2) The information that is required to support a decision or agreement reached in a settlement proceeding.

§ XXX.4 Neutral Impartiality and Confidentiality of Settlement Negotiations.

(a) A neutral shall not voluntarily or through compulsory process disclose or testify concerning settlement communications or settlement documents, unless—

(1) All parties to the settlement proceeding and the neutral consent in writing, and if the settlement communication or document was provided by a non-party participant, that participant also consents in writing;

(2) The request is for a settlement document that was provided to the neutral in a public meeting or is otherwise already in the public domain;

(3) The settlement document is required by law to be made public, but only if it is not available from the person who prepared it or from any other source;

(4) A court determines that there is a need for such testimony or disclosure. The agency takes the position that any such determination should be pursuant to a finding that the need for disclosure to—(i) prevent a manifest injustice, (ii) reveal a violation of law, or (iii) protect the public health or safety is of sufficient magnitude in the particular case to outweigh the integrity of settlement proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential; or

(5) The settlement document or communication is relevant to the resolution of a dispute between the neutral and a party or participant, but only to the extent that the document or communication is used for purposes of resolving that dispute and not any issue in controversy in the settlement proceeding.



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(b) If a demand, by way of discovery request or other legal process, is made for disclosure by the neutral of a settlement document or communication, the neutral shall make reasonable efforts to notify the parties and any affected non-party participant so countermeasures may be taken if desired.

§ xxx.5 Agency Records.

(a) The agency makes no claim of control or ownership over the notes, memoranda, and other work product prepared by a neutral or by his or her staff in connection with a settlement proceeding.

(b) The agency takes the position that settlement documents and communications are not agency records solely on account of their having been received by the neutral during a settlement proceeding; a document or other material that is otherwise an agency record remains as such.

Citations:

54 FR 5212 (February 2, 1989)

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