

**PRINCIPLES OF ALTERNATIVE ENVIRONMENTAL DISPUTE
RESOLUTION: ABSTRACTED, RESTATED AND ANNOTATED**



By
Michael Stone-Molloy
and
Wendy Rubenstein

Conservation Clinic
University of Florida
Levin College of Law
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Thomas T. Ankersen
Director

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INTRODUCTION

Environmental Dispute Resolution has attracted increasing attention in the past few years. Gradually gaining definition, EDR nevertheless still lacks coherence as a discrete area of professional practice. This amorphous quality is characteristic of the experimentalism found in the larger Alternative Dispute Resolution movement.

ADR is understood as any means for resolving disputes outside of conventional means. A great deal of theory has been published concerning both ADR and EDR.¹ A good amount of positive law and regulation has also been promulgated. Relying upon the excellent survey of EDR use in the US, *State of the States*,² we gathered a diverse selection of statutes and regulations which provide for alternative methods of resolving environmental disputes. We then examined each provision to distill the essential principles which they purport to serve. These principles are collected below, restated and annotated.

We reviewed statutes and regulations which establish procedures specifically for environmental disputes. Nevertheless, many of their provisions deal with subjects commonly found in more general ADR statutes. Where it is helpful, our comments will draw attention to those provisions which are especially important in the environmental area. We do not restate here any provisions which are so particular as to have no underlying principle, such as the dates or amounts for deadlines, fees or penalties.

We should also disclaim any pretense towards describing the EDR systems of the states from which we draw. Reading this study will not prepare one to practice EDR in Oregon, Texas or Pennsylvania, for example. The principles we restate here are abstracted from their original legal contexts. Our interest is to reverse-engineer the thinking behind these provisions, and present the kernel ideas in an organized and succinct fashion.

¹ See e.g. Charlene Stukenborg, *The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts*, 19 Dayton L. Rev. 1305 (1994). The perennial source of ADR philosophy is Fisher, Patton and Ury's *Getting to Yes*. See Roger Fisher et al., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 2d ed. 1991).

² Rosemary O'Leary, Tracy Yandle, and Tamilyn Moore, *The State of the States in Environmental Dispute Resolution*, 14 Ohio St. J. on Disp. Resol. 515 (1999).

CHAPTER ONE: DEFINITIONS

This chapter lays out definitions for each of the various dispute resolution techniques. Dispute resolution techniques generally divide control over the dispute between private entities, such as individuals or corporations, and public entities, such as courts or agencies. The range of options for resolving disputes is most often portrayed as a spectrum, with different techniques spread out along a line. This approach, however, does not sufficiently account for the wide variety of dispute resolution techniques, because control may be exercised at different levels along two spectrums. One spectrum is control over procedural decisions; the other is control over substantive decisions. Table 1 below attempts to portray the complete universe of current options for resolving disputes. Referring to that table, we should note that our concern is only with techniques which employ a third party to “referee” the dispute. Therefore we will exclude “settlement negotiations” from consideration.

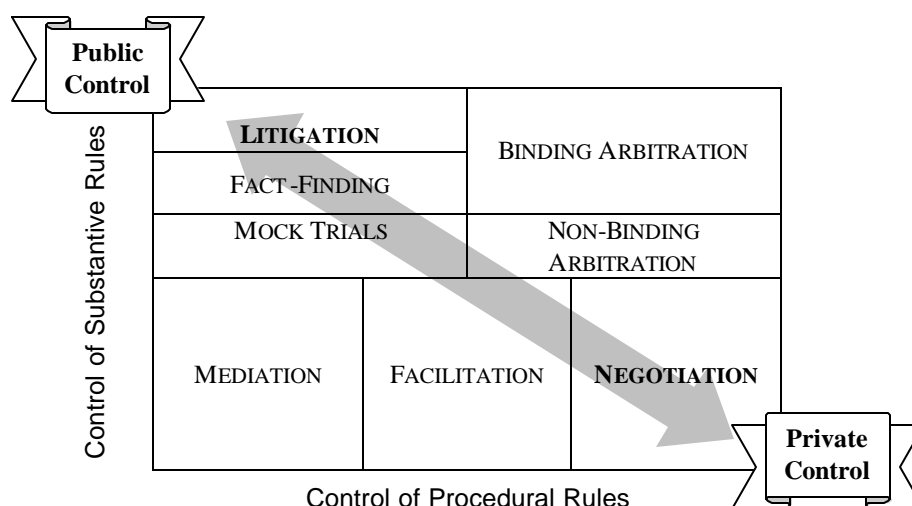


Table 1: The Dispute Resolution Universe

Third parties may either be neutral or partisan. They may have either communicative or decisionmaking authority, or both. Decisionmaking authority may attach to either substantive or procedural issues, or both. Furthermore, decisionmaking authority may have either binding (adjudicatory) or nonbinding (advisory) effect. Finally, third parties may be either Public, with costs paid by public funds, or Private, with costs paid by the parties.

§ 1 Conventional Dispute Resolution (CDR)

Processes employing public third-party neutrals with procedural and substantive decisionmaking authority.

Comment: CDR entities can include courts, or the judicial divisions of agencies. Such processes typically represent the apex of public control over disputes. They are adjudicative in nature, resolving disputes by their own authority, without need for consent or even against the wills of the parties involved. Such authority is typically reserved to the State. The justification for the authority exercised by CDR processes is typically founded on a theory of social contract: members of society,

utilizing and benefitting by society's rules, are presumed to have consented to obey these rules, which serve the purpose of public order and harmony. Should members of that society be unable to maintain that harmony and resolve their own disputes, the State may do so in their place.³

A variant of CDR is “fact-finding,” also known as “mini trials,” the purpose of which is to narrow the field of issues in dispute by resolving the less complicated first—usually key issues of fact.

§ 2 Arbitration

A process employing a private third-party neutral decisionmaker, whose authority on most substantive and procedural issues may be defined by the parties, or by law.⁴

Comment: Arbitration takes a step closer to the consent of the parties, following the same theory of social contract as CDR processes. Indeed, the justifying basis for arbitrating a dispute is most often found in an actual contract. The parties explicitly agree to utilize this mechanism for ending disputes they cannot themselves resolve. Like CDR processes, arbitration is adjudicatory, but somewhat less. Typically the parties gain more control over the procedure of their dispute, but substantive rules of decision remain beyond them. Like CDR processes, arbitration may be designed as a “fact-finding” process to clear key issues out of the way of a settlement.

§ 3 Advisory decision-making

A process employing a neutral third-party decisionmaker, on either a public or private basis, whose authority may be binding regarding procedure, but is not binding regarding substance.⁵

³ In truth, all dispute resolution methods are based on theories of consent, but the justifying bases for adjudicative methods are more abstract. The most abstract form of dispute resolution must without a doubt be criminal law. In such cases, the aggrieved party is completely removed from the process and substituted by a legal fiction: the State, a corporate entity with no real presence. In some cases this is unavoidable; when the crime is murder, the aggrieved party has been himself reduced to a fiction—a mere memory. Although one could say that the State intervenes in criminal matters at the behest of the victim, this is more true in civil proceedings, where at least one party brings the matter to court.

An important point to note here is the ability of the State to represent interests which do not have a discrete existence. This is especially relevant to environmental disputes. It can easily be argued that disputes involving the environment we all live in should be resolved by rules we all live under, and by a party who more fully represents us all. Closely related is the question of personality in the representation of the environment: who should be allowed to speak directly on its behalf? It seems as though the greater the fictional entity, the closer it comes to the nature of the environment: diffuse and collective. Certainly an individual cannot claim to speak for the environment on his own. Yet as disputes find resolution lower on the spectrum of methods, they come closer to the control of the individual. There is a danger therefore that such disputes could fall, as it were, into the wrong hands.

⁴ See Oregon Administrative Rules, *Alternative Amendment Process for Carbon Standard Demonstrations in Lieu of Need*, OR. ADMIN. R 345-027-0200 (2000).

⁵ See Florida Administrative Code, *West Florida Regional Dispute Resolution*, FLA. ADMIN. CODE ANN. r. 29A-3.002(5) (2000)

Comment: Also known as “mock trials,” this is actually a category of techniques which includes non-binding arbitration. These techniques give parties a preview of what a CDR process might do with their dispute—a “reality check,” as it were. The same effect may be achieved through a technique known as “non-binding arbitration.”

§ 4 Mediation

A process employing a neutral third-party communicator, on either a public or private basis, who has procedural decisionmaking authority, with the goal of substantive agreement among the parties.⁶

Comment: With mediation, the ability to resolve substantive issues passes entirely into the control of the parties. This technique is gaining popularity, because the control of procedure by a third party neutral guarantees process certainty, while control of substance by the parties themselves assures outcome satisfaction.

§ 5 Facilitation

A process employing a neutral third-party communicator, on either a public or private basis, who has no decisionmaking authority, with the objective of agreement among the parties.⁷

Comment: Facilitators are the last third-party neutrals in the universe of dispute resolution techniques—beyond them, the parties negotiate directly. With this technique, the neutral must achieve agreement among all parties for even procedural decisions.

§ 6 Ombudsmen

A process employing a third-party partisan communicator, with no substantive but some procedural decisionmaking authority.⁸

[Advisory decision-making is] a procedure aimed at enhancing the effectiveness of negotiations and helping parties more realistically evaluate their negotiation positions. This procedure may include record-keeping, neutral evaluation, or advisory arbitration in which a neutral party or panel listens to the facts and arguments presented by the parties and renders a non-binding advisory decision.

