

**PROTECTING THE  
CONFIDENTIALITY OF  
DISPUTE RESOLUTION  
PROCEEDINGS**

**A GUIDE FOR FEDERAL  
WORKPLACE ADR PROGRAM  
ADMINISTRATORS**

**Interagency ADR Working Group  
Steering Committee**

April 2006

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## INTRODUCTION

The Steering Committee of the Federal Interagency Alternative Dispute Resolution Working Group (IADRWG)<sup>1</sup> issues this Guide for use by administrators of workplace alternative dispute resolution (ADR) programs within federal government departments and agencies. Its primary purpose is to provide practical guidance on the application of the confidentiality provisions of the Administrative Dispute Resolution Act of 1996 (“the ADR Act”; 5 U.S.C. § 574) to federal workplace dispute resolution. Others, including administrators of other ADR programs, ADR professionals and anyone interested in ADR, may also find the information contained in the Guide to be valuable when ADR Act confidentiality applies to their practice. This Guide encourages the integration of the ADR Act and its legislative intent with agency policy and practice. The Guide is not regulation or policy and is not legally enforceable. The Guide is intended to provide helpful advice on potentially difficult questions, to executive branch ADR program administrators engaged in workplace ADR.<sup>2</sup>

This Guide focuses solely on confidentiality related to the use of mediation in federal workplace disputes. Confidentiality under the ADR Act may apply also to other ADR processes used to address workplace disputes, such as facilitation, conciliation and use of ombuds.

“ADR program administrator” is the term used throughout this Guide to define the individual or individuals in an agency responsible for implementing procedures that allow parties to use ADR. The ADR program administrator’s role differs from agency to agency. This is a full-time role in some offices, while in other offices, this is a part-time position. In some agencies and departments the ADR program administrator focuses solely on ADR policy and implementing procedures. In these instances, the program administrator is not a neutral in terms of the confidentiality provisions of the ADR Act. In other agencies and departments, the ADR program administrator is involved in assisting parties in resolving the dispute by serving as the mediator or advising the mediator. In these instances, the program administrator may be a neutral.

This Guide extends the guidance issued by the U.S. Attorney General’s Federal ADR Council, *Report on the Reasonable Expectations of Confidentiality Under the Administrative Dispute Resolution Act of 1996*, 65 Federal Register 83085, December 29,

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<sup>1</sup> The Federal Interagency ADR Working Group was established in 1998 by Congress and the President to coordinate, promote, and facilitate the effective use of ADR in the government, pursuant to the Administrative Dispute Resolution Act of 1996 and a White House Presidential Memorandum.

<sup>2</sup> This Guide applies to the internal management of the civilian executive branch. It is not intended to create any right or benefit, substantive or procedural, enforceable at law or in equity, by a party against the United States, its agencies, its officers or any other person. It is intended to be relied upon as a source of constructive suggestions for the effective administration of agency workplace ADR programs, but is not to be accorded “deference” as an “agency interpretation.” Questions regarding interpretations of applicable law, regulation and policy should be raised with the appropriate legal counsel in each department and agency.

2000 (“the 2000 ADR Guidance”), which may be found at the [www.adr.gov](http://www.adr.gov), the IADRWG website. It should be used in concert with the confidentiality provisions of the ADR Act as well as agency confidentiality policies and guidance. Another useful resource on this topic for ADR program administrators and general counsel staff is the *Guide to Confidentiality Under the Federal Administrative Dispute Resolution Act*, published by the American Bar Association (“the 2005 ABA Guidance”).

Congress enacted the ADR Act to encourage and support the use of ADR within the federal government. The provisions of the ADR Act establish requirements regarding the confidentiality of communication during ADR processes involving federal agencies. These requirements attempt to balance the goals of open government with the need to protect the assurance of confidentiality necessary to encourage free communications within the ADR process. Some of these requirements may differ from the confidentiality provisions under which private practitioners function. This is because various state laws provide different confidentiality protections affecting private neutrals.

Confidentiality is a critical component of a successful ADR process. Guarantees of confidentiality allow parties to freely engage in candid, informal discussions of their interests to reach the best possible settlement of their dispute. A promise of confidentiality allows parties to speak openly without fear that statements made during an ADR process will be disclosed to others. Confidentiality also can reduce posturing and destructive dialogue among parties during the resolution process.

It is essential that neutrals and parties be informed of the confidentiality protections available under the ADR Act and of the limitations to that protection. An ADR program administrator should take the steps necessary to assure that both internal and external neutrals understand the confidentiality provisions that apply to federal ADR programs and that parties are adequately informed of these provisions.

Each chapter of the Guide includes a description and discussion of the issues, a legal analysis, and questions and answers related to confidentiality as it pertains to an aspect of a workplace ADR program. The first chapter discusses issues important to remember throughout a dispute resolution proceeding. This chapter covers the various stages – before, during, and after the actual dispute resolution session – of a dispute resolution proceeding. The remaining five chapters discuss particular issues regarding confidentiality – *i.e.*, confidentiality agreements, record-keeping, program evaluation, access requests, and non-party participants. Effort has been taken to minimize repetition of legal analysis and guidance within the chapters of this Guide; however, such repetition has not been removed where the same material is critical to the understanding of multiple issues addressed. In most instances, reference is made to the relevant passage in another chapter where the issue in question is addressed in greater detail.

## CHAPTER I

### DISPUTE RESOLUTION PROCEEDINGS

#### A. OVERVIEW

This chapter provides advice for ways ADR program administrators can establish procedures and practices to maintain appropriate confidentiality during the various stages of a dispute resolution proceeding (*i.e.*, intake, assessment, convening, dispute resolution session, authority clearance and agreement implementation).

#### **General Description**

The requirement to maintain the confidentiality of information received by an ADR program depends primarily on whether an ADR program administrator, a member of his/her staff, a volunteer, a collateral-duty person and/or an outside contractor may be deemed a “neutral” for purposes of the particular dispute resolution proceeding. If so, the neutral must – with few exceptions – maintain the confidentiality of information obtained or generated on behalf of parties they assist during the dispute resolution proceeding. As discussed later, the role of a neutral used to support the mediation of federal workplace disputes may take several forms, including intake staff, convenors, assessors and mediators.

The responsibilities of an ADR program administrator include identifying appropriate neutrals, understanding the extent of their obligation to maintain confidentiality, ensuring that neutrals are trained in and understand their responsibilities related to confidentiality, and providing support to the neutrals so that they can maintain this confidentiality. The 2000 ADR Guidance encourages agencies to establish policies and practices that support the terms and legislative intent of the ADR Act.

#### **Legal Analysis**

The following are terms and concepts used throughout this Guide. Additional legal analysis will be provided as it is relevant to individual chapters.

*A dispute resolution proceeding* is a process in which:

- an alternative means of dispute resolution is used to resolve an issue in controversy;
- a neutral is used; and
- specified parties participate.

A dispute resolution proceeding encompasses multiple stages, including intake, assessment, convening, the ADR session and activities necessary to execute a final settlement agreement between the parties (5 U.S.C. § 571(6)).

A *dispute resolution communication* is any oral or written communication prepared for the purposes of a dispute resolution proceeding. The ADR Act states specifically, however, that a written agreement to enter into a dispute resolution proceeding or a final written agreement is *not* a dispute resolution communication.

A *neutral* is a person who:

- functions specifically to aid the parties in resolving an issue in controversy;
- is acceptable to the parties; and
- has no conflict of interest with respect to the issues in controversy, unless such issues are disclosed in writing and the parties agree that the neutral may serve.

A neutral may serve with or without compensation and may be a private individual, or employee of a federal agency, state, local or tribal government, public or private organization (5 U.S.C. §§ 583, 571(9), 573).

The term neutral may be used by an agency to define a staff position with certain responsibilities to protect information pursuant to agency policy and procedures. Though the term is the same, to be considered a neutral under the ADR Act, a person must meet the ADR Act's criteria applied on a case-specific basis.

*Neutral's obligation of non-disclosure:*

A neutral is held to a high obligation regarding confidentiality. While there are some exceptions, the ADR Act states that a neutral "shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral" (5 U.S.C. § 574(a)).

A *party* is:

- a named party in a federal proceeding; or
- for proceedings without named parties, a person who will be significantly affected by a decision of a federal agency and participates in the proceedings.

*Parties' obligation of non-disclosure:*

While parties also have an obligation of confidentiality, it is less than that of a neutral. Unless the parties and the neutral agree otherwise, the parties may disclose their own communications as well as statements made by other parties while in joint session (*i.e.*, when all the parties are present). Parties may not, however, disclose communications generated by a neutral, even if these communications were made when all parties are present.

*Changing the confidentiality procedures of the ADR Act*

Parties may, with the consent of the neutral, agree to change the confidentiality provisions of the ADR Act as they pertain to a neutral's obligations and, with appropriate consideration of the possible consequences, as they pertain to their own obligations. Such confidentiality changes are typically accomplished through parties entering a contract generally referred to as a confidentiality agreement. (See Chapter II, Confidentiality Agreements.)

Changing a neutral's confidentiality obligations:

- The extent of a neutral's obligations to maintain confidentiality may be changed under the ADR Act as long as the changes are:
  - made in writing; and
  - signed by the parties and the neutral (5 U.S.C. § 574(a)).
- Parties may also agree among themselves to change a neutral's obligations of confidentiality, but must inform the neutral prior to commencement of the dispute resolution proceeding. (5 U.S.C. § 574(d)).

Changing the parties' confidentiality obligations:

- 5 U.S.C. § 574(b)(2) allows parties to decrease or waive the ADR Act's restrictions on disclosure of their dispute resolution communications if all parties consent in writing. This allows parties to expand the types of communications they can disclose without violating the statute.
- The right of parties to agree to increase their own obligations to maintain confidentiality is not provided for by the ADR Act and is an untested point of law. The Federal ADR Council in the 2000 ADR Guidance suggested that parties address the issue through the use of a contract. Practitioners disagree, however, on whether such agreements are enforceable if challenged. Program administrators are advised to carefully balance the considerations noted in the Legal Analysis section of Chapter II, Confidentiality Agreements, in determining whether to enter agreements that increase parties' confidentiality obligations.

Note that an agreement regarding confidentiality does not change the rights of people who did not sign it, such as coworkers. They may still have access – through Freedom of Information Act (FOIA) requests or other legal means – to some of the communications covered by a confidentiality agreement that are not otherwise protected by the ADR Act. (See Chapter V, Requests for Disclosure of Dispute Resolution Communications)

### **Confidentiality Issues Raised During the Dispute Resolution Proceeding**

#### **Q1: When is someone serving as a neutral?**

**A1:** There are three main criteria that must be met for a person to be considered a neutral under the ADR Act.

1. The person must be acting to assist the parties in resolving a specific dispute. Session neutrals, such as mediators, are considered neutrals. Similarly, intake staff and convening professionals supporting parties in their use of ADR should be considered neutrals, as their work is exclusively focused on helping the parties resolve their controversy.
2. The person must be acceptable to all parties. Usually, the process begins with one party contacting an ADR office. The acceptability of the neutral by that party constitutes acceptance of the neutral until such time as other parties are contacted.
3. The person must have no conflict of interest with respect to the issues or parties, such as potentially benefiting from the outcome, having an obligation to enforce related statutes or regulations, or having a close relationship with one of the parties unless the conflicts are disclosed in writing and the parties agree that the neutral may serve.

A neutral may be a private individual or a federal government employee. There may be more than one neutral on a particular ADR case; for instance, there may be a convenor and a session neutral.

ADR program administrators are neutrals when they are helping the parties resolve their controversy by, for example, discussing ADR options with the parties, coaching and preparing them to negotiate, or by assisting the session neutrals in the mediation on behalf of the parties. Likewise, intake staff are neutrals when they are, for example, discussing the particulars of the case with the parties.

ADR neutrals fulfill many roles in assisting the parties. Under most circumstances, a person may be appropriately considered a neutral while serving in the following roles:



- helping the parties in resolving their dispute; and
- fulfilling at least one of the following functions:
  - discussing information about the dispute with the parties to explore the use of ADR;
  - conducting intake for a specific case going to ADR;
  - helping parties identify and arranging for an appropriate ADR professional;
  - conducting convening (*i.e.*, discussing the case with the parties prior to a session to help them prepare to negotiate effectively); and
  - assisting the parties toward resolving their dispute and/or reaching an agreement.

**Q2: Is an Equal Employment Opportunity (EEO) Counselor a neutral under the ADR Act?**

**A2:** No, the Equal Employment Opportunity Commission (EEOC) discourages EEO Counselors from acting as neutrals because of the potential perception of bias in favor of the agency (EEO Management Directive No. 110). Implicit in this view is the assumption that EEO Counselors, when acting in their counselor role, are not neutrals as defined under the ADR Act.

Additionally, the EEOC recommends against using EEO Counselors as neutrals except as a last resort. Neutrals are often privy to information protected by the ADR Act, which may compromise their ability to serve as an EEO Counselor. Best practices used in agencies suggest that EEO Counselors should not serve as neutrals in a dispute in which they have provided counseling to an aggrieved individual. Additionally, investigators may not serve as neutrals in cases they are investigating. Likewise, neutrals should not serve as EEO Counselors or investigators in cases in which they are or have served as neutrals.

