


RIC 2010 Session:  
 Alternative Dispute Resolution

Billie Pirner Garde, Esq.  
 Clifford & Garde  
 Washington, D.C.  
 March 9, 2010




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Perspective on Early  
 and Post-Investigation  
 ADR

*Perspective of the Accused on why  
 ADR fails and proposed solutions*




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Experience of Audience?

- Engaged in Pre-Investigation ADR process?
- Engaged in Post-Investigation ADR process?
- Were successful at resolution?
- Investigation/Enforcement Action taken after ADR failed?
- No experience with process at all?

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### Early-ADR Issues

Status: Employee allegations of wrongdoing have been formally made against accused, but no investigation conducted.



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### Why Do Early ADR Cases Fail To Settle?

Perspective of **employee** making allegations, to a settlement without investigation:

- I will lose my ability to ensure safety concerns are addressed, and the risks won't be addressed;
- People who retaliated against me will not be held accountable for their behaviors, will treat others in a similar manner, and the risks won't be addressed;
- The settlement is inadequate to address my losses.

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### Why Do Early ADR Cases Fail To Settle? (cont'd)

Perspective of **accused** to a settlement without investigation:

- I will lose my ability to defend myself and my reputation against unfair and unfounded accusations;
- The person who accused me will not be held accountable or exposed for the unfair accusations;
- Payment of any amount of money will be an admission of guilt and I'd rather spend it defending myself.

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### Potential Solutions

- Agreement between the Staff and CI on what the substantive issues are, and how the issues are going to be addressed, as part of the initial documents and conversation between CI and Staff;
- Mediator familiarity with the NRC process to address safety concerns, and **participation** (not just assurance) of the staff on how the underlying issues are going to be addressed;
- Addition of language in the process on NRC staff affirmative obligations to address issues;

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### Potential Solutions (cont'd):

- Agreement must preserve, in a transparent way, the positions of the parties, respecting their deeply held beliefs of innocence or guilt;
- If parties must have factual resolution the process will not work and should not be attempted --- add in an opportunity for the mediator to make a preliminary determination on the appropriateness of the process to meet the needs of the parties. A failed mediation attempt is NOT better than no attempt at all, because it poisons the ability to try later.

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### When Retaliation Is The Issue

- Public health and safety cannot be compromised by illegal retaliation by management, anymore than by violations of technical specifications;
- The prohibitions against retaliatory conduct cannot be excused by a settlement agreement that does not address the offending behaviors sufficient to ensure that no "chilling effect" exists;
- The Staff focus should determine what the specific consequences of the alleged infractions, and ensure those are addressed independent of an ADR agreement.

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Post Investigation ADR

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**Why do Post-Investigation Cases Fail to Settle?**

Accused Party's Perspective:

- There is a lack of credibility of the underlying investigation facts – "It is not true..."
- The consequences of a settlement are too great for the accused party – "I am innocent, and this deal makes me look guilty..."
- When there is a lack of knowledge about what the NRC's position is actually based on.

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**Potential Solutions**

- Add a step to the process for development of a Statement of Agreed Upon Facts and Facts in Dispute – narrowing the mediation to only those facts;
- Give the mediator the Investigation Report and an opportunity for the accused party to rebut/respond to the findings as part of the mediation process;
- Make "safety as the overriding priority" the foundation of the resolution – what is the right answer to ensure safety performance?

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### The Key Question: Are You Stupid or Evil?

This credibility question **MUST** be a part of the investigation – and addressed within any resolution.



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### When Retaliation Is The Issue

- If investigation has concluded that the adverse action was informed, intentional, and public, ADR agreement must address the behaviors publicly with individual accountability. **ADR cannot provide a safe haven for offenders.**
- If investigation has concluded that the conduct was unintentional, based on ignorance or negligence, agreement must address underlying systemic issue -- usually training and/or inadequate preventive processes.
- The potential “chilling effect” consequences on others must be a part of any ADR resolution in which retaliation was substantiated.

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### Full, Fair and Final Resolution



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