⁶ See FLA. ADMIN. CODE ANN. r. 29A-3.002(4)

[Mediation is] a procedure in which a neutral party assists disputing parties in a negotiation process to explore their interests, develop and evaluate options, and reach a mutually acceptable agreement without prescribing a resolution. A mediator may take more control of the process than a facilitator and usually works in more complex cases where a dispute is more clearly defined

See also Maine Revised Statutes Annotated, *Land Use Mediation Program*, ME. REV. STAT. ANN. tit. 5 § 3341(6) (“The purpose of a mediation ... is to facilitate ... a mutually acceptable solution to a conflict...”)

⁷ See FLA. ADMIN. CODE ANN. r. 29A-3.002(3) (“[Facilitation is] a procedure in which the facilitator helps the parties design and follow a meeting agenda and assists parties to communicate more effectively throughout the process. The facilitator has no authority to make or recommend a decision.”)

Comment: Use of Ombudsmen is not truly an EDR mechanism, because they do not have the resolution of disputes as their immediate objective. Such processes usually employ Situation Assessment, a procedure for determining the parties and issues in a dispute, and recommending an appropriate EDR process.

⁸ See FLA. ADMIN. CODE ANN. r. 29A-3.002(1) (“A procedure of information collection that may involve review of documents, interviews and an assessment meeting leading to a written or verbal report identifying: the issues in dispute; the stakeholders; information needed before a decision can be made; and a recommendation for appropriate dispute resolution procedures”).

CHAPTER TWO: POLICY INTERESTS

Alternative processes for resolving environmental disputes have developed for a number of reasons. This chapter describes some of these reasons. In general, EDR processes are a reaction to congested CDR processes. They seek to increase access to an existing justice system by offering parties an alternative choice, by screening out “easier” cases, or by providing specialized processes for certain classes of cases. These are a few of the benefits seen to be achieved thereby:

§ 7 Time Savings

EDR processes can be used to resolve disputes in an expedited manner.⁹

Comment: Some disputes do not require the often complex procedural and substantive norms of CDR, and in fact may become significantly worse when exposed to the difficulties and delays of such processes. Relatively simple conflicts can become intractable.

§ 8 Cost Savings

EDR processes can be used to resolve disputes in an economical manner.¹⁰

Comment: CDR tends to disempower people and thereby creates reliance upon the CDR process. This can overload even well-funded systems. Where resources are scarce, the time saved by alternative processes can translate directly into cost savings.

§ 9 Increased Flexibility

EDR processes can be used to resolve disputes in an adaptable manner.¹¹

Comment: Disputes should be handled by a system which incorporates the fullest possible range of resolution techniques, and is adept at finding the best technique for the situation.

§ 10 Increased Empowerment

EDR processes can resolve disputes in a manner more under the control of the parties to the dispute, while still providing a reliable framework.¹²

⁹ See Texas Administrative Code, *Texas Natural Resource Conservation Commission (TNRCC) Alternative Dispute Resolution Procedure Policy*, 30 TEX. ADMIN. CODE § 40.1 (“To encourage the resolution and early settlement of all contested matters ...”; See also FLA. ADMIN. CODE ANN. r. 29 A-3.001(2) (“To clearly identify and resolve problems as early as possible...”).

¹⁰ See FLA. ADMIN. CODE ANN. r. 29 A-3.001(2) (“[To] utilize the procedures in a low-to-high cost sequence...”).

¹¹ See FLA. ADMIN. CODE ANN. r. 29 A-3.001(2) (“[To] allow flexibility in the order in which the procedures are used...”).

¹² See FLA. ADMIN. CODE ANN. r. 29 A-3.001(2) (“[To] provide as much process certainty as possible.”)

Comment: Where disputants take control of and share in the resolution of the dispute, there tends to be greater satisfaction and compliance with the result. Parties who require assistance in such resolution, however, by definition will require at least a minimum set of rules, or anxiety proceeding from uncertainty will undermine the ability of parties to forge ahead.

§ 11 Improved Public Relations

EDR processes which do not employ third-party decisionmakers are generally perceived to be less intrusive, and therefore are more suited to resolving disputes between parties with ongoing relationships.

Comment: An excellent example is the relationship between environmental agencies and the communities they regulate. Effective policing of a community requires a measure of cooperation on the part of the community, especially when resources for enforcement are limited. Prosecutorial methods can be divisive and damaging to the relationship between regulators and the regulated. Non-decisionmaking neutrals employ collaborative, problem-solving methods which foster relationships of trust and cooperation.

CHAPTER THREE: ORGANIZATIONAL SCHEMES

As noted at the beginning of the previous chapter, EDR process generally seek to amplify or enhance existing systems of justice. An important question to be addressed is: where within the existing Conventional Dispute Resolution system should an EDR process be placed? Below are three possibilities for answering this question.

§ 12 CDR Entity-annexed

An EDR process may be attached to a CDR entity, relying on it for dispute referrals.¹³

Comment: The CDR entity may be either a court, or a regulatory agency. This is a sensible arrangement when EDR is being introduced to the legal system and parties are still unfamiliar with the option. Furthermore, it provides the new EDR process with a reliable channel through which to receive cases.

§ 13 ADR Entity-annexed

An EDR process may be attached to an ADR entity, relying on it for dispute referrals.¹⁴

Comment: It is a common requirement among ADR provisions generally that third-party neutrals have some expertise in the area of the dispute. There is a natural tendency in the practice of ADR to subdivide caseloads by according to the kind of dispute. In such cases, it is rare to find positive law creating the subdivision, in the sense of legislation or regulation. Rather, the subdivision is created by means purely internal to the entity.

§ 14 Dedicated EDR Entity

An EDR process may be instituted as an independent entity, directly receiving relevant disputes.¹⁵

Comment: Such an arrangement may be preferable where there is a lack of adequate forums for receiving such disputes, such as in areas where regulation of natural resources is itself a novelty, or where congestion of courts is such that even a referral process would prove cumbersome.

¹³ In general, the processes which are annexed to CDR entities tend to be multi-purpose ADR, not specifically designed for environmental disputes. See O'Leary et al., *State of the States*, *supra* note 2, at 528 (Colorado), at 530 (Connecticut), at 597 (Utah). But see *id.* at 571 (New Jersey's Department of Environmental Protection has an independent EDR office, separate from its hearings courts).

¹⁴ See *id.* at 537 (Hawaii), at 550 (Maine), at 553 (Massachusetts), at 557 (Minnesota).

¹⁵ For an example of a free-standing EDR entity, we must look outside the United States. The Central American Water Tribunal provides public third-party neutrals in an advisory-decisionmaking process. See Latin American Water Tribunal, *Central American Water Tribunal* (last visited September 5, 2000) <<http://www.tragua.com/WaterTrib.html>>.

CHAPTER FOUR: PROCESS ELEMENTS

Dispute resolution processes can be divided into three stages: 1) Initiating the Process; 2) Presenting the Dispute; and 3) Resolving the Dispute. Beyond that, however, EDR processes have significant variance. In this chapter, we collected a diverse collection of principles into these three categories, and created sub-categories of related principles.

Initiating the Process

By far the most complicated stage of any process is the beginning, and this stage of dispute resolution collects the largest number of principles in our study. Disputes must find their proper way into the process; they must be appropriate to the process (or vice versa); they must include all—but only—the appropriate parties; they must bring forward all the appropriate issues; and many other concerns must be addressed before the dispute itself can be presented.

FORM OF INITIATION

§ 15 Affirmative Duty to Promote

Counsel to parties in a dispute should promote alternatives to litigation.¹⁶ CDR entities should likewise promote alternatives to litigation.¹⁷

Comment: Disputants may be reluctant to use EDR. This may be due to “institutional resistance”: people familiar and comfortable with old processes tend to prefer them, despite their disadvantages, or perhaps because they find it to their individual advantage. See Principles 17, 18 and 20 below for some institutional responses. Professional rules of ethics may also attempt to address this problem.

¹⁶ See 30 TEX. ADMIN. CODE § 40.1 (“It is the affirmative responsibility of each commission employee to effectuate this [EDR] policy”).

¹⁷ See Oregon Revised Statutes, *Land Use Board of Appeals; Review procedures, standing, deadlines, issues subject to review, attorney fees and costs, publication of orders, mediation*, OR. REV. STAT. § 197.830 (1997) (9)(b)

Within 10 days after service of a notice of intent to appeal, the board shall provide notice to the petitioner and the respondent of their option to enter into mediation ...Any person moving to intervene shall be provided such notice within seven days after a motion to intervene is filed. The notice required by this paragraph shall be accompanied by a statement that mediation information or assistance may be obtained from the Department of Land Conservation and Development, the coordinating agency for the Natural Resources Section of the Public Policy Dispute Resolution Program.

See also Florida Administrative Code Annotated, *Department of Environmental Protection, Exceptions to the Uniform Rules of Procedure, Decisions Determining Substantial Interests, Notice of Right to Hearing and to Mediation*, FLA. ADMIN. CODE ANN. r. 62-110.106 (12)

Every notice under this section required to include a notice of the right to an administrative hearing and to mediation (when available) shall read substantially as follows, in pertinent part: ... If mediation is available, insert: “Persons who have filed such a petition may seek to mediate the dispute, and choosing mediation will not adversely affect the right to a hearing if mediation does not result in a settlement.”

§ 16 Optional Request

EDR processes may be provided upon the request of a party.¹⁸

Comment: This may be the most common form of initiating an EDR process. On the one hand, it serves the principle of empowering the parties by giving them the power to choose. On the other hand, it does nothing to overcome institutional resistance, which can be especially problematic when EDR processes are being introduced to the legal system.