*Dilemma: Ming spoke with a counselor in the agency EEO Office and requested that his dispute be mediated. The ADR program administrator selected Karen, a trained mediator and full-time EEO Counselor at the agency, to mediate the matter. Is Karen a “neutral” for Ming’s dispute?*

*Solution: In accordance with best practices, most agency policies, the EEO laws, and EEOC guidance, Karen, as an EEO*

*Counselor, should not serve as a neutral. However, as a last resort, Karen could mediate provided (1) Karen discloses in writing to all the parties that she is a full-time EEO Counselor at the agency, and (2) all parties agree that she may serve.*

**Q3: How can an ADR program administrator ensure that individuals seeking ADR assistance understand the role and obligations of ADR program staff members who serve as neutrals?**

**A3:** The role and confidentiality obligations of persons who fill neutral functions need to be clearly articulated, whether their duties as neutral are collateral or full-time, and whether they are mediators or ADR program administrators. Relevant agency ADR documents – such as guidance, written procedures, brochures and confidentiality agreements – should explicitly specify the roles of neutrals as part of agency ADR processes.

To ensure that individuals seeking ADR assistance understand the roles and obligations of ADR program staff members who serve as neutrals, an ADR program administrator should consider taking the following steps:

- develop and provide to potential parties a model statement clarifying under what circumstances ADR program staff members are considered neutrals for purposes of the ADR Act;
- post a sign or pledge on the door or the wall that includes the person's title and/or office name, clearly identifies the person as a neutral, and states the information the neutral will/will not keep confidential;
- develop, post and distribute materials – such as brochures, codes of conduct, articles for employee newsletters, or agency-wide email announcements – that include information about confidentiality; and
- create a web site that provides an overview of how confidentiality will be protected.

Special consideration should be taken by the ADR program administrators to assure the shared understanding of confidentiality obligations regarding federal employees of other offices who serve as neutrals on a collateral duty basis. ADR program administrators should consider the general suggestions below.

- Contact the supervisor of the neutral serving on a collateral duty basis to discuss whether the supervisor perceives there to be any obstacles to the individual's

ability to uphold the confidentiality obligations required of neutrals under the ADR Act.

- Discuss with appropriate agency officials whether modifications to the employee's position description, or other means of formalizing the neutral role, would be beneficial. The position description should identify the employee as a neutral and set out expectations regarding confidentiality, including clarification of the circumstances in which this person may act as a neutral.
- Clearly delineate to the neutral, to co-workers, and to potential parties, when the person is serving as a neutral and when she/he has other responsibilities.

*Dilemma: Gloria is a bench scientist at a federal agency and a trained mediator. The ADR program administrator would like to include her on the roster of neutrals for the agency. Assuming Gloria agrees, what steps can the ADR program administrator take to ensure that Gloria will be able to maintain confidentiality within the agency when she mediates?*

*Solution: As part of the supervisory approval process, explain to the supervisory chain that Gloria will be unable to share with her supervisors any information about her mediations other than the time(s) and location of the mediation sessions. The ADR program administrator may also want to consider how she/he can provide to his/her supervisor an evaluation of Gloria's performance as a neutral. Finally, discuss with Gloria's supervisor and the personnel office other ways of clarifying her confidentiality restrictions, such as whether her position description should be modified to reflect her collateral duty status as a neutral, or whether to post the relevant code of conduct on her door.*

**Q4: What general actions should an ADR program administrator take to ensure that an appropriate level of confidentiality is maintained in ADR program operations?**

**A4:** An ADR program administrator should be aware of agency policy regarding disclosure of information, and ensure that ADR program practice standards are consistent with the ADR Act. An ADR program administrator can accomplish this by considering:

- limiting email communications to logistics;
- understanding all agency policies that require the disclosure of information by agency staff and ensuring that parties are advised of these policies;

- preparing model confidentiality agreements that incorporate such policies;
- locating the ADR office and dispute resolution sessions in a manner that protects the privacy and confidentiality of parties (*e.g.*, so that co-workers will not see the parties entering into, participating in, or exiting from rooms in which dispute resolution sessions and related meetings are to be held and so that parties' voices will not be heard from outside of these rooms);
- ensuring that phone, email and other communications are secure; and
- if a computer is to be used in drafting a resolution or settlement agreement, ensuring that it is a secure computer which has an appropriate password protection mechanism or restricted access (*i.e.*, ideally not part of a network, with its own printer) and is not located in a public area.

**Q5: What actions should the ADR program administrator take to ensure that an appropriate level of confidentiality is maintained by session neutrals?**

**A5:** There are several steps the ADR program administrator should consider taking in order to ensure appropriate confidentiality by session neutrals, including:

- ensuring that neutrals are trained regarding confidentiality obligations, including:
  - the provisions of the ADR Act,
  - the 2000 ADR Guidance, and
  - relevant agency policy that is incorporated into confidentiality agreements;
- incorporating the role and responsibilities as a neutral in staff personnel position descriptions and performance agreements;
- creating an appropriate work environment for the neutrals addressing issues related to confidentiality (*e.g.*, privacy, records management/storage and database/file security);
- establishing and communicating disciplinary steps/process to address violations of confidentiality by neutrals; and
- developing procedures and ensuring support to assist neutrals subjected to inappropriate demands for access to information.

**Q6: May parties or the agency adopt confidentiality protections different from those provided by the ADR Act?**

**A6:** Yes, the parties may provide, by contract, for a greater or for a lesser degree of confidentiality than that provided for in the ADR Act. However, parties should be made aware of the potential enforceability issues associated with such contractual confidentiality agreements. (See the Legal Analysis section above).

*Dilemma:* Bill and Tanya have agreed to mediate their very sensitive dispute. They become concerned, though, when they learn that, since they are the only parties, under the ADR Act Bill is permitted to tell his buddies about what Tanya says, and Tanya is permitted to tell her friends what Bill says in the dispute resolution session. They ask the ADR program administrator if there is anything they can do to address their concerns regarding confidentiality.

*Solution:* Before responding, the ADR program administrator should consult with agency legal counsel to determine the agency's position on establishing confidentiality protections beyond those provided for in the ADR Act. (See Chapter II, Confidentiality Agreements.) If the agency policy permits, the ADR program administrator could explain that they can draft and sign a contract that states that both parties agree not to disclose anything said during the mediation, unless this disclosure is to authorize or implement a settlement. The ADR program administrator should clarify, however, the limitations of the contract. For example, the contract may not protect the parties from having to disclose the information if they receive a subpoena from someone not at the table. The contract also will not automatically protect the parties from a FOIA request. (See Chapter V, Requests for Disclosure of Dispute Resolution Communications.)

**Q7: What should an ADR program administrator advise a neutral who has heard from a party that he/she has violated a law?**

**A7:** Under the ADR Act, the neutral may disclose a communication if it is “required by statute to be made public.” There are very few statutes that meet this definition. (See 2000 ADR Guidance.) However, even if information is allowed to be disclosed by this exception, the ADR Act underscores that the neutral can make the communication public only if there is no one else who can disclose it.

Additionally, a few statutes have provisions that might require a federal employer to disclose information regarding a violation of law. It is beyond the scope of this guidance to provide an analysis of these statutes and their relationship to the confidentiality provisions of the ADR Act. If an ADR program administrator is concerned about a

potential statutory conflict, he/she should contact the General Counsel office. Additionally, Chapters III and V of this Guide provide additional information and suggestions on this topic.

**Q8: Statutes such as the Inspector General Act and Whistleblower Protection Act may impose an obligation on agency staff to disclose certain classes of information. As a result, some agencies have policies requiring employees to report waste, fraud, abuse, sexual harassment or other forms of misconduct. What should an ADR program administrator advise a neutral regarding obligations to protect such information that is disclosed during a dispute resolution proceeding?**

**A8:** Under the ADR Act, a neutral is precluded from disclosing dispute resolution communications with few exceptions. However, other statutes, such as those mentioned above, may impose obligations to disclose information. The ADR program manager should consider discussing with agency general counsel this potential tension between the ADR Act and other statutes requiring disclosure to determine appropriate agency policy and practice. (See Chapter V, Requests for Disclosure of Dispute Resolution Communications regarding the tension between the ADR Act and other laws or regulations.)

*Dilemma: During a separate meeting with the mediator (i.e., a caucus), Mark discloses to the neutral that he abused his government credit card by using it to buy multiple personal items. The mediator believes that is likely a violation of the government ethics regulation prohibiting waste, fraud, and abuse. During a break, the mediator approaches the ADR program administrator and asks whether to disclose the information. What does the ADR program administrator tell him?*

*Solution: The ADR program administrator should tell him that, under the ADR Act, there is no applicable exception to justify the neutral's disclosure of this information. However, the ADR program administrator should further explain actions he can take based on any agency policy regarding the tension between the ADR Act and other statutes requiring disclosure. For example, if the parties signed a confidentiality agreement stipulating that criminal activity, fraud, waste, and abuse may or must be disclosed, he may disclose the information.*

### **When a mediator reveals allegation in caucus**

*Dilemma: There is a mediation involving three parties: Yasmin, the complainant; Sean, the timekeeper; and Angie, Yasmin's supervisor. There is a joint session in which only the time*

*and attendance disputes were raised. In caucus with the external mediator, Yasmin reveals several allegations of harassment against a manager in another office. Yasmin asks the mediator to discuss the allegations with Angie, her supervisor, but asks that the allegation not be revealed to the offending manager or to anyone else. The mediator goes into caucus with Angie and reveals the allegations of harassment against the other manager, adding that Yasmin does not want the allegations revealed to anyone. Angie, aware of the agency's strict anti-harassment policy, advises the mediator that, under agency policy, he has no choice but to immediately initiate a preliminary inquiry into whether harassment has occurred, and, if the inquiry determines that harassment has occurred, take immediate action to stop such harassment. Under the agency's policy, Angie must also notify the alleged harassing manager's office director. The mediator asks for a break to consult with the ADR program administrator for guidance on whether he should tell Angie that the ADR Act prohibits her from disclosing these dispute resolution communications.*

*Solution: The ADR program administrator should advise the mediator to explain to Angie, the supervisor, that 5 U.S.C. § 574(b) of the ADR Act says that, with certain exceptions, parties to dispute resolution proceedings shall not disclose dispute resolution communications from the neutral. None of the exceptions apply here. The ADR program administrator should further advise the mediator on any agency policy regarding the tension between the ADR Act and other statutes requiring disclosure.*

### **When allegations are made in joint session**

*Dilemma: In joint session focused on interpersonal issues, Liam, the complainant tells Andrew, his supervisor, that a co-worker has been harassing him. Andrew informs Liam he will take immediate action to stop the harassment.*

*Solution: The ADR program administrator should be sure that all mediators know and that parties understand that, under 5 U.S.C. § 574(b)(7) of the ADR Act, there is no prohibition on a party disclosing the communications of another party when they are provided to all parties to the dispute resolution proceeding.*

## **When a joint session is confidential**

*Dilemma: The parties, in consultation with appropriate legal counsel, have signed a mediation agreement (i.e., a contract) providing that they will not disclose any communications made by the parties during the dispute resolution proceeding. During joint session the complainant reveals an allegation of harassment. The supervisor says that she would like to report these allegations and address them. What should the ADR program administrator advise the mediator to do?*

*Solution: The ADR program administrator should ensure mediators know that, although the ADR Act does not protect joint session communications, the parties may, in compliance with agency policy, contract independently to keep dispute resolution communications made in joint sessions confidential. (See the Legal Analysis section.) The supervisor, as a party, risks being in breach of the contract if he or she discloses the communication.*

## **Q9: When may an intake, session or other neutral disclose information protected by the ADR Act to the ADR program administrator?**

**A9:** The neutral may disclose dispute resolution communications, and communications provided in confidence to the neutral, only to other neutrals assisting the parties to resolve this dispute. Before the session neutral makes disclosures of information protected by the ADR Act to the ADR program administrator, consider the following.

- Is the ADR program administrator a neutral with respect to this dispute? If so, the neutral may disclose freely, but the ADR program administrator must maintain the confidentiality of the information consistent with the ADR Act. If the ADR program administrator is a neutral who has the job of supporting and guiding session neutrals, she/he is fulfilling this function by hearing information that the session neutral shares to better assist the parties in resolving their dispute.
- If the ADR program administrator is not a neutral with respect to this dispute, she/he may only obtain and disclose information from the neutral that is not a dispute resolution communication or otherwise provided in confidence to the neutral. For example, an agreement to mediate, information and data that are necessary to document an agreement reached and information for research or educational purposes can be discussed with the ADR program administrator.

*Dilemma: Paul, the ADR program administrator, schedules cases and identifies appropriate neutrals for the agency's workplace*



*disputes. His cases are referrals from the agency EEO Office and the personnel office. In this particular matter, Paul has had no contact with the parties other than to confirm date and location. Is Paul a neutral regarding this matter?*

*Solution: Paul, who merely schedules cases and does not have contact with the parties other than to confirm date and location, is not a neutral for this particular dispute because he is not aiding the parties in resolution of their dispute. Under these circumstances, the session neutral cannot share any dispute resolution communications with Paul; unless an exception under the ADR Act applies.*

*Dilemma: Elena, the agency ADR program administrator, met with the parties individually prior to the session to help the parties understand the process and focus the issues to be mediated. Is Elena a neutral regarding this matter?*

*Solution: Elena is a neutral for purposes of this particular dispute. The session neutral can freely share any information with Elena regarding the mediation session.*

*Dilemma: Doug is the Director of the small agency EEO office. The only agency workplace ADR function is located in the EEO office, but there is no specified ADR program administrator. Both collateral duty and full time counselors handle incoming cases and offer mediation to the complainants. If the complainant is interested, the counselor sends the information to Doug who arranges the logistics of the mediation. Is Doug a neutral? What can the session neutral discuss with Doug?*

*Solution: This is a difficult situation because Doug directly supervises the session neutral, specifically on her ability to mediate. However, as the office is structured, Doug is not a neutral. He is not functioning specifically to aid the parties in resolving a controversy. He is not engaged in the substance of the dispute, just the logistics. Additionally, as the head of the office charged with implementing the EEO laws, the situation is rife with potential conflicts of interest. Therefore, under these facts, the session neutral may not share dispute resolution communications with Doug.*

*To address the concerns, Doug could designate a separate ADR program administrator in or outside his office. That*

*person could then serve as a neutral and help to mentor and evaluate the on-staff neutral. Alternatively, the neutral could share information with Doug if all parties to the dispute resolution proceeding and the neutral consent in writing.*

**Q10: Sometimes the parties or the neutral determine that the participation of an expert or resource person in the ADR process would be helpful. How can the ADR program administrator protect the confidentiality of the process when “outsiders” are brought in?**

**A10:** Under the ADR Act, non-party participants generally are not bound to maintain confidentiality. They may, however, sign a contract binding them to confidentiality if all participants agree. (See Chapter II, Confidentiality Agreements.)