§ 17 Discretionary Referral

A CDR entity should have discretion to refer cases in whole or in part to an EDR entity, by its own motion.¹⁹

Comment: While perhaps necessary to overcome “institutional resistance,” any provision which allows for selection of the process against the wills of the parties should be exercised with care. Safeguards should be put in place against possible abuses of such discretion.

§ 18 Discretionary Acceptance

An EDR entity, upon a request for services, may refuse if less than all parties request it, but may not refuse if all parties request it.²⁰

Comment: This sensible provision is an example of a safeguard on discretion, such as was mentioned in the comment to Principle 17, above. This provision may likewise be applied to discretionary referral decisions.

¹⁸ The option may be conditioned. See Kentucky Administrative Regulations Service, *Content of the Operations and Reclamation Proposal*, 805 KY. ADMIN. REGS. 1:170 (1997) § 4(1)

The surface owner may file with the division a request for mediation at any time after he has received from the operator the proposed operations and reclamation proposal, but only after the operator has filed his request for mediation and not later than the time set forth in the Notice of Request for Mediation provided by the department and mailed to the surface owner.

See also Pennsylvania Code, *Environmental Hearing Board; Practice and Procedures; Formal Proceedings, Prehearing Conferences and Prehearing Procedures; Voluntary mediation*, 25 PA. CODE § 1021.84 (2000) (a) (“Upon request by all the parties, the Board may ... allow the parties to utilize voluntary mediation services.”)

¹⁹ See Maine Rules of Court for Referral of Cases to the Court Alternative Dispute Resolution Service (CADRES), *Discretionary Mediation Referrals*, ME. CT. CADRES R. 2 (“A judge or justice may refer any contested civil action for mediation, either on the filing of a motion or on the court’s own motion”). See also 30 TEX. ADMIN. CODE § 40.6(b) (“Upon unanimous motion of the parties and at the discretion of the judge, the provisions of this subsection may apply to contested hearings”).

²⁰ See Oregon Administrative Rules, *Land Conservation and Development Department; Citizen-Initiated Enforcement Orders; Mediation and Settlement*, OR. ADMIN. R. 660-045-0160 (2000) (1) (“During the 60-day period... the requester or the affected local government or district may request mediation services from the department. The department may provide such services. If the requester and the affected local government or district jointly request such services, the department must provide them...”).

§ 19 Mandatory Referral

CDR Entities may be required to refer certain classes of disputes to EDR entities first.²¹

Comment: The status quo is thus reversed for these classes of disputes: the alternative becomes the convention, and the formerly conventional becomes the final alternative. This provision is especially well-suited for classes of disputes which share common elements, such as the need for a certain area of technical expertise. Environmental disputes fit this description well. In some instances, the EDR process may be exclusive of any other.²² Care should be exercised with such provisions, however, to guarantee that individual rights to due process are not thereby denied or infringed.

CONDITIONS

§ 20 Injury in Fact

The EDR process may require that the initiating party should have some cognizable injury.²³

Comment: This sort of provision may be problematic in the environmental setting, where there may be many stakeholders with a wide variety of diffuse interests. Conditions are placed upon process initiation to save time, by eliminating weak problems early, but this is more the concern of CDR processes.

§ 21 Controversy

A conflict must in fact exist between two or more parties before an EDR process may be invoked.²⁴

Comment: This provision, like the preceeding and the following rules, is meant to limit the number of disputes entering the EDR process. It guards against spurious or hypothetical controversies which, although they appear unlikely in theory,

²¹ See ME. CT. CADRES R. 1 (“MANDATORY MEDIATION REFERRALS The following cases shall be referred by a court to CADRES for mediation on a routine basis, unless the judge or justice having jurisdiction over a particular matter grants a waiver ... C. ENVIRONMENTAL ENFORCEMENT ACTIONS ... D. LAND USE MATTERS.”)

²² See OR. ADMIN. R 345-027-0200(1), (2)

Scope of rule: This rule is limited to amendments of existing site certificates in which the holder requests to demonstrate compliance with the applicable carbon dioxide emissions standard...

Resolution of disputes: There will be no contested case with respect to an amendment under this section. Disputes concerning the certificate holders demonstration of compliance with the carbon dioxide emissions standard shall be settled through binding arbitration.

²³ See ME. REV. STAT. ANN. tit. 5 § 3341(3) (“A Landowner may apply for mediation under this subchapter if that landowner [has] suffered significant harm as a result of a governmental action regulating land use...”).

²⁴ See 30 TEX. ADMIN. CODE § 40.6(a) (“at least one letter protesting the application [must have] been filed with the commission”).

actually occur in practice. An initial formalistic step, such as a letter of objection, lends credibility to the dispute. Nevertheless, formalism goes against the basic EDR policy of flexibility, so again: care in drafting should be employed.

§ 22 Exhaustion

The controlling EDR entity may require the initiating party to first exhaust a certain amount of conventional procedures pertaining to the dispute.²⁵

Comment: The exhaustion requirement is most pertinent to CDR entities, which typically seek to limit their number of cases. EDR entities, by contrast, ought to be able to receive disputes from any point of progression. A balance must be achieved between administrative and judicial control of disputes, and their early settlement through EDR.

§ 23 Deadlines

Time limitations may be placed upon the initiation of the EDR process.²⁶

Comment: Statutory language may require firm deadlines for the initiation of EDR processes, allowing variation only in exceptional circumstances. Once more, caution should be exercised: the nature of alternative dispute resolution is one of openness and inclusiveness, and this is often especially true when dealing with environmental disputes, which can involve entire communities.

EFFECT OF INITIATION

§ 24 Stay of Proceedings

CDR procedural deadlines pertaining to a dispute should be deferred by a certain amount of time upon the decision of a CDR entity to refer the dispute to an EDR process.²⁷

²⁵ See 30 TEX. ADMIN. CODE § 40.6(a) (“EDR procedures under this chapter may begin, at the discretion of the EDR director, anytime after the application has been deemed administratively complete...”); ME. REV. STAT. ANN. tit. 5 § 3341(3) (“A Landowner may apply for mediation under this subchapter if that landowner [has] sought and failed to obtain a permit, variance or special exception and has pursued all reasonable avenues of administrative appeal...”); OR. ADMIN. R. 345-027-0200(4)(d)

Any person who filed written comments by the 30-day deadline on the department’s proposed order on the amendment and appeared at the Council meeting at which the Council adopted its final order may request binding arbitration to resolve a dispute concerning demonstration of compliance with the applicable carbon standard.

²⁶ See e.g. FLA. ADMIN. CODE ANN. r. 29A-3.005; OR. ADMIN. R. 345-027-0200(4)(d).

²⁷ See Oregon Revised Statutes, *Miscellaneous Matters Related to Government and Public Affairs, Comprehensive Land Use Planning Coordination, Land Use Board of Appeals, Stay of proceedings to allow mediation*, OR. REV. STAT. § 197.860 (1997) (“All parties to an appeal may at any time prior to a final decision ... stipulate that the appeal proceeding be stayed for any period of time agreeable to the parties and the board or court to allow the parties to enter mediation”); 25 PA. CODE § 1021.84(a) (“[T]he Board may stay a matter for a period of up to 120 days to allow the parties to utilize voluntary mediation services”); ME. REV. STAT. ANN. tit. 5 § 3341(5)

Comment: In this way the CDR process remains as the primary process, providing motivation for the parties to make use of the reprieve which the EDR time offers. This sort of provision only effectively applies to EDR processes which do not use decisionmaking neutrals, because it is the attraction of gaining some control over the decision, coupled with the possibility of losing that control, which provides the motivation to reach a resolution.

§ 25 Rights Preserved

Use of a nondecisionmaking EDR process should not effect any change in the rights of parties to access CDR processes.²⁸

Comment: Nondecisionmaking EDR should not be a lockout from CDR, or it will be shunned. Furthermore, such a provision would do away with the threat of the parties losing control over the determination of their issues, a significant motivator for communication.

§ 26 Rights Foreclosed

Use of a decisionmaking EDR process should foreclose the rights of parties to access CDR processes.

Comment: Once a decisionmaker has been chosen, parties should not be allowed to disregard that commitment. Otherwise, decisionmaking EDR processes would be vulnerable to manipulation by strategizing disputants. There are, of course, nonbinding processes which purport to utilize a neutral decisionmaker, such as nonbinding arbitration or mock trials, but this is something of an oxymoron. Nonbinding decisions are not really decisions at all, but rather suggestions submitted to the parties for their approval. It is only with the acceptance of the parties that they become binding; therefore the final method of resolution is more contractual, bearing closer resemblance to the negotiatory processes than to the adjudicative processes.

SELECTING THE PROCESS

§ 27 Freedom of Choice

Parties should be allowed to choose from among a variety of alternatives to litigation.²⁹

[T]he period of time allowed by law or by rules of the court for any person to file for judicial review of the governmental action for which Mediation is requested under this subchapter is stayed for 30 days beyond the date the mediator files the report required under subsection 12 ... but in no case longer than 120 days from the date the landowner files the application for mediation...

²⁸ See FLA. ADMIN. CODE ANN. r. 29A-3.001(5), 3.002(7)

Use of the RDRP shall not alter a jurisdiction's, organization's, group's or Individual's right to a judicial or administrative determination of any issue if that entity is entitled to such a determination under statutory or common law... Being a 'named party' in the RDRP does not convey or limit standing in any judicial or administrative proceeding.

Comment: One characteristic of the ADR movement has been to move control of disputes from public entities like courts, into the hands of the private parties involved in the disputes, whenever and to such an extent as possible. As the Table 1 illustrates, the universe of options has become quite varied, and innovation is still encouraged. Disputants may not be well-positioned to select the best option, especially if they are not employing counsel. CDR entities are the most common point of first contact in a dispute; therefore, it is recommended that they employ Ombudsmen, who can assist disputants in finding an appropriate resolution process.

§ 28 Continuing Flexibility

EDR processes should allow the option to change the type of process.³⁰

Comment: In the same spirit as Principle 25 above, parties should not be locked into the process they select, in case it becomes apparent that the dispute would be better handled by a different process. At any time prior to resolution, parties should be allowed to “ratchet” public control of their dispute either up or down. The essential goal, however, should always be continued progress toward full resolution. Partial agreements already achieved should not be abandoned along the way. See Principle 61 below.

SELECTING THE NEUTRAL

§ 29 Default

When the parties have no agreement concerning the selection of a neutral, then the EDR entity should appoint the neutral.³¹

²⁹ See 30 TEX. ADMIN. CODE § 40.3 (“The commission ... may seek to resolve a contested matter through any EDR procedure. Such procedures may include, but are not limited to, those applied to resolve matters pending in the state's district courts”).

³⁰ See New Jersey Administrative Code, *Department of Environmental Protection, Processing of Damage Claims Pursuant to the Spill Compensation and Control Act, Boards of Arbitration: Administrative conference, preliminary hearing, and mediation conference*, N.J. ADMIN. CODE tit. 7 § 1-9.6 (c) (2000) (“With the consent of the parties, the [arbitration] board at any stage of the proceeding may arrange a mediation conference in order to facilitate settlement”).

³¹ Some systems prefer to have the decision made by the EDR entity in the first place. See 30 TEX. ADMIN. CODE § 40.4(a) (“the EDR director shall assign a mediator [and] may assign a substitute or additional mediator [as he] deems necessary”); Florida Statutes, *Natural Resources; Conservation, Reclamation, and Use, Water Resources, Miscellaneous Provisions, Apalachicola-Chattahoochee-Flint River Basin Compact*, FLA. STAT. § 373.71(a)

(5) If the Commission is unable to resolve the dispute... the Commission shall select, by unanimous decision of the voting members of the Commission, an independent mediator... (6) If the Commission fails to appoint an independent mediator... the party submitting the claim shall have no further obligation bring the claim before the Commission and may proceed by pursuing any appropriate remedies, including any and all judicial remedies.

In the event of disagreement, the selection process may be quite involved. See OR. ADMIN. R. 345-027-0200 (5)(d)

Comment: The lack of agreement could proceed equally from indifference or dispute. In the latter case, however, the EDR entity should take care not to offend one party while pleasing the other. In former case, the EDR entity might have the additional option of appointing a private neutral instead of a public neutral.

§ 30 Agreement

When the parties agree, their choice of a private neutral should be allowed.³²

Comment: This is consistent with the policy of empowering the parties. There may be cases that are not appropriately handled by neutrals of the parties' choosing. Such cases should have the option ruled out from the beginning, categorically. To only remove the choice in individual cases would be to single those parties out and risk the appearance of unfairness.

§ 31 Cost

When a private neutral is employed, the costs will be shared evenly between the parties, unless the parties otherwise agree.³³ Parties may be required to bear a portion of the cost for utilizing public neutrals.³⁴

If the parties are unable to agree upon one of the candidates within 10 days of receiving the list from the arbitration administrator, each party may return to the arbitration administrator within 15 days of receiving the list a preference sheet consisting of: (A) A list of names to strike not more than the total number of candidates divided by the number of parties to the arbitration, minus one, rounded down to a whole number. (B) A rank-ordering of all the other names, using only whole positive numbers, with first choice being number 1. If a party fails to return the completed list on time or exceeds the number of allowed strikes, the arbitration administrator shall disregard that party's preference sheet. The arbitration administrator shall assume that any name not stricken or rank-ordered by a party shall receive a rank ordering equal to the total number of candidates. The arbitration administrator shall choose the arbitrator from the candidates not stricken, based on the aggregate rank ordering of the parties. In the event of a tie in the preference points, the arbitration administrator will use his or her discretion to select one of the candidates tied for the best score.

³² See 30 TEX. ADMIN. CODE § 40.4(b) ("A private mediator may be hired for commission EDR procedures provided that: (1) the participants unanimously agree to use a private mediator; (2) the participants unanimously agree to the selection of the person to serve as the mediator").

When one or more of the parties does not agree, then the court or the alternative dispute resolution entity should appoint a public neutral. See ME. CT. R. 2 ("The referral may be to a mediator agreed to by the parties or, in the absence of agreement, to CEDRES").

³³ See 30 TEX. ADMIN. CODE § 40.4(c) ("If a private mediator is used, the costs for the services of the mediator shall be apportioned equally among the participants, unless otherwise agreed upon by the participants...").

When the EDR Entity employs public neutrals as independent contractors, the cost may be defrayed by a fee shared equally among the parties. See Maine Revised Statutes Annotated, *Court Alternative Dispute Resolution Service*, ME. REV. STAT. ANN. tit. 4 § 18-B7 ("FEES. When a court refers parties to the Court Alternative Dispute Resolution Service, the court shall assess the parties a fee to be apportioned equally among the parties, unless the court otherwise directs").

Indigent parties should be allowed to petition the dispute resolution entity for waiver of their share of the costs for public neutrals. See ME. REV. STAT. ANN. tit. 4 § 18-B7 ("A party may file an *in forma pauperis* application for waiver of fee").

Comment: In order for the neutral to appear as such, the parties must share the burden of his cost and the privilege of his employment. This same principle applies where limited resources require a contribution from the parties for the employment of a public neutral. On the other hand, some flexibility should be found for cases where an imbalance of resources between the parties makes the cost disproportionately burdensome on one side.

§ 32 Expertise

Neutrals should have some expertise in the area of the dispute.³⁵

Comment: Component issues in a dispute which demand special expertise may be separated out and dealt with by different neutrals as required for efficiency and accuracy. This a common and sensible provision, especially when dealing with a predefined area of special interest, such as the environment. An important fact to remember is that, whatever variations of scientific expertise may be required, one area of knowledge should be common to all neutrals in an EDR process: applicable law.

§ 33 Training

The EDR Entity should provide at least 40 hours of training for public neutrals, [and for private neutrals at their own expense,] or certify other training as equivalent.³⁶

The cost of the neutral may be borne by the public for an initial period, and by the parties thereafter. *See* ME. REV. STAT. ANN. tit. 5 §3341 (9) (“Participants in the mediation may share the cost of mediation after the initial 4 hours of mediation services have been provided”); OR. ADMIN. R. 345-27-0200 (5)(aa) (“Expenses. Each party to the arbitration shall bear its own witness fees and other costs, except that the site certificate holder will pay all reasonable costs incurred by the Council and the Office of Energy”); 25 PA. CODE § 1021.84 (b) (“The parties are responsible for selection of a mediator and payment of the mediator’s fees”).

³⁴ Failure to bear such costs may have legal consequences. *See* 805 KY. ADMIN. REGS. 1:170 § 4 (2)

If the surface owner does not file his mediation fee within the time and in the manner required in the Notice of Request for Mediation, he shall be deemed to have failed to satisfy the statutory requirements applicable to mediation, the mediator shall file a report noting the failure and recommend the acceptance of the operator’s operations and reclamation proposal.

³⁵ *See* 30 TEX. ADMIN. CODE § 40.5(b)(2) (“Each [outside] mediator shall have some expertise in the area of the contested matter...”); and § 40.5(a)(2) (“Other individuals may serve as [agency] mediators on an ad hoc basis in light of particular skills or experience which will facilitate the resolution of individual contested matters”); ME. REV. STAT. ANN. tit. 5 § 3341 (2) (“The Court Alternative Dispute Resolution Service shall: A. Assign mediators under this subchapter who are knowledgeable in land use regulatory issues and environmental law...”); OR. ADMIN. R. 345-027-0200 (5)(d) (“Appointment of Neutral Arbitrator: The arbitration administrator will compile a list of at least 10 candidate arbitrators who the arbitration administrator determines are qualified by education, training and experience to arbitrate the matter, with preference to be given to those with experience in energy matters and administrative procedures”); FLA. STAT. § 373.71(a)(5) (“The mediator... shall be a person knowledgeable in water resource management issues...”).

³⁶ *See* 30 TEX. ADMIN. CODE § 40.5(a)(1) (“To the extent practicable, each [agency] mediator shall receive 40 hours of formal training in EDR procedures through programs approved by the EDR director ...”) and

Comment: This provision is complimentary to the common requirement that neutrals have some expertise in the area of the dispute. Such experts are very often not versed in dispute resolution techniques. It is generally easier to teach experts how to be neutrals than to teach neutrals how to be experts. The EDR entity should also serve as a gatekeeper for those neutrals selected by the parties.

§ 34 Conflicts of Interest

Neutrals should be free from any conflict of interest whatsoever.³⁷

Comment: Such provisions should usually be accompanied by full disclosure requirements, which would allow the gatekeeping EDR entity to decide what constitutes a conflict of interest. This of course would not apply to Ombudsmen, who are by definition partisan, and not neutral, however objectively they might assess the situation.

§ 35 Immunity

Neutrals should be immune from civil liability for acts performed within the scope of their duties.³⁸

Comment: This standard provision seeks to reassure those who are stepping between two or perhaps many more persons in the midst of a conflict. The limitation of their duties should be as well-defined as possible, so that they may know what lines not to cross.