The participation of resource persons may be arranged ahead of time or may be initiated during the session. These individuals may be experts in a substantive area or they may be agency employees with expertise in an area that pertains to the dispute or to the potential resolution (*e.g.*, a pension/benefit expert, if retirement is expected to arise as an issue or option).

Under certain circumstances, non-party participants may be considered “neutrals” under the ADR Act for purposes of the confidentiality provisions. To be considered a neutral, they must:

- either be brought into the proceedings by the session neutral and acceptable to the parties or be brought into the proceedings by the parties jointly; and
- meet the other statutory requirements for “neutral.” (See Q1, above.)

If only one party brings the expert or resource person into the session, the person is not a neutral under the ADR Act.

An ADR program administrator should consider briefing resource persons, whether they are “neutrals” or simply non-party participants, on confidentiality provisions prior to their participation in the ADR process. If they are to participate in the session, they should be encouraged to sign the confidentiality agreement. If they are brought in mid-session and are only answering questions and not hearing confidential dispute resolution communications, signing of the confidentiality agreement may not be necessary.

*Dilemma: Bill, an employee who is mentally impaired, has agreed to enter mediation with his supervisor. The parties have agreed that Celia, a vocational rehabilitation counselor with relevant expertise, will participate in the session as a resource person. The mediator asks the ADR program*

*administrator whether Celia is a neutral, and, if not, how to ensure the parties' confidentiality.*

*Solution: The rehabilitation counselor is a neutral because she will be assisting the parties to resolve their dispute and not serving as an advocate for either party. Both parties agree that Celia should participate. As a best practice, the ADR program administrator or the mediator should spend time with Celia prior to the session explaining confidentiality provisions. Celia should sign the confidentiality agreement, along with the other participants.*

*Dilemma: Ariana, the session neutral, is mediating a dispute between a geologist and his supervisor over the employee's latest performance evaluation. During the session, Ariana proposes bringing in a geologist who has no relationship to either party to advise her on technical issues. The parties concur. Ariana asks the ADR program administrator whether the resource geologist is a "neutral."*

*Solution: The resource geologist is a neutral because she meets all the criteria under the ADR Act and was selected by the neutral. The resource geologist has all the protections and obligations of neutrals under the ADR Act. The resource geologist should sign the confidentiality agreement, along with the other participants.*

*Dilemma: Aron, a manager, and Michael, an employee, are mediating a dispute involving the amount of Michael's pension. Michael has brought a pensions expert to assist him in explaining the technical aspects of his case. The session neutral asks the ADR program administrator whether the pension expert is a neutral.*

*Solution: The pension expert is not a neutral because Michael brought her into the process to assist him. In this capacity, she has neither the obligations nor the protections of the ADR Act. The pension expert should sign the confidentiality agreement, along with the other participants.*

**Q11: Does the answer to the question above change if the "outsider" is a personal representative of one of the parties?**

**A11:** Yes. As noted in the 2000 Guidance, consistent with common legal practice, the obligation of parties extend to their representatives and agents. Therefore, a personal representative is held to the same confidentiality obligations as a party.

## CHAPTER I

### DISPUTE RESOLUTION PROCEEDINGS

#### B. OVERSIGHT RESPONSIBILITIES BEFORE THE DISPUTE RESOLUTION SESSION

This section provides advice for ways ADR program administrators can establish procedures and practices to maintain appropriate confidentiality during the intake, assessment and convening stages of the Dispute Resolution Process. It also discusses what to do when an employee first contacts an ADR program staff member seeking general information about the agency's ADR program.

##### **General Description**

The confidentiality provisions of the ADR Act are intended to shield from disclosure communications between an employee and an ADR program staff member pertaining to a particular dispute. The confidentiality protections of the ADR Act start when the employee first contacts an ADR program staff member concerning a dispute. 5 U.S.C. § 574(a) and (b) emphasize the integrity of dispute resolution proceedings in general and provide assurance to parties in future cases that their communications will remain confidential.

Intake refers to the process used by the ADR program to capture specific information pertaining to a particular dispute from the individual who initiated contact with the ADR program. Intake activities may include setting the date, time, and place for the dispute resolution session, as well as case development (such as gathering enough information to determine who the right parties are to bring to the table to reach a resolution to the dispute that is effective and can be implemented).

Assessment refers to the process of discussing the ADR options and the processes they entail, and designing the process for use in a particular case, with the participation of the parties. Assessment may also refer to the neutral's review of a case to determine whether it is suitable for resolution through ADR, and, if so, which ADR process is most appropriate.

Convening refers to the process of preparing the parties to participate in ADR. Depending upon the structure of the particular ADR program, some convening tasks may overlap elements of the assessment and/or intake.

**Confidentiality Issues Raised During Initial Contacts and Program Intake**

**Q1: When an employee contacts an agency ADR program staff member seeking general information about the agency's ADR program, are the communications confidential under the ADR Act?**

**A1:** No, the employee requesting general program information has not indicated an expectation of confidentiality. The employee is not discussing a particular dispute or issue in controversy and therefore not speaking to the ADR program staff member in his/her capacity as a neutral.

**Q2: When an employee first contacts an agency ADR program staff member seeking advice about resolving a specific dispute or seeking to enter a workplace ADR process, are the communications confidential under the ADR Act?**

**A2:** Yes, the agency ADR program staff member performing intake duties and responding to questions about ADR could be appropriately identified as a neutral and therefore the communications would be confidential under the ADR Act. The employee has a reasonable expectation that such communication with the ADR program staff member is confidential because the discussion is about a process to resolve a dispute through an ADR process. In other words, the employee does not expect that the ADR program staff member would divulge the information imparted to him/her. (See 2000 ADR Guidance.) Agency policy and practice should dictate that ADR program personnel performing intake duties identify themselves as neutrals and explain to parties seeking assistance the confidentiality of their communications.

*Dilemma: Mary, an employee, contacts her agency ADR program seeking assistance in resolving a dispute and describes a dispute to Joelle, an intake person.*

*Solution: The conversation is confidential because Joelle obtained substantive information about the dispute and is assisting parties in resolving an issue in controversy.*

**Q3: Is the completed intake form confidential?**

**A3:** Yes, unlike an EEO intake form, the ADR intake form – used to initiate assistance for the parties – is a dispute resolution communication. It is confidential if the form includes information about a specific individual(s) and/or dispute. The neutral should ensure that the completed intake form remains confidential. The ADR program administrator should be aware of the requirements under the Federal Records Act regarding the intake form. (See Chapter III, Agency Record-Keeping.)

**Q4: Is the information provided to or by a neutral during a convening and case assessment automatically covered by the confidentiality provisions of the ADR Act?**

**A4:** Yes, communications between a neutral and a party during a convening and case assessment to assist in and resolve a dispute are protected by the confidentiality provisions of the ADR Act. Some ADR programs may conduct case assessments and otherwise share information among neutrals in the ADR program as an integral part of its procedures. There may be more than one neutral associated with a case during the course of a dispute resolution process (*e.g.*, an intake neutral, a convening neutral, as well as the neutral that facilitates a face-to-face proceeding). Any such information shared between neutrals for the purpose of assisting the parties is likewise protected.

**Q5: Does the ADR Act provide for confidentiality when a non-neutral individual, other than as an ADR party, participates in case assessment or convening?**

**A5:** No, in some cases an agency representative will gather information regarding a dispute to assist the agency in making a determination as to whether to participate in ADR. Such a role might be filled, for example, by the civil right officer or a labor-management representative. That person is acting as an advocate for the agency to determine the best interests of the agency. This is not a neutral function, because the person is not aiding both parties in resolving the dispute, and, therefore, the ADR Act does not provide for confidentiality. To protect the credibility of the ADR program, neutrals should ensure that confidential dispute resolution communications or communications provided in confidence to the neutral will not be shared with non-neutral agency personnel.

**Q6: Are written case assessment reports confidential?**

**A6:** Yes, if the assessor is a neutral for that case, the report is protected by the ADR Act. Creation of an assessment report may, however, constitute a record under the agency's record-keeping procedures. An ADR program administrator should evaluate the benefits of having a written report for documentation and evaluation purposes in relation to the requirements to maintain the confidentiality of the report. (See Chapter III, Agency Record-Keeping).

**Q7: What can an ADR program administrator do to protect confidentiality when an individual contacts a convenor/assessor informally?**

**A7:** An ADR program administrator should consider advising the convenor/assessor to explain to the individual that she/he is a neutral. It may be helpful for the neutral, even at this informal stage, to take only limited notes. Whether such notes are subject to federal record keeping requirements is discussed in Chapter III, Agency Record-Keeping.

**Q8: Is it necessary for the neutral conducting a convening (convenor) and parties to sign any confidentiality agreement?**

**A8:** No, convenors, who may include persons conducting intake, generally do not sign confidentiality agreements. However, such a practice could constitute an added confidentiality protection. Sometimes convening includes joint discussions, such as conference calls, with the parties to reach agreement on procedures. In these cases, it may be beneficial for the participants to sign the confidentiality agreement before such discussions, to memorialize the parties' expectations regarding confidentiality of dispute resolution communications during convening activities. Because convening may be done telephonically, it may be necessary to create a method for remotely obtaining the signatures of parties, such as through the exchange of confidentiality agreement signature pages via facsimile.

**Q9: What actions can an ADR program administrator take to ensure that an appropriate level of confidentiality is maintained for all dispute resolution communications that occur before the dispute resolution session?**

**A9:** An ADR program administrator should consider taking the following steps:

- define the ADR process in all agency documents and information to include intake, assessment, and convening, if such steps are part of the agency's ADR program;
- appropriately identify neutrals who perform intake, assessment, and convening functions to those potentially interested in using ADR;
- train neutrals to inform employees about their role and when confidentiality applies;
- appropriately educate agency staff of the ADR program and confidentiality protections afforded communications;
- identify which records are necessary to ADR program operations and determine how to safeguard the confidentiality documents that must be maintained; and
- establish position descriptions for persons who fill intake/assessor/convenor functions, whether collateral-duty or full-time, which specify and explain that these roles are neutral roles.



## Summary

As the ADR program administrator, have I considered:

- Deciding who is authorized to function as a neutral in my program?
- Appropriately identifying the individual(s) as a potential neutral?
- Identifying the neutral(s) in my program to agency staff and potential parties?
- Educating ADR program staff, including those who engage in intake, assessment and convening, about the nature of their confidentiality and record keeping obligations?
- Taking all necessary steps to ensure the program supports the neutral's confidentiality?
- Ensuring that the convening and assessment process is explicitly specified in agency documents and information as part of the ADR process for purposes of confidentiality?
- Ensuring that the parties understand the role of a neutral and their responsibilities for confidentiality?
- The benefits of having the parties sign a confidentiality agreement before substantive discussions begin?
- Educating mediators, agency personnel, and other mediation participants, including resource persons, about the nature of their confidentiality obligations?

## CHAPTER I

### DISPUTE RESOLUTION PROCEEDINGS

#### C. OVERSIGHT RESPONSIBILITIES DURING THE DISPUTE RESOLUTION SESSION

This section provides advice for ways ADR program administrators can establish procedures and practices to maintain appropriate confidentiality during a dispute resolution session. A dispute resolution session begins following the appointment of a session neutral or the agreement of the parties to commence proceedings with the session neutral.

##### **General Description**

Once the intake and convening stages have been completed, the parties are ready to begin the dispute resolution session stage of the dispute resolution proceeding. This stage is the heart of the dispute resolution proceeding and is also the point at which the neutral and the parties actively work to resolve the dispute through the use of various ADR techniques in joint and private meetings or through telephone conversations. The dispute resolution session phase ends when the dispute is resolved, or the parties agree or neutral determines that the dispute cannot be resolved.

The session neutral may be an employee of the federal government (internal neutral) or a private sector neutral (external neutral).