(b)(1) (“Each [outside] mediator shall first have received 40 hours of Texas mediation training as prescribed by Texas law”).

³⁷ See OR. ADMIN. R. 345-027-0200 (5)(e) (“No person shall serve as arbitrator in any arbitration in which that person or that person's employer has any direct or indirect financial interest in the result of the arbitration”); FLA. STAT. §373.71 (a)(5) (“The mediator... shall disclose any and all current or prior contractual or other relations to any member of the Commission”); New Jersey Administrative Code, *Department of Environmental Protection, Processing of Damage Claims Pursuant to the Spill Compensation and Control Act, Boards of Arbitration: Membership of Board*, N.J. ADMIN. CODE tit. 7 § 1J-9.3 (e) (2000)

Before the appointment of any person appointed as arbitrator becomes effective, the appointee shall disclose to the administrator any circumstance likely to affect the arbitrator's impartiality, including without limitation any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with any of the parties or any of their representatives. Upon receipt of such information from the appointee, the administrator shall communicate the information to the parties and to the board. Upon receipt of such information from a source other than the appointee, the administrator shall communicate the information to the appointee, to the parties and to the board.

³⁸ See ME. REV. STAT. ANN. tit. 4 § 18-B3 (“[A]n ADR provider ... is immune from any civil liability ... for acts performed within the scope of [his] duties”); OR. ADMIN. R. 345-027-0200 (5)(z) (“Neither the Council nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules”); New Jersey Administrative Code, *Department of Environmental Protection, Processing of Damage Claims Pursuant to the Spill Compensation and Control Act, Boards of Arbitration: Exculpation of arbitrators*, N.J. ADMIN. CODE tit. 7 § 1J-9.24 (“No arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules”).

SELECTING THE LOCATION

§ 36 Proximity Requirement

EDR processes may require that certain subclasses of disputes be conducted as close to their location of origin as is possible and appropriate.³⁹

Comment: In general EDR processes take place at the EDR office, or at a location of the parties' choosing. In certain subclasses of cases it may be advisable to require a provision such as the one above. Environmental disputes tend to involve communities and natural features which are difficult to describe or present in remote locales. The cited provision, for example, addresses itself to disputes over land. Neutrals may benefit from gaining a "feel" for the context of an environmental dispute.

SELECTING THE PARTIES

§ 37 Initial Identification of Parties

The initiating and the responding parties should provide the neutral with a list of all additional parties.⁴⁰

Comment: Proceeding upon the assumption that the parties to a dispute are the ones most likely to know whose interests are immediately involved in the dispute, this provision places upon them the obligation of providing a starting point for the identification of parties.

§ 38 Notification

The EDR entity should notify all readily identifiable interested parties concerning the initiation of the EDR process.⁴¹ Where a decisionmaking neutral is employed, a record of

³⁹ See ME. REV. STAT. ANN. tit. 5 § 3341 (6) ("[T]he mediator, whenever possible and appropriate, shall conduct the mediation in the county in which the land that is the subject of the conflict is located").

⁴⁰ See ME. REV. STAT. ANN. tit. 5 § 3341 (7)(A) ("The landowner and the governmental entity shall provide to the mediator the names and addresses of the parties, intervenors and other persons who significantly participated in the underlying governmental land use action proceedings"). See also e.g. Florida Administrative Code Annotated, *Regional Planning Councils*, *West Florida Regional Planning Council*, *West Florida Regional Dispute Resolution*, FLA. ADMIN. CODE ANN. r. 29A-3.002 (7) ("[A] 'Named party' shall be any jurisdiction, public or private organization, group or individual who is named in an initiation letter, including the initiating jurisdiction, or is admitted by the named parties to participate in settlement of a dispute")(Virtually all Florida regional planning councils have substantially identical dispute resolution language).

⁴¹ See OR. ADMIN. R. 345-027-0200 (5)(c) ("Notice of Arbitration: Upon request for arbitration pursuant to these rules, the Arbitration Administrator shall issue an arbitration notice to the applicant and all persons who filed written comments by the 30-day deadline and appeared at the Council meeting at which the Council adopted its final order..."); New Jersey Administrative Code, *Department of Environmental Protection, Processing of Damage Claims Pursuant to the Spill Compensation and Control Act, Boards of Arbitration: Notice of arbitration*, N.J. ADMIN. CODE tit. 7 § 1J-9.2 (2000)

The administrator shall provide written notice of the arbitration to the claimant, to all potentially responsible parties identified as of the date of the notice, and to any other person who has

the notification attempt should be made.⁴² Parties may for expediency agree to notification by other means.⁴³

Comment: Notification is perhaps the most important element of an EDR process, because environmental interests are diffuse and the initial parties may well not be the only ones involved. Where the interests are diffuse enough to merit it, the EDR process may call for notification of the general public.

§ 39 Public Access

The neutral may allow or restrict public access to the EDR process as necessary to balance the public right to know and the private need for effectiveness.⁴⁴

Comment: The interests involved with environmental disputes may diffuse themselves beyond the class of those materially affected, and into the domain of the general public. In such cases, EDR processes must serve a similar function as that normally served by CDR processes: that of the public forum.

§ 40 Intervention

Persons other than those initially identified as adverse or interested parties may petition to the neutral for inclusion in the EDR process.⁴⁵

contested the validity or amount of damage claims or cleanup and removal costs presented to the Fund for payment.

⁴² See OR. ADMIN. R. 345-027-0200 (5)(t) (“Serving of Notices: Any notice of hearing or arbitration decision shall be considered delivered or served on the parties when sent by certified mail to the addresses of record of the parties”).

⁴³ New Jersey Administrative Code, *Department of Environmental Protection, Processing of Damage Claims Pursuant to the Spill Compensation and Control Act, Boards of Arbitration: Expedited procedures*, N.J. ADMIN. CODE tit. 7 § 1J-9.20 (2000)

(a) The parties, the administrator and the board may unanimously agree to conduct the arbitration proceeding pursuant to the expedited procedures in this section... (b) ...the parties shall accept all notices from the board by telephone. The board shall subsequently confirm such notices to the parties in writing, provided however, that the failure to provide written confirmation shall not invalidate the telephone notice.

⁴⁴ See ME. REV. STAT. ANN. tit. 5 § 3341 (6) (“the mediator shall balance the need for public access to proceedings with the flexibility, discretion and private caucus techniques required for effective mediation”); OR. ADMIN. R. 345-027-0200 (5)(k) (“Other persons may observe the proceedings, but may not participate in the hearings”); New Jersey Administrative Code, *Department of Environmental Protection, Processing of Damage Claims Pursuant to the Spill Compensation and Control Act, Boards of Arbitration: Conduct of hearing*, N.J. ADMIN. CODE tit. 7 § 1J-9.9 (e) (2000)

Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.

⁴⁵ See ME. REV. STAT. ANN. tit. 5 § 3341 (7) (“B. Any other person who believes that that person’s participation in the mediation is necessary may file a request with the mediator to be included in the mediation..”)

Comment: The next stage of finding interested or affected parties gives the neutral authority to consider applications from unnamed parties to be brought into the EDR process. Some guidelines for the decision should be provided, or size of the party class could vary unpredictably between the excissively large and the unreasonably small.

§ 41 Invitation

The neutral may invite any additional person to become a party if necessary for the effectiveness of the EDR process.⁴⁶

Comment: This is a stop-gap provision for potential notification failure. Notice that the neutral extends a mere invitation. It is difficult to imagine an EDR process that might go so far as to force someone to become a party, outside of the criminal sphere. When dealing with environmental crimes, however, it may be instead the rule that at least one party is given such an irrefusable invitation.

§ 42 Exclusion

The neutral may exclude or restrict any person from participation necessary for the effectiveness of the EDR process.⁴⁷

Comment: Exclusion in this sense means a temporary measure, similar to the removal of witnesses from a courtroom, or caucuses during mediation.

§ 43 Nontransportability

A party entering an EDR process should not thereby automatically gain entry to any related CDR process.⁴⁸

Comment: CDR processes go to great lengths at times to define and restrict the class of disputants who may come before them. It would defeat the efficiency purpose of EDR to allow the process to be manipulated so as to provide a back

The window of opportunity may be limited to a certain time frame. *See* OR. ADMIN. R. 345-027-0200 (5)(c) (“The notice [of initiation] shall specify a date by which such persons must request to participate in the arbitration as a party”).

Classes of parties may be recognized. *See* New Jersey Administrative Code, *Department of Environmental Protection, Processing of Damage Claims Pursuant to the Spill Compensation and Control Act, Boards of Arbitration: Class Actions*, N.J. ADMIN. CODE tit. 7 § 1J-9.5 (“The board may acknowledge a class of claimants...”).

⁴⁶ *See* ME. REV. STAT. ANN. tit. 5 § 3341 (7)(C) (“The mediator shall determine if any other person’s participation is necessary for effective mediation”) and (8) (“A mediator shall include in the mediation process any person the mediator determines is necessary for effective mediation ...”).

⁴⁷ *See* ME. REV. STAT. ANN. tit. 5 § 3341 (8) (“A mediator may exclude or limit a person’s participation in mediation when the mediator determines that exclusion or limitation necessary for effective mediation”).

⁴⁸ *See* FLA. ADMIN. CODE ANN. r. 29A-3.001 (6) (“Participation in the RDRP as a named party or in any other capacity does not convey or limit intervenor status or standing in any judicial or adaunistrative proceedings”).

door into CDR for parties who could not otherwise gain entry. The EDR process must be treated by the parties as an end in itself, at least potentially, or they will be engaging in bad faith, and the process will fail.

§ 44 Representation

Parties may be represented by counsel; when counsel is to be present, other parties should receive notice.⁴⁹

Comment: Despite the lowered levels of formality, EDR processes are still essentially legal processes, and parties should be allowed to receive professional advice. There is a concern, however, that access to such advice could impinge on the neutrality of the process if one side is allowed to gain unfair advantage thereby. Therefore, the neutral should be informed of the presence of counsel prior to convening the process, and should then notify the other parties. In certain cases, the EDR process may benefit by the availability of public counsel for indigent parties.

SELECTING THE ISSUES

§ 45 Presentation by the Parties

The parties should be allowed the first opportunity to present the questions at issue in the dispute.⁵⁰

⁴⁹ See OR. ADMIN. R. 345-027-0200 (5)(j) (“Representation by Counsel: Any party may be represented at the hearings by counsel”); N.J. ADMIN. CODE tit. 7 § 1J-9.9 (b)

Any party may be represented by counsel or other authorized representative. A party intending to be so represented shall notify the other party and the board of the name and address of the representative at least three days prior to the date set for the hearing at which the person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

⁵⁰ See OR. ADMIN. R. 345-027-0200 (4)(d) (“A person requesting a binding arbitration shall provide a description of the issues to be arbitrated [and] a statement of the facts to be at issue...”), (5)(c)

The arbitration notice shall advise that a party may not advance an issue unless that party raised the issue in its written comments on the department's proposed order, unless the findings in the Council's final order differ materially from the findings recommended in the proposed order, in which case a party may request arbitration on new issues related to such differences.

See also N.J. ADMIN. CODE tit. 7 § 1J-9.6 (b) (“The board, in its discretion, may schedule a preliminary hearing with the parties and/or their representatives and the board to specify the issues to be resolved, to stipulate to uncontested facts, and to consider any other matters that will expedite the arbitration proceedings”; *id.* § 1J-9.8

Prehearing requirements

(a) At least 10 days before the commencement of the hearing, the parties shall have:

1. Met and prepared a stipulation of facts not in dispute, and provided it to the board;
2. Met and pre-marked a joint set of exhibits as to which neither authenticity nor relevance is disputed, and provided it to the board;

Comment: This provision presumes that the parties to a dispute will be better positioned to appreciate the issues involved. Indeed, the EDR entity may be completely unaware of the dispute until the parties come forward with it. In any event, a provision such as this follows the policy of empowering the parties to control their own dispute. Furthermore, it may have the effect of clearing away simpler issues through stipulation.

§ 46 Summary by the EDR Entity

The EDR entity should formulate a summary of questions at issue among the parties.⁵¹

Comment: It may be useful for the EDR entity to combine the issues presented by the opposing parties into one document. This restatement of the dispute could offer the opportunity to reframe the problems in a manner more conducive to their resolution. Simply by creating one document, the parties may be encouraged to view the dispute as a shared problem rather than a devisive competition. Furthermore, the neutral may gain the confidence of the parties by illustrating his care and attention for their concerns.

§ 47 Precluded and Required Issues

Neutrals may be precluded from considering certain issues;⁵² likewise, neutrals may be required to consider certain issues.

Comment: The area of Environmental Dispute Resolution by definition already restricts the kinds of issues that may be considered. The range of issues available

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3. Met and resolved all questions of authenticity as to any evidence with respect to which relevance remains in dispute, and advised the board of such resolution;
 4. Identified and advised the board of all evidentiary and procedural issues which must be resolved in limine; and
 5. If required by the board, filed trial briefs with the board and served copies of the trial briefs upon all parties

See also FLA. STAT. § 373.71 (a)(7) (“the mediator... may request that each party to the Compact submit, in writing, to the mediator a statement of its position regarding the issue or issues in dispute. Such statements shall not be exchanged by the parties except upon the unanimous agreement of the parties to the mediation”).

⁵¹ *See* OR. ADMIN. R. 345-027-0200 (5) (“(b) Matters subject to binding arbitration: The arbitration administrator shall prepare an arbitration statement stating the issues identified for arbitration by the parties”).

⁵² This may be true even of non-decisionmaking neutrals. *See* 805 KY. ADMIN. REGS. 1:170 § 4 (3)

The mediator shall not settle damage claims or make any determinations regarding them in his report. However, information presented by the operator or surface owner as to the costs incurred by either party as a result of the projected drilling and the loss of minerals or surface damage may be utilized by the mediator in recommending the placement of roads, pits or other construction and reclamation activities in a manner which has the least adverse surface impact.

The first sentence of this provision is ill-phrased, because mediators by definition do not settle—the parties are the ones who settle. The intent is likely to set the goals for mediators in this context.

within the category may of course be further restricted. The inverse requirement, that neutrals must consider certain issues, is merely a logical possibility, not found in any of the statutes or regulations we examined.

§ 48 Related Issues

Neutrals should be empowered to receive all issues related to the same occurrence.⁵³

Comment: This provision is imported from CDR and relates to the efficient handling of disputes, where all issues that bear a common relation may be dealt with by one forum. Such a provision may find application in decisionmaking processes like arbitration, but the policy of flexibility in EDR more generally militates against a rigorous application of such a principle. It may instead be more efficient to resolve separate issues within a dispute by different means: mediating some and arbitrating others, for example. Furthermore, such a provision as this goes directly against the previous provision which allows preclusion of certain issues. Care must be taken when drafting to avoid this sort of internal conflict.

Presenting the Dispute

Most EDR statutes and regulations incorporate rules for presenting disputes by referring to more general statutes, regulations, or professional codes of ethics. Collected below are those principles which drafters of the EDR provisions felt were too important to leave out.

PROCEDURE

§ 49 Scheduling

The neutral should have primary responsibility for scheduling all sessions of the EDR process.⁵⁴

Comment: One of the simplest functions for a neutral party is the handling of administrative trivia such as arranging the schedule and reserving the location for process sessions. By relieving the parties of this burden, their attention can be more focused upon the resolution of their dispute.

⁵³ N.J. ADMIN. CODE § 7:1J-9.4 (“Jurisdiction over all claims related to discharge: One board may be convened to hear and determine all claims arising from or related to a common discharge”).

⁵⁴ See ME. REV. STAT. ANN. tit. 5 § 3341 (7) (“The mediator is responsible for scheduling all mediation sessions”); OR. ADMIN. R. 345-027-0200 (5)(f) (“Scheduling of Hearing: The date of the hearing shall be established by the arbitrator”); FLA. STAT. §373.71 (a)(7) (“[T]he mediator shall establish the time and Location for the mediation session or sessions...”); N.J. ADMIN. CODE tit. 7 § 1J-9.9

(a) The board shall set the date, time, and place for each hearing. The board shall mail to each party notice thereof at least 10 days in advance, unless the parties by mutual agreement waive such notice or modify the terms thereof. For good cause shown, the board may postpone any hearing upon the request of a party or upon the board's own initiative.

§ 50 Recordkeeping

Decisionmaking neutrals should keep the official record of the EDR process.⁵⁵

Comment: An important element mitigating the anxiety of parties as they submit their dispute to the decision of another can be the keeping of an official record, which facilitates review. It is crucial that this record be as complete and balanced as possible, and that the decision taken by the neutral proceeds logically from the record. When this is not the case, there will likely be one of two possible negative outcomes. If the flawed record or discordant decision is subject to review, then that review will be sought and much of the savings achieved by EDR will be lost. If no review is available, then the losing party will be noncompliant, requiring further process to enforce the decision. In either case, relations among the parties will remain strained or be further aggravated, making future disputes more likely, especially when the parties have continuing relationships—a common feature of environmental disputes. Furthermore, the losing party will have lost confidence in the process, and will be less likely to use it or cooperate with it in the future. All of these hazards are avoided when processes such as mediation or facilitation are used, because in such cases the communication between the parties is sufficiently strong that they can retain decisionmaking power themselves.

§ 51 Collection of Evidence

Decisionmaking neutrals should be empowered to collect whatever written or oral evidence might be required for the rendering of an effective decision.⁵⁶

⁵⁵ See OR. ADMIN. R. 345-027-0200 (5)(m) (“Record of Hearing: A written record of the proceedings shall be made. The record shall contain all correspondence and writing regarding the proceedings, evidence received or considered, and the arbitration decision”); N.J. ADMIN. CODE tit. 7 § 1J-9.9 (c) (“The board shall make arrangements to obtain a record, stenographic or otherwise, and the administrator shall bear the expense thereof”).

⁵⁶ The standard of admissibility may be flexible. See OR. ADMIN. R. 345-027-0200 (5)(p)

Evidence: Evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs shall be admissible ... The Arbitrator may subpoena witnesses or documents independently or upon the request of any party. The arbitrator shall be the sole judge of the admissibility of the evidence offered

See also N.J. ADMIN. CODE tit. 7 § 1J-9.9 (j) (“The arbitrator may receive in evidence exhibits offered by either party. The names and addresses of all witnesses and a description of the exhibits in the order received shall be made a part of the record”); *id.* § 7:1J-9.11 (b) (“The board shall be the judge of the relevance and materiality of the evidence offered. Strict conformity to the legal rules of evidence shall not be necessary; provided however, that the board shall respect all privileges recognized by the New Jersey Rules of Evidence”).

The authority granted to the decisionmaker may also be flexible. See New Jersey Administrative Code, *Department of Environmental Protection, Processing of Damage Claims Pursuant to the Spill Compensation and Control Act, Boards of Arbitration: Discovery*, N.J. ADMIN. CODE tit. 7 § 1J-9.7(a) (“The board shall have complete discretion regarding discovery, provided however, that the board shall exercise such discretion in light of the expedited nature of Spill Fund Arbitration...”)