##### **Confidentiality Issues Raised During the Dispute Resolution Session**

**Q1: What actions should an ADR program administrator take to ensure appropriate confidentiality of discussions between the neutral(s) and the parties during the dispute resolution session?**

**A1:** An ADR program administrator should consider taking the following steps.

- Ensure that neutrals are trained regarding the confidentiality requirements of the ADR Act and any agency policy that is incorporated into a confidentiality agreement regarding conduct of the dispute resolution session. This includes:
  - having neutrals become familiar with the 2000 ADR Guidance before commencing the dispute resolution session;
  - ensuring that the session neutral appropriately conveys the requirements of the ADR Act to the parties;

- ensuring that the session neutral discusses with the parties the possible implications of modifying the confidentiality provisions of the ADR Act; and
- ensuring that the session neutral advises the parties of the possible need to consult with the ADR program administrator during the session and that the ADR program administrator is bound by the confidentiality provisions of the ADR Act and any agreement he or she signs.
- Recommend that the parties and the session neutral execute a confidentiality agreement prior to the start of the dispute resolution session. (See Chapter II, Confidentiality Agreements.)
- Consider whether the room in which the dispute resolution session is being held provides sufficient protection of confidentiality so that the voices of the session participants will not be heard outside the room.
- If a computer is to be used in drafting a resolution or settlement agreement, ensuring that it is a secure computer which has an appropriate password protection mechanism or restricted access (*i.e.*, ideally not part of a network, with its own printer) and is not located in a public area.
- If the dispute resolution session is conducted by telephone, ensure that the communications are secure.
- Provide to the neutral and each participant a packet of information:
  - summarizing the confidentiality provisions of the ADR Act (including the ability of the parties to modify the confidentiality provisions of the ADR Act) and any agency policy that may be agreed upon and apply at the dispute resolution session;
  - enclosing a model confidentiality agreement; and
  - outlining the key points that the mediator should cover in the opening statement.
- Ensure that the neutral reminds the parties, at the conclusion of the session, of their obligation to maintain the level of confidentiality provided for by the ADR Act or the alternative level of protection, if they have agreed to one.

**Q2: During the dispute resolution session, the parties reach an apparent impasse, which the session neutral cannot overcome without consulting with a person outside the session. What direction should the ADR program administrator provide to the neutral?**

**A2:** The ADR program administrator should consider advising the neutral to first seek to have the parties obtain the needed information themselves. In the event that the parties are unable to obtain the information, the neutral should advise the parties of her/his potential need to confer with an ADR professional or non-party subject matter expert during the dispute resolution session. The session neutral may disclose facts to such persons to enable a fruitful discussion of possible approaches to resolve the apparent impasse, so long as the neutral stays within the bounds of the confidentiality requirements of the ADR Act. If the session neutral determines that information protected by the ADR Act needs to be disclosed to the non-party subject matter expert or ADR professional, the session neutral must obtain the permission of the parties before pursuing such consultation further.

**Q3: During the dispute resolution session, the session neutral and the ADR program administrator have a routine meeting to discuss the status of the session. What may the neutral disclose?**

**A3:** So long as the ADR program administrator is considered to be a neutral in this matter, the ADR program administrator is already bound to protect the confidentiality of the information presented by the parties. Therefore, the neutral may disclose as much information as she/he thinks necessary for the consultation to be effective.

**Q4: During a break in a dispute resolution session, the ADR program administrator is approached by an individual, such as a supervisor, interested in the outcome of the session and asks how the session is going. What may the ADR program administrator disclose?**

**A4:** The ADR program administrator should not disclose anything about the session. However, the ADR program administrator may note that a proceeding has occurred and, if a final settlement was arrived at, discuss the terms of the settlement with the party's supervisor to the extent allowed by agency policy and procedures. The ADR Act does not protect a final settlement agreement from disclosure. If the ADR program administrator has knowledge of what was disclosed during the dispute resolution session, whether by actively participating in the session or by exercising supervisory oversight of the ADR program, the ADR program administrator may not disclose that knowledge.

**Q5: What should an ADR program administrator do if an agency policy is found to have reporting requirements that are more detailed than, or in conflict with, the ADR Act? What if the scope of the agency policy is more limited than that of the ADR Act?**

**A5:** Agency policies and guidance may require that certain information obtained by agency staff be disclosed to the agency. However, disclosure of such information will constitute a violation of the ADR Act, unless the parties agree to a modification of the ADR Act's provisions through the incorporation of the agency disclosure requirements into a signed confidentiality agreement. (However, see the Legal Analysis Section, of Chapter II, Confidentiality Agreement.) It is the obligation of an ADR program administrator to ensure that parties are aware of any agency policies incorporated into confidentiality agreements that affect the provisions of the ADR Act.

**Q6: Should an ADR program administrator's advice to a neutral be different if the session neutral is an internal agency staff member or an individual from outside the agency?**

**A6:** No, the general obligations of a neutral to ensure the confidentiality of dispute resolution communications is the same regardless of whether the session neutral is an internal agency staff member or an individual from outside the agency.

### **Summary**

As the ADR program administrator, have I considered:

- Determining that the neutral is aware of, and will assist the parties in understanding, the scope of confidentiality protections provided by the ADR Act?
- Ensuring that the neutral specifies to the parties what aspects of agency policy incorporated into a confidentiality agreement of the parties go beyond the ADR Act's confidentiality protections or require the disclosure of information protected by the ADR Act?
- Checking to see that the session neutral has reviewed the 2000 ADR Guidance before commencing the dispute resolution session, and understands the effect of any agency policy regarding confidentiality or requiring the disclosure of certain information?
- Ensuring that the neutral will protect confidentiality through appropriate selection of session rooms, use of telephones, and the use of computers for drafting a resolution or settlement agreement or conveying other dispute resolution communications to parties?
- Ensuring that the neutral's opening statement states that he or she may need to consult with the ADR program administrator, other ADR professionals, or subject matter experts?

## CHAPTER I

### DISPUTE RESOLUTION PROCEEDINGS

#### D. OVERSIGHT RESPONSIBILITIES AFTER THE DISPUTE RESOLUTION SESSION

This section provides advice for ways ADR program administrators can establish procedures and practices to maintain appropriate confidentiality following completion of the dispute resolution session, but prior to final settlement of the mediated dispute.

##### **General Description**

The confidentiality provisions of the ADR Act protect dispute resolution communications that occur prior to the completion of a final agreement between the parties resolving the dispute through mediation. Because resolution of federal disputes typically requires execution of a formal settlement document by the parties and the agency, the final settlement may not occur until sometime after the end of the dispute resolution session. During this period, disclosure of dispute resolution communications may be necessary to allow the agency representative to have appropriate officials sign off on, or otherwise approve, the settlement agreement, and to enable the employee to seek a legal review of the settlement.

Any communications that occur after execution of the final settlement between the parties are not protected by the ADR Act.

##### **Confidentiality Issues Raised After the Dispute Resolution Session**

**Q1: Upon completion of the dispute resolution session, the parties sign a draft , written settlement agreement and provide a copy to the neutral. What information regarding dispute resolution communications may the parties or neutral provide to agency officials?**

**A1:** A party or neutral may disclose information protected by the ADR Act only to the extent necessary to obtain the required signatures on the settlement agreement (5 U.S.C. § 574(g)).

A best practice used by some agencies is to encourage the parties, rather than the neutral, to disclose information protected by the ADR Act to the extent necessary to obtain approval, *i.e.*, proper signatures on the settlement agreement. Also, some agencies have written agency policies that state that agency personnel who receive information otherwise protected by the ADR Act to review or approve a settlement agreement, will keep this information confidential, or be subject to agency disciplinary proceedings if they do not.

**Q2: An agency official poses a question to the ADR program administrator who assisted the parties as a neutral regarding the reasoning behind a particular provision of a settlement agreement. She/he asks the ADR program administrator about the circumstances leading to the agreement. What may the ADR program administrator disclose?**

**A2:** A neutral may not discuss any information disclosed during the dispute resolution session. Consequently, the agency official should be referred to the parties, who may voluntarily disclose information protected by the ADR Act that may be relevant to determining the meaning of the settlement agreement (5 U.S.C. §§ 574(a), 574(b)(6)). If the agency official's need for clarification from the neutral pertains to approval or implementation of the settlement agreement and the neutral has received prior permission from the parties to disclose information for this purpose, then the neutral may disclose the necessary information. If the agency official does not have a legitimate need to know (*e.g.*, she/he is merely curious about the circumstances but can make an approval determination without the requested information), the neutral may not make the disclosure.

**Q3: Following execution of the final settlement agreement between the parties, an agency official asks the ADR program administrator for a copy of this agreement. May the ADR program administrator provide a copy to the official?**

**A3:** Yes, the ADR Act does not prohibit the disclosure by any party or the neutral of the final settlement agreement between the parties. Therefore, the final formally executed, written settlement agreement may be provided to agency officials. The final settlement agreement is specifically excluded from the definition of a dispute resolution communication protected by the ADR Act (5 U.S.C. § 571(5)). However, agency policy may put restrictions on how and to whom a final settlement agreement can be shared by agency staff.

**Q4: Following execution of the final settlement agreement between the parties, one of the parties wants to discuss with the neutral what occurred in the dispute resolution session. What advice should the ADR program administrator provide to the neutral?**

**A4:** The ADR program administrator should consider advising the neutral that if a party wishes to discuss his/her impressions or thoughts about the dispute resolution session with the neutral after the dispute resolution proceeding has concluded with the execution of a final settlement agreement, the neutral should inform the party that the conversation is not confidential.

**Q5: Following execution of the final settlement agreement between the parties, a dispute arises between the parties over the implementation of their agreement. One of the parties wants to discuss what occurred in the dispute resolution session with the ADR program administrator who assisted the parties as a neutral in an effort to clarify the intent of the settlement. Is the conversation covered under the confidentiality protections of the ADR Act?**

**A5:** No, if a party wishes to discuss his/her impressions or thoughts about the dispute resolution session with the ADR program administrator after the dispute resolution proceeding has concluded with the execution of a final settlement agreement, the ADR program administrator should inform the party that the conversation is not confidential. For confidentiality to apply to the current situation, the party would have to initiate a new dispute resolution case regarding the current dispute over implementation of the agreement.

**Summary**

As the ADR program administrator, have I considered:

- Ensuring that the session neutral understands she/he generally cannot disclose dispute resolution communications and communications provided to the neutral in confidence?
- Suggesting that session neutrals have the parties acknowledge either orally or in writing that the neutral may disclose information protected by the ADR Act to the extent necessary to obtain approval of the settlement agreement?
- Drafting an agency policy regarding disclosure of information protected by the ADR Act for purposes of approval of the settlement agreement?



## CHAPTER II

### CONFIDENTIALITY AGREEMENTS

This chapter provides advice for ways ADR program administrators can establish procedures and practices to maintain appropriate confidentiality when the parties express in writing their mutual understanding on confidentiality as it applies to the dispute resolution proceeding.

#### *General Description*

The ADR Act will apply to communications during a dispute resolution proceeding regardless of whether it is invoked by a confidentiality agreement. However, a confidentiality agreement is a way for parties, and the neutral(s) assisting them, to express their understanding and agreement on how communications and documents exchanged during a dispute resolution proceeding will be handled and protected. More formally, it is a contract between the parties that documents this common understanding and agreement. A confidentiality agreement is often incorporated into a broader contractual agreement, typically referred to as a mediation agreement, that outlines the procedures and rules that will be used to conduct a dispute resolution session, such as a mediation.

#### *Legal Analysis*

Confidentiality agreements fall into three general classes, those that:

- simply cite the ADR Act,
- decrease (or waive) confidentiality protections, and
- increase confidentiality protections beyond what the ADR Act provides.

#### *Citing ADR Act*

Citing the ADR Act in a confidentiality agreement emphasizes the intent of the parties and the neutral to be engaged in a proceeding that is granted the special protection found in the statute.

#### *Decreasing Confidentiality Protections*

The ADR Act expressly allows parties by written agreement to waive the confidentiality obligations on themselves. If all parties agree in writing, then the parties may disclose a dispute resolution communication. (See 5 U.S.C. § 574(b)(2)). A waiver agreement could be limited to certain topics, such as issues of national security, sexual harassment or other important agency concerns.

The ADR Act, in two provisions, allows for agreements that free the neutral from confidentiality obligations.

- If the parties and the neutral agree in writing, then a neutral may disclose dispute resolution communications. If the dispute resolution communication in question was provided by a non-party participant, then that participant must also sign the written agreement before the neutral may disclose the communication. (5 U.S.C. § 574(a)(1).
- The parties may also agree to allow the neutral to disclose dispute resolution communications, but they must inform the neutral prior to the commencement of the dispute resolution proceeding. (5 U.S.C. § 574(d)(1)) The language of this section does not require that the agreement be in writing or expressly state that the neutral must agree. However, as a best practice, the program administrator should advise the parties to document the agreement in writing. If a neutral does not wish to abide by the agreement, the neutral could withdraw from the dispute resolution proceeding.

#### *Increasing Confidentiality Protections*

Parties may agree to increase the neutral's confidentiality obligations, but they must inform the neutral prior to the commencement of the dispute resolution proceeding. (5 U.S.C. § 574(d)(1)) (See bullet above)

Whether parties may increase their own confidentiality obligations by written agreement is an untested point of law. Most often such provisions are considered to protect party to party communications in joint sessions. The Federal ADR Council in the 2000 ADR Guidance suggests that parties provide protection for such communications through use of a written confidentiality agreement. Practitioners disagree, however, on whether such agreements may be enforceable. In determining whether to include provisions in a confidentiality agreement to protect the confidentiality of "party-to-party" communications in joint sessions, program administrators should advise parties to balance the following considerations.