Indeed, decisionmakers may be given investigatorial powers. See New Jersey Administrative Code, *Department of Environmental Protection, Processing of Damage Claims Pursuant to the Spill*

Comment: Closely related to and supporting the recordkeeping obligation, provisions for the collection of evidence give decisionmaking neutrals the power they need to assemble complete and balanced records. The two provisions go together; the first should not be employed without the second. This is a key aspect to the loss of control which parties agree to when they avail themselves of decisionmaking EDR processes.

§ 52 Deadlines

Time limitations may be placed upon any stage of the EDR process.⁵⁷

Comment: Statutory language can either allow variation whenever parties agree, for flexibility, or require exceptional circumstances, for expediency.⁵⁸ Generally, it is preferable that all parties agree to the deadline. Nevertheless, the ability to impose deadlines may be a desirable attribute for the neutral to have. Deadlines can be efficient motivators for performance. Care should be taken, however, that the neutral exercise such power judiciously. Whenever action is taken regardless or contrary to the will of a party, the policy of empowerment is being infringed. It may be useful to give a nondecisionmaking neutral, such as a mediator, the ability

Compensation and Control Act, Boards of Arbitration: Inspections and investigations by the Board, N.J. ADMIN. CODE tit. 7 § 1J-9.13

The board may conduct inspections or investigations of any real or personal property which is relevant to the claim. An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall advise the administrator and the parties. The board shall set the date and time and shall notify the administrator and the parties thereof. Any party may be present at such inspection or investigation. If one or all parties are not present at the inspection or investigation, the board shall make a verbal or written report to the parties and afford them an opportunity to comment.

⁵⁷ See e.g. generally FLA. ADMIN. CODE ANN. r. 29A-3.005. See also OR. ADMIN. R. 345-027-0200 (5)(f) (“Unless otherwise agreed by the parties, the hearing shall be held within 30 days of appointment of the arbitrator”).

⁵⁸ See e.g. generally FLA. ADMIN. CODE ANN. r. 29A-3.005. See also OR. ADMIN. R. 660-045-0160 (4)

A deadline set forth in this division be altered or waived under these two conditions: (a) The requester and the affected local government or district both agree to such a change before the deadline is reached ; and (b) The commission or hearings officer approves of such a change before the deadline is reached

See also OR. ADMIN. R. 345-027-0200 (5)(f) (“The arbitrator may postpone or continue any hearing on good cause shown by a party, or upon the arbitrator's own initiative, or if stipulated by all of the parties”); OR. ADMIN. R. 660-045-0160 (4)

A deadline set forth in this division be altered or waived under these two conditions: (a) The requester and the affected local government or district both agree to such a change before the deadline is reached ; and (b) The commission or hearings officer approves of such a change before the deadline is reached.

to declare an end to the process.⁵⁹ This ability may be useful for clearing impasses, or at least saving time in irreconcilable cases.

§ 53 Procedural Variance

Decisionmaking neutrals may relax procedural requirements, within the law, as necessary for fairness and justice, and parties may independently agree to tighten procedural requirements.⁶⁰

Comment: The spirit of EDR is the general loosening of procedural restrictions which might impede the effective and efficient resolution of disputes. The first phrase serves the policy of flexibility, with an anti-cheating provision to prevent abuse by parties seeking to escape legal obligations. The second phrase serves the policy of empowering the parties to take control of their own dispute. When nondecisionmaking neutrals are used, parties may agree to relax procedural requirements themselves.

CONDUCT OF THE PARTIES

§ 54 Communication with Decisionmakers

Parties should not discuss questions at issue with decisionmakers outside the presence of the other parties, without their consent,⁶¹ unless the absent parties were afforded sufficient notice and failed to appear.⁶²

⁵⁹ See FLA. STAT. §373.71 (a)(10) (“The mediator may terminate the non-binding mediation session or sessions whenever, in the judgment of the mediator, further efforts to resolve the dispute would not lead to a resolution”).

⁶⁰ See New Jersey Administrative Code, *Department of Environmental Protection, Processing of Damage Claims Pursuant to the Spill Compensation and Control Act, Boards of Arbitration: Variance from procedural requirements*, N.J. ADMIN. CODE tit. 7 § 1J-9.18

- (a) Except as provided in (c) below, the board may relax any of the procedural requirements of this subchapter if the board determines that strict adherence to such requirements would result in unfairness or injustice.
- (b) Nothing herein shall be deemed to preclude the parties from voluntarily agreeing to procedures more detailed than those found in this subchapter, provided that such supplemental agreements are approved by the board, and do not violate the limitations of (c) below. By way of illustration, such procedures may include guidelines for the presentation of expert testimony and the use and exchange of such testimony, or specific discovery procedures.
- (c) Notwithstanding (a) and (b) above, the board shall not relax procedural requirements of this subchapter if such requirements are imposed by the Act, by other applicable State or Federal statutes, or by applicable decision, order or decree of a court of competent jurisdiction.

⁶¹ See OR. ADMIN. R. 345-027-0200 (5)(i) (“Communications with the Arbitrator: No party or its representative may communicate in any way with the arbitrator about issues in dispute in the arbitration unless all parties are present or have given written permission to do so”).

⁶² See OR. ADMIN. R. 345-027-0200 (5)(o)

Arbitration in the Absence of a Party: The arbitration may proceed in the absence of any party who, after due notice, fails to be present. A decision shall not be made solely on the failure of a

Comment: In the end, all compliance must proceed from the volition of the parties; otherwise, further legal action may be required to compel compliance, and any savings achieved by the EDR process will be lost. In order to achieve an effective resolution of the dispute, the neutral must maintain his appearance of neutrality. If one or more of the parties gains the ear of the neutral in private, suspicion and mistrust will taint the neutral's standing in the eyes of the other parties. Such a taint will attach to any decision made with the participation of the neutral, undermining the likelihood of compliance. This is true with mediators just as much as with arbitrators. In mediation, however, the neutral may use a technique called "caucusing," in which he consults alternately with each party in a private session.⁶³ Caucuses provide mediators with special insight to the dispute because of their guarantee of confidentiality. In this way the mediator gains access to information which the parties are not willing to share with each other, and often from there can craft creative solutions which were not apparent to the parties. Because the technique risks the appearance of bias, mediators should fully inform the parties as to the purpose of caucusing, and obtain their prior consent.

§ 55 Good Faith Cooperation

The parties should be obligated to supply relevant information, and to make a good-faith effort to cooperate in the advancement of the process.⁶⁴

Comment: When placing upon the neutral an obligation to coordinate the process, it may be wise to place a corollary obligation upon the parties to participate in the process with good faith. While some delays may be inevitable, and indeed may be necessary and desirable, it is important that parties not be allowed to manipulate the EDR process. Such abuse will undermine public confidence in the process.

party to attend the hearing. The arbitrator shall require the attending party to submit such evidence as the arbitrator may require for the making of an decision

See also N.J. ADMIN. CODE tit. 7 § 1J-9.9 (1)

Unless the Act or any other applicable law or regulation provides otherwise, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award... (p) There shall be no oral communication between the parties and any member of the board, except at the hearing, unless the parties and the arbitrator agree otherwise. Any written communication from the parties to the board shall be directed to the board, the administrator, and to all of the parties. (q) All pleadings, notices, motions, correspondence or any submissions whatsoever to the board shall be served upon all parties and upon the administrator.

⁶³ *See* FLA. STAT. § 373.71 (a)(11) ("The mediator is authorized to conduct joint *and separate* meetings with parties") (emphasis added).

⁶⁴ *See* OR. ADMIN. R. 345-027-0200 (5)(f) ("The arbitration administrator will request all parties to supply information regarding available dates to assist the arbitrator in expeditious completion of scheduling upon appointment").

§ 56 Oath

Decisionmaking neutrals should be required to swear an oath that they will faithfully execute their charge.⁶⁵

Comment: The value of an oath is in its symbolic nature and psychological impact. Such formalities hopefully increase the neutral's dedication to—and the parties' confidence in—the EDR process. The need for an oath decreases in proportion to the anxiety of the parties and the decisionmaking power of the neutral.

Resolving the Dispute

The policy interests of expediency and cost-effectiveness are generally served by the principles collected under this heading, but care must be taken to preserve the fairness of an EDR system. Mistakes and abuses should not be left uncorrected, or disputants will shun the EDR system and return to CDR systems.

§ 57 Within the Law

Disputes should be resolved within the bounds of applicable law.⁶⁶

Comment: Provisions such as this may be problematic, because there may be uncertainty as to what law applies to a dispute, and how. The somewhat more formalized procedures which employ decisionmaking neutrals present an easier way to serve this principle. There is always a danger that EDR processes may be used to “cheat” legal obligations. It is important that the confines of applicable law be maintained. For this reason, as stated in the comment to Principle 32, all neutrals should have knowledge of the law which applies to the dispute. An EDR process may wish to make legal counsel available to its neutrals as needed—perhaps the same counsel as mentioned in the comment to Principle 44, for indigent parties.

§ 58 Resolution by Default

Decisionmaking neutrals may be empowered to resolve disputes on the basis of one or more party failing to contest the issues.⁶⁷

⁶⁵ See OR. ADMIN. R. 345-027-0200 (5)(l) (“Oaths: The arbitrator shall take [an] oath ... This oath may be administered in writing”); N.J. ADMIN. CODE tit. 7 § 1J-9.3 (g) (“Before proceeding with the first hearing, each arbitrator shall take the following oath of office: I hereby solemnly swear to fairly, impartially and faithfully execute my duties as an arbitrator in accordance with the Spill Compensation and Control Act, and all other applicable laws and regulations”).