#### Reasons to Consider Including Provisions

- Promotes open discussions and may increase the amount and quality of information exchanged by the parties, leading to potential increase in the quality and number of successful resolutions
- May support a party's willingness to use mediation to resolve a dispute over more adversarial options
- Supports the use of mediation techniques to improve the relationship between the parties through the greater use of joint sessions

## Reasons to Consider Not Including Provisions

- Avoids the possibility that the provisions, if challenged, would be found by a court to not be enforceable, potentially resulting in the disclosure of statements presumed to be confidential
- Reduces the time required and responsibility of the program administrator to educate parties appropriately prior to the mediation, since it avoids the need to ensure that the parties are informed of the potential consequences of a possible future challenge to such a provision's enforceability and the relationship of the provision to possible reporting requirements
- Simplifies the drafting of the confidentiality agreement

If a program administrator has considered all of the factors above, using a written confidentiality agreement to increase their own confidentiality obligations might be a way to increase the open exchange of information and the use of mediation techniques which focus more on relationship building.

NOTE: A confidentiality agreement is an agreement of the parties to enter into a dispute resolution proceeding and is, therefore, not protected from disclosure by the ADR Act. 5 U.S.C. § 571(5) specifically excludes such agreements from protection under the ADR Act.

In addition, dispute resolution communications between a neutral and a party that are protected from disclosure by the ADR Act are exempted from disclosure under the Freedom of Information Act. (5 U.S.C. § 574(j)) This FOIA exemption, however, may not apply to communications protected by a confidentiality agreement if such communications are not otherwise protected by the ADR Act. (See Chapter V, Requests for Disclosure of Dispute Resolution Communications)

### **Confidentiality Issues Raised by a Confidentiality Agreement**

#### **Q1: What information might be included in a confidentiality agreement?**

**A1:** A confidentiality agreement should include information to show the understanding of the parties and the neutral about the scope and limitations of confidentiality protection that apply to the dispute resolution proceeding. At a minimum, it should include a simple statement affirming the intention of the parties and neutral that the provisions of the ADR Act apply. Many confidentiality agreements also include information highlighting certain details and limitations of the confidentiality protections of the statute, such as:

- that all forms of communication (written and oral) may be protected;
- that a party's communications made available to all other parties (*i.e.*, communications during a joint session) are not protected from disclosure by a party; and

- that, if agency policy permits, parties have the ability to change the confidentiality protections of the ADR Act.

An ADR program administrator should consider providing parties and neutrals with a model confidentiality agreement to facilitate their discussion and signature.

**Q2: What are examples of additional provisions that, if agency policy permits parties to do so, could be included in a confidentiality agreement?**

**A2:** Parties and neutrals assisting them sometimes agree to include provisions in confidentiality agreements that change or enhance protections provided by the ADR Act (see Legal Analysis section, above), such as agreements that specify that:

- communications made by the parties in joint session, or those that are otherwise available to all parties, may not be disclosed by a party
- the parties' communications are also protected by other applicable authorities that restrict disclosures, including the Federal Rules of Evidence or the Administrative Procedure Act;
- the parties will not subpoena the neutral(s) regarding matters relating to the dispute resolution proceeding;
- there will be no verbatim recording of the dispute resolution proceedings such as an audio tape or a stenographic record; or
- aspects of agency policy – including requirements to disclose certain information learned during a dispute resolution proceeding, such as fraud or sexual abuse – are not superseded by ADR Act confidentiality provisions in this particular ADR process.

**Q3: Should an ADR program administrator require the use of confidentiality agreements in all disputes?**

**A3:** Yes, although it is not required to obtain the protections of the ADR Act, there are substantial benefits to the parties, neutral(s) and ADR program in having a signed confidentiality agreement. Confidentiality agreements help parties clarify their understanding of confidentiality as it pertains to their dispute resolution proceedings. Confidentiality agreements provide parties an opportunity to craft provisions that meet their needs and ensure a record of their agreement. In addition, confidentiality agreements can allow an ADR program administrator to include additional protections required by some neutrals, such as protection from future subpoenas. A best practice is for the ADR program administrator to require parties and neutral(s) assisting them to enter into a confidentiality agreement in any dispute that, if not resolved, may lead to legal action between the parties. (See Legal Analysis section above.)

#### **Q4: When should a confidentiality agreement be signed?**

**A4:** A confidentiality agreement should be signed at the earliest possible time in the dispute resolution proceeding. This may serve as a way to ensure that the parties and all ADR program staff neutrals assisting the parties are aware of confidentiality requirements and protections. An ADR program administrator should consider presenting a confidentiality agreement for signature of each party and participating members of ADR program staff at the time of intake of the dispute.

#### **Summary**

As the ADR program administrator, have I considered:

- Ensuring that the parties and neutral(s) are educated about the purpose, and benefits of signing a confidentiality agreement?
- If parties are considering using a written confidentiality agreement to increase their own confidentiality obligations, ensuring that the parties are aware of and have balanced the considerations noted in the Legal Analysis section above?
- Requiring the signing of a confidentiality agreement in all appropriate disputes?
- Providing parties and neutrals with a model confidentiality agreement that contains the following:
  - a statement of the intent of the parties and neutral(s) that the confidentiality provisions of the ADR Act apply to their communications;
  - an explanation of the scope and limits of the protections provided by the ADR Act and the ability of parties to agree to alternative protections;
  - inclusion of additional provisions, if appropriate, intended to enhance or change the confidentiality provisions of the ADR Act; and
  - an explanation of the impacts on confidentiality of any additional incorporated provisions, including relevant agency policy or guidance and their ability to protect communications from disclosure?
- Retaining the original or a copy of the confidentiality agreement?

## CHAPTER III

### AGENCY RECORD-KEEPING

This chapter provides advice for ways ADR program administrators can establish procedures and practices to maintain appropriate confidentiality and meet the requirements of the Federal Records Act.

#### General Description

Under the Federal Records Act, the records an agency representative creates and maintains are presumed to be federal records, and agencies are required to document many, if not most, of their functions. The ADR Act establishes requirements for ensuring the confidentiality of dispute resolution communications. These responsibilities have ramifications throughout the course of the dispute resolution proceeding, and influence how neutrals (both internal and external), under an ADR program administrator's oversight, perform their dispute resolution duties.

#### Legal Analysis

Under the Federal Records Act (44 U.S.C. §§ 2101 et seq., 2901 et seq., 3101 et seq., 3301 et seq.), federal agencies are required to create and maintain records that relate to their official functions. Agency heads are charged with this duty and must establish an effective and sustainable program for records management. Typically, agency heads delegate record keeping responsibilities under the Federal Records Act to program heads, such as the ADR program administrator.

Only documents that are federal records are required to be maintained. Federal records are defined as:

All books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an employee of a federal agency during its official business, and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government, or because of the informational value of data in them.

The Federal Records Act specifically excludes the following from being defined as federal records: library and museum material, made or acquired, and preserved solely for reference or exhibition purposes; extra copies of documents preserved only for convenience of reference; and stocks of publications and processed documents (44 U.S.C. § 3301).

Once a document is deemed a record, the agency must determine how long it must be kept and whether the record is temporary or permanent; it does so by establishing a retention and disposal schedule to be approved by the National Archives and Records Administration (“NARA”; 44 U.S.C. § 3303a(a),(d)). Most federal records are temporary (“*i.e.*, they do not have sufficient administrative, legal research, or other value to warrant their continued preservation”) (36 C.F.R. 1220.14). Some can be disposed of within a matter of days or months, while others must be retained for years. In either circumstance, the agency may dispose of the records according to the time period set out in the retention and disposal schedule approved by the NARA.

While the Federal Records Act would require the maintenance of federal records relating to ADR programs, it does not impact the confidential status of records, which are protected dispute resolution communications under the ADR Act. In other words, federal records may need to be retained in accordance with the Federal Records Act, but if they are dispute resolution communications under the ADR Act, these records are confidential and access to them must be restricted.

### **Confidentiality Issues Raised Under Federal Record-Keeping Requirements**

#### **Q1: Are an internal neutral’s notes of the dispute resolution proceeding federal records?**

**A1:** It depends. If the notes are rough notes (the personal recollection or preliminary drafts of the neutral) and the neutral does not circulate the notes to anyone they are not federal records (36 C.F.R. 1222.34(c)). If the notes appear to be formal, *e.g.*, as a specific settlement proposal/options, or are given to any person, including another neutral or the parties, then the neutral’s notes are likely to be federal records.

#### **Q2: Are documents given to the internal neutral by the parties federal records?**

**A2:** Documents received by the neutral during the course of the dispute resolution proceeding are not federal records unless they are maintained by the neutral after the conclusion of the dispute resolution proceeding.

#### **Q3: Do the above answers change if the neutral is an external neutral?**

**A3:** Yes, the requirements of the Federal Records Act generally apply only to records made or given to federal employees (44 U.S.C. § 3301). Records received by or notes created by the external neutral are not federal records.

However, occasionally, some contracts pursuant to which the neutral is hired, or an agreement signed by a volunteer, may contain language providing that documents created by a contractor are agency or federal records. In these circumstances, the Federal Records Act would apply in the manner described in A1 & A2, above. An ADR program administrator should consider reviewing such contracts to ensure that an external neutral’s notes and other products are not considered agency records.

**Q4: How can an ADR program administrator ensure that documents are maintained in an appropriate manner under the Federal Records Act?**

**A4:** There are a variety of options available to an ADR program administrator for document maintenance that are also consistent with the requirements of the Federal Records Act. An ADR program administrator may require neutrals to submit all of their case files to the ADR program administrator's office, to be maintained in a separate and secure file area. An ADR program administrator would be required to maintain these case files as sealed. However, an ADR program administrator would be prohibited from reading these files (*i.e.*, not have "access" to them), with the exception of case files for cases on which the ADR program administrator was a neutral. Alternatively, an ADR program administrator might require each neutral to maintain case files in a secure and separate area in each neutral's office. Overall, the first option may be preferable, because it is easier to ensure restricted access to confidential federal records in one central area. However, if neutrals are off site and are disbursed in many different locations, it may be more practicable to have each neutral maintain her/his own case files in secure areas with restricted access.

**Q5: Are agreements to mediate and settlement agreements federal records?**

**A5:** Yes, because these agreements are entered by federal employees, they are federal records. However, they are not confidential under the ADR Act.

**Q6: Are duplicate copies of materials or personal calendars of ADR program staff federal records?**

**A6:** No. 36 C.F.R. § 1222.34(f)(2) states that duplicate copies made only for convenience are not federal records. However, they may be confidential under the ADR Act.

**Q7: Are intake case logs and tracking information federal records?**

**A7:** Yes. To the extent that such documents can identify a particular dispute and reveal information protected by the ADR Act, they are confidential under the ADR Act. It is suggested that an ADR program administrator follow the practices suggested in A9, below.

**Q8: What advice can an ADR program administrator provide neutrals to ensure that the neutrals' documents do not become federal records?**

**A8:** An ADR program administrator may advise internal neutrals to take only rough notes, and to keep such notes only to themselves. The neutrals should be advised to avoid circulating notes to the parties or other neutrals, unless the neutral deems it necessary. Bear in mind, however, that the more the notes appear to be formal or a detailed explanation of the dispute resolution proceeding and discussions, the more likely they might be deemed federal records.



If an individual neutral believes that some notes may be useful to the parties, *e.g.*, an outline of settlement options, and wants to circulate them to the parties, then the neutral may need to retain these notes as federal records and follow some of the recommendations in A9, below.

**Q9: How can an ADR program administrator protect the confidentiality of federal records as ADR program case logs, a neutral’s formal notes or notes which are circulated?**

**A9:** An ADR program administrator should consider taking the following actions:

- establish procedures which strictly limit the number of authorized personnel who have access to these documents, such that:
  - neutrals involved in the resolution of a particular dispute would have access to confidential federal records (*e.g.*, case files, notes, *etc.*) relating to that dispute, and
  - ADR program administrators who perform only ministerial tasks in support of the program should not have access to those records;
- mark these documents in large letters “ADR Act CONFIDENTIAL” and maintain them in a secure locked area;
- establish specific retention schedules for all protected documents:
  - for confidential federal records (such as a neutral’s formal notes, an ADR program administrator’s notes on particular disputes, or case logs which contain confidential, identifying information), short retention schedules should be established that run up until the dispute is resolved or the dispute resolution proceeding is terminated. The schedules should identify the documents as sensitive documents under the Federal Records Act and the schedules should be submitted to NARA for approval (as the law requires); and
  - for non-confidential federal records (such as case logs without identifying information), a longer retention schedule may be appropriate.
- talk to the agency's Privacy Act officer to determine whether your records are considered to be a Privacy Act system and if so, whether they fit under an existing agency system or require a new one to be created. See the Privacy Act, 5 U.S.C. 552a.

**Q10: How should an ADR program administrator establish a records retention schedule?**

**A10:** An ADR program administrator should talk with records officials, develop a retention schedule, emphasize the sensitivity of documents, and follow the practices suggested in A9 above. The ADR program administrator should also become familiar with the National Archives and Records Administration General Records Schedule (see [http://www.archives.gov/records\\_management/ardor/grs01.html](http://www.archives.gov/records_management/ardor/grs01.html)). Number 27 refers to ADR files.

*Dilemma: The supervisor to whom the ADR program administrator reports requests to see the case files on all cases mediated in the last two years.*

*Solution: The ADR program administrator should explain that all files of dispute resolution proceedings that are still open are in a secure file area. She/he should further explain that there is no access to all open files containing identifying information and neutrals' notes because under the ADR Act, such files are confidential and may only be viewed by neutrals that assist in resolving the issue in controversy. As to case files where the case files are closed, all such files have been disposed of under the approved retention schedule. The ADR program administrator may offer to show the supervisor the case logs with the identifying information excised.*

**Summary**

As the ADR program administrator, have I considered:

- Identifying a records retention official?
- Maintaining electronic or written data which are likely to be deemed federal records?
- Establishing and obtained approval from NARA for short retention schedules for confidential federal records?
- Maintaining a secure area for federal records?
- Marking each federal record “ADR Act Confidential”?
- Minimizing access to confidential federal records?

- Advising internal neutrals to dispose of their rough notes which have not been circulated to anyone?
- Promptly disposing of all confidential federal records once the retention period expires?

## CHAPTER IV

### EVALUATION OF ADR PROGRAMS AND PROCESSES

This chapter provides advice for ways ADR program administrators can establish procedures and practices to maintain appropriate confidentiality of information gathered in support of, and results of, ADR program or process evaluation efforts.

#### General Description

ADR program evaluation is a means by which to determine whether an ADR program or process is meeting its goals and objectives. Evaluation results are useful in determining what works and what does not, and may be a critical factor in decisions regarding whether and how to modify or expand a program or an ADR process. An ADR program administrator should understand the importance of early program evaluation in ensuring the quality of their ADR programs and/or ADR practices. This chapter addresses two types of evaluations in which information is collected by an ADR program administrator or an outside evaluator: (1) evaluation of an entire program (covering many disputes) and (2) evaluation of a particular dispute resolution proceeding.

Although the ADR Act does not protect evaluation reports or results from disclosure, there are some practical mechanisms that should be considered by an ADR program administrator to preserve the privacy of evaluation information.

#### Legal Analysis

The ADR Act recognizes that research and education concerning use of alternative dispute resolution techniques are important to the continued development of the field. 5 U.S.C. § 574(h) provides that the gathering of information for research or educational purposes shall not be prevented so long as the parties and the specific issues in controversy are not identifiable. However, there are no legal guarantees that such information relating to federal agency ADR processes, once collected, will not be subject to disclosure. Therefore, any evaluation program must be aware of these risks and take steps to minimize the possibility of inappropriate disclosures.

Information held by an evaluator is not protected from disclosure by the confidentiality provisions of the ADR Act. Only information held by a neutral or parties is protected from disclosure under the ADR Act (5 U.S.C. § 574(a), (b)).

It is not a violation of the ADR Act's confidentiality provisions for a party or a neutral to disclose protected dispute resolution communications to an evaluator. Section 574(h) permits parties and neutrals to answer an evaluator's questions, participate in an evaluation and disclose dispute resolution communications, so long as the evaluation is conducted in a way that the parties and specific issues in controversy are not identifiable.

**Confidentiality Issues Raised While Designing and Conducting Evaluations, and Reporting Evaluation Results**

**Q1: How can an ADR program administrator minimize the risk of dispute resolution communications being disclosed inappropriately or unnecessarily by the parties or neutrals when participating in an evaluation?**

**A1:** The ADR Act permits disclosures of dispute resolution communications by a neutral or party for purposes of evaluation. Once such disclosures are made, however, the information held by the evaluator is not protected under the ADR Act. Consequently, an ADR program administrator should consider advising neutrals and parties that they:

- may participate in an evaluation;
- should request information from the evaluator to ensure that collected information will be maintained in a way that the parties and specific issues in controversy are not identifiable;
- should provide only information necessary for the evaluation; and
- should avoid providing information that reveals intimate information presented by session participants.

An ADR program administrator should consider including in the information packet given to participants in the program notice that there may be evaluations of the dispute resolution program and explain the benefits the program will derive from the feedback. An ADR program administrator should also request participants' and neutrals' consent to participate in future evaluations.

**Q2: How can an ADR program administrator ensure that data obtained during an evaluation is appropriately handled and maintained, because the ADR Act does not protect information collected by the evaluator?**

**A2:** ADR program evaluation will inevitably include some individual, case-specific information. To ensure that ADR program data is appropriately handled and maintained, an ADR program administrator should consider taking the following actions:

- collect only the data necessary;
- code intake information to ensure anonymity;
- code individual case names;
- avoid using substantive, case-specific information in reports or surveys;
- separate case-sensitive and non-case-sensitive information;

- aggregate evaluation data; and
- keep case-sensitive information in a locked file and/or create a “firewall” protection.

**Q3: Do other statutes, like FOIA, protect evaluation information from disclosure?**

**A3:** Evaluation information may be subject to disclosure in response to a FOIA request. The best practices for minimizing the inappropriate disclosure of information obtained through evaluation are therefore to follow the recommendations in A2, above. At the same time, an ADR program administrator will also need to balance the best and effective practices for evaluation of dispute resolution programs with the risks of potential required disclosures.

**Q4: Will hiring an outside evaluator minimize the risk of disclosure of evaluation information under FOIA?**

**A4:** Information collected by an outside evaluator, which is not included in an evaluation report or other document given to a federal agency, would be protected from disclosures because FOIA applies only to records held by a federal agency. However, the final products, such as evaluation reports or evaluation documents given to the federal agency, would likely be subject to disclosure unless an exemption applied. Thus, because most evaluation reports are typically going to be given to the federal agency that has contracted with the outside evaluator, use of an outside evaluator will not prevent the potential disclosure of such reports under FOIA.

**Summary**

As the ADR program administrator conducting evaluations, have I considered:

- Including protections for evaluation information throughout my program?
- Collecting only the data I need?
- Ensuring anonymity of participants?
- Ensuring anonymity of cases?
- Filing sensitive data separately from other files?
- Protecting sensitive data through “firewalls”?
- Reporting obtained information only in the aggregate?
- Notifying and obtaining consent of participants and neutrals to participate in evaluations?

## CHAPTER V

### REQUESTS FOR DISCLOSURE OF DISPUTE RESOLUTION COMMUNICATIONS

This chapter provides advice for ways ADR program administrators can establish procedures and practices to maintain appropriate confidentiality when requests for the release or disclosure of dispute resolution communications are received.

#### General Description

Requests for disclosure of protected dispute resolution communications come from two primary sources: (1) persons without specific statutory authority to obtain information, and (2) persons with statutory authority to obtain information. These requests may be directed to the neutral or a party, as well as an ADR program administrator.

Release, or disclosure, of any information or communication protected from disclosure by the ADR Act is a sensitive subject. The ADR Act recognizes the unique nature of federal ADR processes and attempts to balance the participants' need for confidentiality with the requirements of an open government. The ADR Act also distinguishes the confidentiality obligations of private neutrals and federal neutrals mediating for their own agency or as part of a sharing neutrals program. Requests for disclosure of information protected by the ADR Act are inevitable. An ADR program administrator plays a pivotal role in ensuring that requests are addressed promptly and appropriately, and that decisions to grant or deny a request are made according to the requirements of the ADR Act and agency policy and procedures.

#### Legal Analysis

Under the ADR Act, a neutral has a high obligation regarding confidentiality, and may not voluntarily disclose, or be compelled to disclose, information protected by the ADR Act unless authorized by a statutory exception (5 U.S.C. § 574(a)). Whenever a neutral receives a request for disclosure of a dispute resolution communication, the parties must be notified and given an opportunity to object. A court may order disclosure by a neutral only after carefully balancing the need for disclosure against the damage to the integrity of dispute resolution processes in general, using criteria stated in the ADR Act.

While parties also have an obligation of confidentiality, it is less than that of a neutral. There are a number of exceptions to the requirement that parties may not voluntarily disclose, or be compelled to disclose, information protected by the ADR Act. Unless they have agreed otherwise, via a contractual confidentiality agreement, parties may disclose what they and other parties said during a "joint session." (See the Legal Analysis section of Chapter II, Confidentiality Agreement.) They may also disclose their own statements and information. In general, they may not disclose communications generated by a neutral. A court may order a party to disclose information protected by the ADR Act, but the court must first apply a balancing test.

The Inspector General Act of 1978 (“IG Act”) does not directly address access to information concerning dispute resolution proceedings protected by the ADR Act. Rather, the IG Act sets out the general authority of Inspectors General to obtain information to carry out their responsibilities. Under the IG Act, each Inspector General is authorized “to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available \* \* \*” to the agency. (5 U.S.C. Appx. § 6(a)(1)).

The Freedom of Information Act does not directly address requests for information concerning dispute resolution proceedings protected by the ADR Act. However, FOIA provides that an agency is not required to provide requested information if the subject matter of a request is specifically exempted from disclosure by statute (5 U.S.C. § 552(b)(3)(A) and (B)). The ADR Act specifically exempts certain dispute resolution communications between a neutral and a party from disclosure under Section 552(b)(3) of FOIA (5 U.S.C. § 574(j)). Note that information obtainable through a FOIA request is limited to agency records. (See Chapter III, Agency Record-Keeping, for additional information on what constitutes “federal records.”)

As the Federal ADR Council acknowledged in the 2000 ADR Guidance, there is tension between the ADR Act and other laws or regulations that authorize access to certain classes of information. The issues of statutory interpretation between these differing authorities have not yet been considered in an appropriate forum. This Guide follows the 2000 ADR Guidance’s endorsement of a cooperative approach where the ADR program and Federal requesting entities establish good working relationships such that disputes over demands for disclosure of confidential communications can be minimized. The 2005 ABA Guidance discusses this topic in some detail.

### **Confidentiality Issues Raised When Disclosure of Protected Dispute Resolution Communications is Requested**

#### ***I. REQUESTS FOR DISCLOSURE OF INFORMATION PROTECTED BY THE ADR ACT BY PERSONS WHO DO NOT HAVE STATUTORY AUTHORITY TO OBTAIN INFORMATION***

This Section addresses requests for disclosure of information regarding a dispute resolution proceeding by people who have no statutory authority to require disclosure of information. Such persons may include agency officials, representatives of other federal, state, tribal or local governmental organizations, private parties, or agency employee relations, labor relations and workplace violence staff. While there are no statistics available on the number of these informal requests for information protected by the ADR Act or who makes them, many ADR program administrators report that informal requests are common. These requests come in many forms. They include everything from a casual question (*e.g.*, “I heard there was a mediation today. How did it go?”), to more pointed requests by supervisors or other interested non-participants (*e.g.*, to be “briefed on the mediation session”).



**Q1: Who is responsible for deciding how, when, and if information protected by the ADR Act should or must be disclosed?**

**A1:** The provisions of the ADR Act focus on the neutral’s responsibilities for responding to requests for disclosure. This “just say no” policy to casual requests for information applies to all neutrals – private or federal. If the request is made in writing or some other formal manner, the neutral must notify the parties and give them an opportunity to object to disclosure. When a neutral receives an informal or casual request for disclosure, the neutral must decline to disclose information protected by the ADR Act, unless the parties have waived confidentiality protection (See Chapter II, Confidentiality Agreements), or the release is authorized by a statutory exception.

The ADR Act imposes no obligation for a party to inform the neutral or other parties when the party receives a disclosure request. However, a party must consider the ADR Act’s requirements when making the decision to disclose.

The role of an ADR program administrator in responding to disclosure requests is not addressed in the ADR Act. However, it is clear that while neutrals have the statutory responsibility to respond to disclosure requests, an ADR program administrator often will have a practical role. This is most likely to be the case when the neutral was obtained from a sharing neutrals program or is a federal employee in the same agency. In such cases, an ADR program administrator may need to provide the neutral with contact information to notify the parties and facilitate any decision.

**Q2: What is an ADR program administrator’s role when receiving a request for disclosure directed to the neutral or a party?**

**A2:** If an ADR program administrator receives a request for information that is directed to a neutral or party, she/he should immediately forward the request to the appropriate person along with an offer to provide assistance. This assistance can include contact information for other parties and/or the neutral, a review of the program files for copies of non-confidential documents such as the Agreement to Mediate and the Settlement Agreement, and any appropriate consultation resources.

**Q3: Are there any circumstances under which an ADR program administrator could or should defend a neutral that has declined a request to disclose information?**

**A3:** Under the provisions of the ADR Act, parties are required to be notified of a request to a neutral for disclosure of information and should be given an opportunity to defend the neutral to avoid disclosure of protected information. There is nothing in the ADR Act that addresses an ADR program administrator’s obligation or ability to defend a neutral. So, it would seem that an ADR program administrator could undertake a defense of the neutral on behalf of the agency in order to protect the integrity of a particular session or of the agency’s program, in general.

**Q4: What steps can an ADR program administrator take to ensure prompt, appropriate responses to requests for disclosure from requestors without statutory authority to obtain information?**

**A4:** There are a number of steps an ADR program administrator can consider taking to limit the possibility that information protected by the ADR Act will be disclosed inadvertently or in violation of the ADR Act. Those steps include:

- establishing a general policy of non-disclosure;
- identifying which records maintained by the ADR program are not protected from disclosure;
- treating any information concerning a dispute resolution proceeding not protected by the ADR Act in the same manner as other communications that may be restricted as private or internal agency communications under agency policies or practices;
- establishing a review process that identifies any agreement of the parties that provides for greater or lesser confidentiality protection, in order to ensure that disclosure requests are decided appropriately as they relate to these agreements; and
- establishing policies and procedures for processing requests for disclosure and for determining when and how to disclose information protected by the ADR Act.

**Q5: How does an agreement of parties for more confidentiality protection than is available under the ADR Act affect the parties' responses to requests for disclosure?**

**A5:** Parties may agree in writing to more confidentiality protection than is available under the ADR Act. (However, see the Legal Analysis section of Chapter II, Confidentiality Agreements). Very often this additional protection relates to communications made during joint sessions, which are not protected under the ADR Act. Parties should consider and respond to disclosure requests in accordance with the requirements of the ADR Act and of their written agreement.