⁶⁶ See ME. REV. STAT. ANN. tit. 5 § 3341 (6) (“The purpose of a mediation ... is to facilitate, within existing land use laws, ordinances and regulations, a mutually acceptable solution ...”); OR. ADMIN. R. 345-027-0200 (5)(w) (“Scope of Decision: The arbitrator shall interpret and apply the relevant statutory requirements to determine whether the applicant has complied with the carbon dioxide emission standard...”).

Comment: Waiver is an old time-saving tool for CDR processes, which are traditionally too busy to bother with parties who don't stand up for themselves. Closely related to implied consent, waiver would seem to suit EDR processes. Such provisions, however, do not empower the parties as do other consent-based provisions. Rather, waiver provisions represent a limit upon the power of parties, designed to compel their active participation in the process. The policy served here is expediency. A collateral effect may be the enhancing of a resolution's effectiveness, insofar as parties are compelled to participate more. A drawback may be the undermining of effectiveness, insofar as default resolutions by definition lack a measure of volition from one or more parties.

§ 59 Partial Agreement

When parties reach agreement on component issues in a dispute but fail to avoid litigation entirely, or if some but not all the parties are able to agree, these partial agreements may be treated either as stipulations limiting the contested matter as it proceeds, or as contract binding only those parties agreeing to them.⁶⁸

Comment: By dividing disputes into component issues which can be separately resolved, progress is salvaged. However, greater importance is thereby given to sub-agreements and 'side' agreements. In complex disputes, there is a potential for balkanization among the parties. The alternative "all-or-nothing" approach might work to sell resolution to reluctant closers, but could also result in wasted time and effort. On the other hand, partial agreements are powerful tools for building comprehensive resolutions. For example, it is a common negotiation technique in sales to break a pitch into components, each of which are sold separately in sequence. As the sales pitch progresses, the customer increasingly feels invested in

⁶⁷ See New Jersey Administrative Code, *Department of Environmental Protection, Processing of Damage Claims Pursuant to the Spill Compensation and Control Act, Boards of Arbitration: Default*, N.J. ADMIN. CODE tit. 7 § 1J-9.15

Where there is only one known potentially responsible party, and that party fails to appear at the hearing without obtaining an adjournment thereof, and where neither the administrator nor other persons contest either the validity or amount of the claim presented to the Fund for payment, a decision may be made solely on the default of the potentially responsible party. In all other cases, a decision may not be made solely on the default of a party, and the board shall require the party who is present to submit such evidence as is deemed necessary to arbitrate the issues before the board, except that issues raised only by a defaulting party need not be addressed by the board, and the board's determination of all issues before it shall be binding as to the defaulting party.

See also Principle 54, above.

⁶⁸ See 30 TEX. ADMIN. CODE § 40.7

When EDR procedures do not result in the full settlement of a contested matter, the participants, in conjunction with the mediator, shall limit the contested issues through the entry of written stipulations. Such stipulations shall be forwarded or formally presented to the judge assigned to conduct the hearing on the merits and shall be included in the hearing record.

See also FLA. ADMIN. CODE ANN. r. 29A-3.002 (11) ("A settlement may be agreed to by some or all of the named parties"); 25 PA. CODE § 1021.84 (g) ("[A] signed settlement agreement shall ... bind only the parties signing it").

the process, and it becomes increasingly difficult to say “no” at the end. In the same way, by starting with easier issues, an EDR process can create a gentle slope towards full agreement.

§ 60 Agreement Generally

Agreements are binding in regards to that subject matter.⁶⁹

Comment: The advantage of utilizing the consent of the parties to resolve disputes is that the elaborate procedural safeguards of decisionmaking CDR processes are largely unneeded. This is the source of most cost and time-saving benefits in EDR. With an affirmative expression of consent from the party, people later reviewing the resolution of the dispute are entitled to presume that it was fair and regular. Agreements in EDR processes have, therefore, many of the same attributes as contracts. Care should be taken in crafting and administering the EDR process to ensure that parties are aware of these attributes, and understand when and to what they are agreeing.

§ 61 Writing and Signing Requirement

Agreements and decisions must be put into writing and signed by the parties and the neutral before they can be considered resolved.⁷⁰

Comment: Writing and signing provisions are the best way to address the concerns raised in the comment to the preceeding rule. When an agreement has been reduced to writing and signed by a party, that party presumably is aware that his action creates at that time binding obligations in the terms set out above his signature. Writing and signing do more than create a document for the record. The symbolic value of the written word and the personal signature lend solemnity and seriousness to the process, and carry with them a host of cultural signifiers that serve well to indicate the importance of the event. However, care must be taken where a party is from a culture which does not have a similar written tradition.

⁶⁹ See 30 TEX. ADMIN. CODE § 40.8 (“Agreements... are enforceable in the same manner as any other written contract”).

⁷⁰ 30 TEX. ADMIN. CODE § 40.8 (“Agreements of the participants reached as a result of EDR must be in writing”); ME. REV. STAT. ANN. tit. 5 § 3341 (11) (“A mediated agreement must be in writing. The landowner, the governmental entity and all other participants who agree must sign the agreement as participants and the mediator must sign as the mediator”); OR. ADMIN. R. 660-045-0160 (3) (“A stipulation, agreed settlement, or consent order must be in writing and must be signed by both the requester and the affected local government or district”); OR. ADMIN. R. 345-027-0200 (5)(v)

Form of the Decision: The arbitrator's decision shall be in writing and shall be accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth

See also New Jersey Administrative Code, *Department of Environmental Protection, Processing of Damage Claims Pursuant to the Spill Compensation and Control Act, Boards of Arbitration: Decisions of the Board; award; payment of claim*, N.J. ADMIN. CODE tit. 7 § 1J-9.16(a) (“All decisions of the board shall be in writing...”); 25 PA. CODE § 1021.84 (g) (“Only a signed settlement agreement shall be binding...”).

Such situations are especially possible in the field of environmental disputes, where stakeholders may hail from a wide variety of cultural backgrounds. To a party from a culture with an oral tradition, the written word may have little or no significance. In such cases, agreements should be written and signed, but also communicated in forms appropriate to the exceptional parties.

§ 62 Award

Decisionmaking neutrals should be afforded flexibility to tailor appropriate awards.⁷¹

Comment: Such a provision should be expressed clearly when drafting a decisionmaking EDR process, because the principle of empowering the parties is more fundamental than that of providing flexibility. Ordinarily, parties should be allowed to determine by agreement what awards the neutral may or may not grant. A compromise solution may be to give the widest range of flexibility to the neutral by default, when parties are unable to agree on limitations.

§ 63 Confidentiality

Any communication made during the EDR process and relating to the dispute, and any material produced or employed in the process, should be confidential, unless independently discoverable.⁷²

Comment: The EDR process should present a “safe haven” where parties may discuss their differences without fear. However, parties should not be allowed to use the process to immunize certain information from discovery. This is once again the tension between the need to empower parties, versus the need to avoid empowering cheats. EDR processes should work to fortify, not undermine, CDR processes. The neutral should perform a gatekeeping function in this regard, and therefore must have some knowledge of what communications or materials are “independently discoverable.”

⁷¹ See N.J. ADMIN. CODE tit. 7 § 1J-9.16 (e) (“The board may grant any remedy or relief that the board deems just and equitable and within the scope of the arbitration provision of the Act”).

⁷² See 30 TEX. ADMIN. CODE § 40.9(a)-(d)

[C]ommunication relating to the subject matter made by a participant in an EDR procedure ... is confidential... Any notes or record made of an EDR procedure are confidential ... An oral communication or written material used in or made a part of an EDR procedure is admissible or discoverable only if it is admissible or discoverable independent of the procedure... If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the judge to determine, *in camera*, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order or whether the communications or materials are subject to disclosure

See also N.J. ADMIN. CODE tit. 7 § 1J-9.9 (e) (“The arbitrator shall maintain the privacy of the hearings unless the Act or any other applicable law or regulation provides to the contrary”); 25 PA. CODE §1021.84 (h) (“A party’s participation in voluntary mediation may not be used as evidence in a proceeding before the Board. Communications between the parties during the mediation period shall be regarded as offers of settlement and are neither discoverable nor admissible as evidence in a proceeding before the Board”); FLA. STAT. §373.71(8), (9) (“The mediator shall not divulge confidential information... Each party to the mediation shall maintain the confidentiality of the information received during the mediation”).

§ 64 Judicial and Administrative Review

Agreements reached between parties or decisions made by authorized decisionmaking neutrals may be final regarding courts,⁷³ but may be subject to review by administering agencies.⁷⁴

Comment: Care must be exercised when drafting such provisions, so as to achieve an effective balance between the need for ensuring harmony with controlling law on the one hand, and the need for assuring certainty in the agreement process on the other.

⁷³ See OR. ADMIN. R. 345-27-0200 (5)(y) (“Judicial Review: The decision of the arbitrator shall be final and binding. There is no judicial review of the Council’s revised final order”); N.J. ADMIN. CODE tit. 7 § 1J-9.16 (h) (“Determinations made by the board shall be final. Any action for judicial review shall be filed in the Appellate Division of the Superior Court within 30 days after the filing of the decision with the administrator”).

⁷⁴ See 25 PA. CODE § 1021.84(f) (“A settlement reached by the parties as a result of voluntary mediation shall be submitted to the Board for approval”).