**Q6: May any person, including a federal agency employee or management official, who is not a neutral or a party to the dispute, request and obtain disclosure of information protected by the ADR Act?**

**A6:** In general, a person without statutory authority to obtain information (“non-statutory requestor”) may not obtain information that is protected by the ADR Act. However, non-statutory requestors may request and obtain any information that does not meet the ADR Act’s definition of a dispute resolution communication. These may include written agreements to enter into ADR, written settlement agreements, statements made by a party in a “joint session,” where all parties are present, and documents created by a party and

made available to all parties. While some agencies restrict access to the contents of settlement agreements on a need-to-know basis, the confidentiality provisions of the ADR Act do not prevent disclosure of a final written settlement agreement that was the result of a dispute resolution proceeding.

There are a limited number of situations where non-statutory requestors may obtain disclosure of information protected by the ADR Act. These include a request by an agency decision-maker for information necessary to make a reasoned decision regarding the settlement of a mediated dispute, and a request by an agency supervisor for information necessary to successfully implement a settlement agreement. (See Chapter I, Dispute Resolution Proceedings: D. Oversight Responsibilities After the Dispute Resolution Session.)

*Dilemma: An agency employee is aware that a mediation has concluded and asks the ADR program administrator, “How did it go?” How should the program administrator respond to this personal request for information?*

*Solution: The ADR program administrator should not reveal anything about the session. The ADR program administrator would be well advised to not even acknowledge the mediation session. Rather, the ADR program administrator should simply decline to comment in any way.*

*Dilemma: The ADR program administrator’s supervisor asks “to be briefed” about a particular mediation session. What may the ADR program administrator disclose?*

*Solution: The ADR program administrator may note that a proceeding occurred and, if a settlement was reached, discuss the terms of the settlement with the supervisor. (The confidentiality provisions of the ADR Act do not cover a final written settlement agreement.) If the ADR program administrator has knowledge of what was disclosed during the dispute resolution session, whether by actively participating in the session or by exercising supervisory oversight of the ADR program, the ADR program administrator may not disclose that knowledge. The ADR program administrator’s supervisor is unlikely to be a neutral within the meaning of the ADR Act and cannot be given information about dispute resolution communications that may have been shared with the ADR program administrator.*

**Q7: May a party disclose a dispute resolution communication that is relevant to resolving a dispute over the existence or meaning of a settlement arrived at through a dispute resolution proceeding? May an ADR program administrator disclose the communication?**

**A7:** Yes, there is a specific exception for disclosure of such communications by a party (5 U.S.C. § 574(b)(6)). Even if an ADR program administrator served as a neutral in the particular mediation process, she/he may not disclose the information (5 U.S.C. § 574(a)).

*II. REQUESTS FOR DISCLOSURE OF INFORMATION PROTECTED BY THE ADR ACT BY PERSONS OR FEDERAL ENTITIES WHO DO HAVE STATUTORY AUTHORITY TO OBTAIN INFORMATION*

This Section addresses requests for disclosure of information regarding a dispute resolution proceeding by people with statutory authority to obtain information from a federal agency, *e.g.*, an agency Office of the Inspector General, Office of Special Counsel, and other governmental agencies. Such requests appear to be much less common than the informal requests described in the last Section. Experience – and anecdotal reports – suggests that few ADR program administrators have ever received a request for information protected by the ADR Act based on statutory authority, and it is anticipated that formal requests will continue to be rare. However, any such request is likely to involve important legal and program issues, and the results will affect all federal ADR efforts. Therefore, it is essential for program administrators to be aware of the tension that exists between the ADR Act and other statutory authorities and to prepare for potential requests. This Section addresses only issues raised by requests for disclosure of information held by an ADR program administrator, either in their role as a neutral or because the information is in files maintained by the ADR program.

**Q1: A number of federal entities have statutory authority to obtain information concerning federal agency activities. Which statutes are the most likely to generate requests of information protected by the ADR Act?**

**A1:** The following is a list of federal statutes most likely to generate requests for information protected by the ADR Act:

- Inspector General Act (5 U.S.C. Appx.);
- Whistle Blower Protection Act (5 U.S.C. § 1212(b)(2));
- Freedom of Information Act; and
- Federal Labor Relations Act (Chapter 8 CSRA).

This list is not comprehensive and an ADR program administrator may want to work with their General Counsel office to develop a more exhaustive list applicable to their program. In addition, there are other statutes that may be read to impose an affirmative obligation on federal employees to disclose certain classes of information. These include, but are not limited to, 18 U.S.C. § 4 (knowledge relating to the commission of a felony) and 28 U.S.C. § 535 (investigation of crimes involving government officers and employees).

**Q2: How should an ADR program administrator handle requests from the Inspector General or from other persons or entities with statutory authority to obtain information?**

**A2:** An ADR program administrator is in a position to be approached for disclosure of information protected by the ADR Act. Some of these requests will be from persons or entities that have statutory authority to obtain information. Some of the requestors may believe that an ADR program administrator must disclose the information despite the confidentiality provisions of the ADR Act, and despite any alternative protections that have been agreed upon by the parties. Therefore, it is important for an ADR program administrator to be prepared to decide how and when to allow disclosure of information protected by the ADR Act.

There are three basic steps an ADR program administrator can take to prepare for any disclosure request:

1. educate and inform him/herself about the persons and entities with statutory authority to make requests and their missions, duties and responsibilities;
2. develop policies and procedures for processing and responding to disclosure requests; and
3. develop a collaborative, professional working relationship with the agency Inspector General and other persons or entities that may need to make disclosure requests.

An agency's General Counsel office is a good source of information about potential requestors, their statutes, their missions and any legal questions an ADR program administrator may have as he/she develops policies and procedures.

**Q3: How comprehensive should the ADR program policies and procedures be concerning responding to requests of information from persons with statutory authority?**

**A3:** The policies and procedures should be applicable to all potential statutorily based requests for disclosure of information protected by the ADR Act. The purpose of the policies and procedures should include:

- protecting the confidentiality of the dispute resolution proceedings;
- providing a means for protecting the competing interests of dispute resolution proceeding participants and the requestors; and
- establishing consistent, reliable processing and responses to requests.

**Q4: What should be included in an ADR program’s policies and procedures regarding protecting, and responding to requests for disclosure of, information protected by the ADR Act?**

**A4:** Written policies and procedures, whether short and simple or long and complicated, provide a necessary measure of predictability and reliability to an agency’s consideration and response to requests for disclosure. The following checklist is intended to help an ADR program administrator develop policies and procedures that are designed to avoid or minimize potential “access request” disputes and that are appropriate for their own agency.

1. Central processing. All requests for disclosure should be logged in and retained in a central location. This ensures that no requests are overlooked, and it provides a convenient method of tracking the request throughout the decision-making and response process.
2. Decision maker. One individual whose rank and stature within the agency allow him/her to act independently should have delegated authority to decide whether or not the agency should release information protected by the ADR Act. Note that this person cannot make decisions requiring external neutrals to disclose communications protected by the ADR Act.
3. Notice procedures. Anyone receiving a request for disclosure should immediately send the request to central processing. Central processing should notify each party, neutral, and other participants of the request.
4. Criteria for analyzing the request. These criteria should include, but not be limited to:
  - the source and identity of the requestor;
  - the statutory basis, if any, for the request;
  - the reason or purpose of the request;
  - whether some, or all, of the requested information meets the ADR Act criteria for confidentiality protection;

- whether some, or all, of the requested information can be obtained from other sources;
- whether some, or all, of the parties object to release of the information;
- whether some, or all, of the information meets the ADR Act criteria for releasing information protected by the ADR Act;
- whether some, or all, of the information is protected by a contract between the parties;
- whether some, or all, of the information is protected by a statute or rule other than the ADR Act; and
- whether some, or all, of the information is protected by agency policy or regulation.

5. Standard response. A standard format for responding to requests should include:

- a clear statement of whether the information will, or will not, be disclosed;
- a consent form signed by the parties and/or neutral, if information is being disclosed; and
- an official to contact if there are questions or objections.

6. Record keeping and reporting. Each agency should keep careful records of every request and the agency's response, for accurate reporting purposes.

**Q5: Does a request from an agency Inspector General raise unique confidentiality issues?**

**A5:** Yes, there is a tension between the duties and responsibilities of an Inspector General under the IG Act (5 U.S.C. App. §§ 2 and 3), and the confidentiality provisions of the ADR Act. The ADR Act prohibits both neutrals and parties from disclosing information protected by the ADR Act unless it falls within one of the enumerated exceptions, while the IG Act authorizes the Inspector General to have access to documents relating to an agency's programs and operations. There is no easy resolution to this conflict. An ADR program administrator should educate themselves about the issue and make every attempt to establish good working relationships with their agency Inspector General to prevent, or at least minimize, any potential conflicts.

**Q6: Why would the Inspector General need to request information protected by the ADR Act?**

**A6:** Inspectors General are charged with two general duties with respect to agency operations: (1) to audit, and (2) to investigate an agency's programs and operations (IG Act, § 2). To carry out these responsibilities, an Inspector General may do the following.

- Investigate allegations of criminal wrongdoing and administrative misconduct by agency employees. This includes allegations of criminal activity by non-agency individuals and entities that has a direct impact on the agency.
- Inform the head of the agency and Congress of problems and deficiencies in the agency's programs. This includes a semi-annual report to Congress.
- Audit and inspect agency programs and operations. This includes the activities of outside entities doing business with, or obtaining any benefit from, the agency.

**Q7: Is the form, and practical effect, of a request from the Inspector General different depending upon whether the neutral or party is a federal employee?**

**A7:** Yes, if the neutral or party is a federal employee, the Inspector General can request the information from the employee's agency but cannot subpoena it. If the neutral or party is a federal employee of another federal agency (as when the neutral was obtained from a federal sharing neutrals program), the Inspector General must request the assistance of the other agency in obtaining the information from the employee. If the neutral or party is a private person, the Inspector General can use its administrative subpoena authority to obtain any written materials in the person's possession. If the private person fails to respond or produce the information, the Inspector General can have the subpoena enforced by a federal district court.

It is important to note here that most federal agencies have policies requiring employees to report misconduct and to cooperate with the Inspector General when asked for information related to any official audit, investigation or other review.

**Q8: Should an ADR program administrator consider entering into an agreement with the Inspector General and, if so, what should it contain?**

**A8:** Yes, effectively coordinating and cooperating with the Inspector General in your agency (or others making requests pursuant to a statute) may help to prevent or de-escalate disputes concerning formal requests for information protected by the ADR Act. Therefore, in addition to developing policies and procedures for the ADR program, an ADR program administrator may wish to enter into an agreement with the Inspector General on procedures for initiating requests and the ADR program's response. These procedures should be made a part of the agency's ADR policy, and should refer to the agency's other policies for reporting to, and cooperating with, the Inspector General.



An agreement or memorandum of understanding should address the following issues:

- description of the problem or issue, including the competing interests and statutes, the lack of legal precedents, why the Inspector General might need access to information protected by the ADR Act and the significance of confidentiality in ADR processes;
- recitation of the purpose of the agreement;
- applicable statutes (*e.g.*, ADR Act and IG Act);
- definitions of ADR and Inspector General terminology (*e.g.*, information protected by the ADR Act and special agent);
- criteria for determining when disclosure is appropriate or necessary;
- description of access needs for audit or evaluation purposes;
- description of access needs for investigative purposes;
- agreement to seek information from other sources before requesting disclosure from the neutral or parties;
- procedures for requesting information;
- procedures for processing requests and independent, fully informed decision making; and
- procedures for addressing agency refusals to disclose.

### *III. REQUESTS FOR DISCLOSURE OF INFORMATION PROTECTED BY THE ADR ACT PRESENTED IN THE FORM OF A SUBPOENA OR COURT ORDER*

#### **Q1: Under what circumstances may a federal court order disclosure of communications protected by the ADR Act?**

**A1:** A court may order disclosure of information protected by the ADR Act only when it is necessary to: (1) prevent a manifest injustice; (2) help establish a violation of law; or (3) prevent harm to the public health and safety. The court must determine that the need for the testimony or disclosure is so great in the particular case that it outweighs “the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential” (5 U.S.C. § 574(a)(4) & (b)(5)).

**Q2: Does a court order to disclose information protected by the ADR Act apply to both the neutral and a party?**

**A2:** Yes, either the neutral and/or a party may be ordered to disclose the communication, if it meets the criteria for disclosure outlined in A1, above.

**Q3: If information protected by the ADR Act has been improperly disclosed, can a court allow the improper disclosure to be admitted into testimony in a court or other legal proceeding?**

**A3:** No, information protected by the ADR Act that is improperly disclosed is not admissible in a proceeding related to the issues in controversy. However, it may be admissible in a proceeding that does not cover the same issues.

*IV. REQUESTS FOR DISCLOSURE OF INFORMATION PROTECTED BY THE ADR ACT PRESENTED IN THE FORM OF A FOIA REQUEST*

**Q1: Is an ADR program administrator who receives a FOIA request for documents and oral communications created or made by parties during a particular dispute resolution proceeding required to disclose the information?**

**A1:** No, communications during a dispute resolution proceeding that are protected by the ADR Act are specifically exempted from disclosure under Section 552(b)(3) of FOIA. An ADR program administrator should not disclose any information protected by the ADR Act.

Oral communications between and among the neutral and the parties are not covered, because FOIA only applies to federal records.

An ADR program administrator can take steps to facilitate review of documents for FOIA requests and to assist in decision-making about disclosure.

**Q2: If parties have agreed to greater confidentiality protections than is available under the ADR Act, are communications protected solely by their agreement subject to FOIA?**

**A2:** Yes, parties cannot contract for more protection from FOIA requests than the ADR Act provides (5 U.S.C. § 574(d) & (j)).

## Summary

As the ADR program administrator, have I considered:

- Establishing a general policy of non-disclosure?
- Establishing policies and procedures for processing disclosure requests?
- Establishing policies and procedures for determining if, when, and how to disclose information protected by the ADR Act?
- Educating myself about the federal statutes and federal entities most likely to generate disclosure requests?
- Developing a collaborative, professional working relationship with the agency Inspector General and other persons or entities that may need to make disclosure requests?
- Entering into an agreement with the agency Inspector General concerning disclosure requests?
- Educating myself about administrative and court orders and developing policies and procedures for responding to a subpoena or other order?
- Educating myself about FOIA and developing policies and procedures for responding to FOIA requests?

## CHAPTER VI

### **NON-PARTY PARTICIPANTS IN THE DISPUTE RESOLUTION SESSION: SPOUSES, FAMILY MEMBERS, FRIENDS, AND UNION REPRESENTATIVES**

This chapter provides advice for ways ADR program administrators can establish procedures and practices to maintain appropriate confidentiality when non-party participants are present at the dispute resolution session.

#### **General Description**

Typically, the persons present at the dispute resolution session are the parties, the neutral, and any personal representatives of the parties, such as an attorney. On occasion, parties may wish to bring other individuals with them to the dispute resolution session. Some may want their spouses, a friend, or co-worker to be there. Resource persons or observers may also be present at the dispute resolution session. Furthermore, agency employees who belong to the union (or collective bargaining unit) may also be present at the dispute resolution session. A person who belongs to the union may come just as a friend, or she/he may be the personal representative of the party. The union member may also be an employee of the union, part of the union's management staff, or a shop steward. In the latter capacities, the person may be present on behalf of the union as a collective bargaining unit, not on behalf of the party. Alternatively, the union member may come both on behalf of the union and on behalf of the party. An ADR program administrator should seriously consider the consequences of the presence of non-party participants in a dispute resolution proceeding.

#### **Legal Analysis**

The ADR Act defines a party to a dispute resolution proceeding as an individual who is named as a party to a federal proceeding or an individual who is significantly affected by the decision of a federal agency who participates in a proceeding without named parties. Other individuals may participate in a dispute resolution proceeding as a formal representative of a party, at the party's request, such as an attorney or union official. The ADR Act's confidentiality provisions specifically apply to parties and their formal representatives. Any other individual, who is not serving as a neutral, present in a dispute resolution proceeding is considered a "non-party participant."

Non-party participants who may be present in a dispute resolution proceeding are not subject to the ADR Act's confidentiality provisions. Persons like co-workers and friends who accompany a party to a mediation, either for moral support or other personal reasons, are not covered by the ADR Act's confidentiality provisions. However, there are options to protect confidentiality or minimize the likelihood of disclosures by non-party participants.

**Confidentiality Issues Raised for Non-Party Participants at the Dispute Resolution Session**

**Q1: If an employee's best friend is at the dispute resolution session for moral support, is the best friend prohibited from disclosing dispute resolution communications made by the neutral, or other parties in private caucuses?**

**A1:** No, the best friend is free to disclose anything she learns, because the ADR Act does not cover her, unless a confidentiality agreement applies.

**Q2: What categories of persons are not covered by the ADR Act's confidentiality provisions?**

**A2:** Anyone who is not a party to the dispute or anyone who is not a party's personal representative is not covered by the ADR Act's confidentiality provisions. For example, friends, resource persons, persons representing a union, observers, co-workers, family members and spouses who attend the mediation are not covered.

**Q3: What can an ADR program administrator do to protect the confidentiality of dispute resolution communications when a non-party participant is present in a dispute resolution session?**

**A3:** An ADR program administrator should consider the following actions:

- require that non-party participants sign a confidentiality agreement (See Chapter II, Confidentiality Agreements);
- train all neutrals on the importance of having all non-party participants sign an established, separate confidentiality agreement; and
- train all neutrals on educating the participants in the session on their confidentiality obligations.

The participation of resource persons may be arranged ahead of time or may be initiated during the session. These individuals may be experts in a substantive area or they may be agency employees with expertise in an area that pertains to the dispute or to the potential resolution (*e.g.*, a pension/benefit expert, if retirement is expected to arise as an issue or option).

Under certain circumstances, non-party participants may be considered "neutrals" under the ADR Act for purposes of the confidentiality provisions. To be considered a neutral, they must:

- either be brought into the proceedings by the session neutral and acceptable to the parties or be brought into the proceedings by the parties jointly; and

- meet the other statutory requirements for “neutral.” (See Chapter 1, Dispute Resolution Proceedings: A. Overview.)

If only one party brings the expert or resource person into the session, the person is not a neutral under the ADR Act.

An ADR program administrator should brief resource persons, whether they are “neutrals” or simply non-party participants, on confidentiality provisions prior to their participation in the ADR process. If they are to participate in the session, they should be encouraged to sign the confidentiality agreement. If they are brought in mid-session and are only answering questions and not hearing confidential dispute resolution communications, signing the confidentiality agreement may not be necessary.

**Q4: Are union members who are present on behalf of their collective bargaining units, and not solely as a representative of the party, covered by the confidentiality provisions of the ADR Act?**

**A4:** No, union members present on behalf of their collective bargaining units, and not solely as a representative of the party, are not covered by the ADR Act confidentiality provisions, and are free to disclose any information learned at the session, unless they signed a confidentiality agreement restricting their disclosure.

**Q5: An ADR program administrator and the session neutral may, due to legal requirements, have no authority to exclude union members who are representing a bargaining unit. When this happens, what steps can an ADR program administrator take to maximize the confidentiality of dispute resolution communications while such a union member is at a dispute resolution session?**

**A5:** In general, an ADR program administrator should be proactive with respect to the role of unions participating in dispute resolution proceedings and coordinate with the agency’s labor relations office or General Counsel office on these efforts.

An ADR program administrator should consider the following actions:

- establish with each union (through mediation or negotiation) a general protocol for union participation in dispute resolution proceedings; and
- urge participating union members representing a bargaining unit to sign the standard confidentiality agreement.

If the union representative is unable to sign the standard confidentiality agreement, the session neutral should negotiate an alternative confidentiality agreement that approximates as closely as possible the ADR Act’s provisions. The neutral should also make sure that the parties understand the potential consequences of the union representative’s inability to sign the standard confidentiality agreement. Alternatively, if

signing a standard or alternative confidentiality agreement is not possible, the session neutral, with the assistance of an ADR program administrator as necessary, should define on a case-by-case basis a union participation protocol.

Considerations for a protocol might include:

- If union representatives feel that, as bargaining unit representatives, they have a duty to report on certain information occurring at the dispute resolution session, the protocol could permit limited disclosure by the union representative to: (1) bargaining unit members who have a need to know such information, and (2) information that is only relevant to the union member's duties of fair representation of the bargaining unit (*e.g.*, seniority systems, *etc.*);
- The neutral, in consultation with the parties and the union representative, may consider including union representatives at joint sessions and holding private caucuses with the employee or agency without the presence of union members. If the union representatives are not present at the private caucuses, the neutral may consider giving non-confidential updates to the union representatives as the outlines of a potential settlement emerge either at a subsequent joint session or in a separate meeting; and
- The neutral should make sure parties understand the consequences of the union representatives' inability to sign a confidentiality agreement.

### Summary

As the ADR program administrator, have I considered:

- Establishing a standard confidentiality agreement for non-party participants?
- Educating neutrals about the importance of requiring all non-party participants to sign such an agreement and of explaining the confidentiality provisions to them?
- Ensuring that union members, who are present on behalf of a bargaining unit, sign the standard confidentiality agreement or an alternative one with strong confidentiality protections?
- Being proactive in establishing a general protocol for union participation in dispute resolution proceedings or educating session neutrals about the importance of mediating union participation protocol on a case-by-case basis?

## APPENDIX

### CHAPTER SUMMARIES

#### *Summary for Oversight Responsibilities Before the Dispute Resolution Session*

As the ADR program administrator, have I considered:

- Deciding who is authorized to function as a neutral in my program?
- Appropriately identifying the individual(s) as a potential neutral?
- Identifying the neutral(s) in my program to agency staff and potential parties?
- Educating ADR program staff, including those who engage in intake, assessment and convening, about the nature of their confidentiality and record keeping obligations?
- Taking all necessary steps to ensure the program supports the neutral's confidentiality?
- Ensuring that the convening and assessment process is explicitly specified in agency documents and information as part of the ADR process for purposes of confidentiality?
- Ensuring that the parties understand the role of a neutral and their responsibilities for confidentiality?
- The benefits of having the parties sign a confidentiality agreement before substantive discussions begin?
- Educating mediators, agency personnel, and other mediation participants, including resource persons, about the nature of their confidentiality obligations?

#### *Summary for Oversight Responsibilities During the Dispute Resolution Session*

As the ADR program administrator, have I considered:

- Determining that the neutral is aware of, and will assist the parties in understanding, the scope of confidentiality protections provided by the ADR Act?
- Ensuring that the neutral specifies to the parties what aspects of agency policy incorporated into a confidentiality agreement of the parties go beyond the ADR Act's confidentiality protections or require the disclosure of information protected by the ADR Act?



- Checking to see that the session neutral has reviewed the 2000 ADR Guidance before commencing the dispute resolution session, and understands the effect of any agency policy regarding confidentiality or requiring the disclosure of certain information?
- Ensuring that the neutral will protect confidentiality through appropriate selection of session rooms, use of telephones, and the use of computers for drafting a resolution or settlement agreement or conveying other dispute resolution communications to parties?
- Ensuring that the neutral's opening statement states that he or she may need to consult with the ADR program administrator, other ADR professionals, or subject matter experts?

**Summary for Oversight Responsibilities After the Dispute Resolution Session**

As the ADR program administrator, have I considered:

- Ensuring that the session neutral understands she/he generally cannot disclose dispute resolution communications and communications provided to the neutral in confidence?
- Suggesting that session neutrals have the parties acknowledge either orally or in writing that the neutral may disclose information protected by the ADR Act to the extent necessary to obtain approval of the settlement agreement?
- Drafting an agency policy regarding disclosure of information protected by the ADR Act for purposes of approval of the settlement agreement?

**Summary for Confidentiality Agreements**

As the ADR program administrator, have I considered:

- Ensuring that the parties and neutral(s) are educated about the purpose, and benefits of signing a confidentiality agreement?
- If parties are considering using a written confidentiality agreement to increase their own confidentiality obligations, ensuring that the parties are aware of and have balanced the considerations noted in the Legal Analysis section above?
- Requiring the signing of a confidentiality agreement in all appropriate disputes?

- Providing parties and neutrals with a model confidentiality agreement that contains the following:
  - a statement of the intent of the parties and neutral(s) that the confidentiality provisions of the ADR Act apply to their communications;
  - an explanation of the scope and limits of the protections provided by the ADR Act and the ability of parties to agree to alternative protections;
  - inclusion of additional provisions, if appropriate, intended to enhance or change the confidentiality provisions of the ADR Act; and
  - an explanation of the impacts on confidentiality of any additional incorporated provisions, including relevant agency policy or guidance and their ability to protect communications from disclosure?
- Retaining the original or a copy of the confidentiality agreement?

**Summary for Agency Record-Keeping**

As the ADR program administrator, have I considered:

- Identifying a records retention official?
- Maintaining electronic or written data which are likely to be deemed federal records?
- Establishing and obtained approval from NARA for short retention schedules for confidential federal records?
- Maintaining a secure area for federal records?
- Marking each federal record “ADR Act Confidential”?
- Minimizing access to confidential federal records?
- Advising internal neutrals to dispose of their rough notes which have not been circulated to anyone?
- Promptly disposing of all confidential federal records once the retention period expires?

### **Summary for Evaluation of ADR Programs and Processes**

As the ADR program administrator conducting evaluations, have I considered:

- Including protections for evaluation information throughout my program?
- Collecting only the data I need?
- Ensuring anonymity of participants?
- Ensuring anonymity of cases?
- Filing sensitive data separately from other files?
- Protecting sensitive data through “firewalls”?
- Reporting obtained information only in the aggregate?
- Notifying and obtaining consent of participants and neutrals to participate in evaluations?

### **Summary for Requests for Disclosure of Dispute Resolution Communications**

As the ADR program administrator, have I considered:

- Establishing a general policy of non-disclosure?
- Establishing policies and procedures for processing disclosure requests?
- Establishing policies and procedures for determining if, when, and how to disclose information protected by the ADR Act?
- Educating myself about the federal statutes and federal entities most likely to generate disclosure requests?
- Developing a collaborative, professional working relationship with the agency Inspector General and other persons or entities that may need to make disclosure requests?
- Entering into an agreement with the agency Inspector General concerning disclosure requests?
- Educating myself about administrative and court orders and developing policies and procedures for responding to a subpoena or other order?

- Educating myself about FOIA and developing policies and procedures for responding to FOIA requests?

**Summary for Non-Party Participants in the Dispute Resolution Session**

As the ADR program administrator, have I considered:

- Establishing a standard confidentiality agreement for non-party participants?
  - Educating neutrals about the importance of requiring all non-party participants to sign such an agreement and of explaining the confidentiality provisions to them?
  - Ensuring that union members, who are present on behalf of a bargaining unit, sign the standard confidentiality agreement or an alternative one with strong confidentiality protections?
  - Being proactive in establishing a general protocol for union participation in dispute resolution proceedings or educating session neutrals about the importance of mediating union participation protocol on a case-by-case basis?
-