

**TRANSPORTATION GOVERNMENT MEDIATION
PROGRAMS AS AN EFFECTIVE TOOL
FOR ADVOCATES, PART II:
Debunking Program Myths and Legends, Best Practices for
Advocates and Neutrals**

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As discussed in Part I of this article: *Transportation Government Mediation Programs as an Effective Tool for Advocates*, the Federal Maritime Commission and Surface Transportation Board offer an array of cost effective alternative dispute resolution ("ADR") services to assist parties in resolving small and large scale commercial and regulatory disputes. However, despite the potential appeal of these programs, participants and counsel are often apprehensive because of the perceived risks and challenges of using government-provided dispute resolution services. This part of the article will address the five most prevalent myths surrounding transportation government mediation and ombuds programs and will suggest best practices for counsel and neutrals to avoid party exposure and to maximize the benefits of using such ADR programs.

Myth #1: A government neutral presides over the dispute in an adjudicative capacity.

Disputing parties and counsel often view the government appointed neutral in one of two erroneous ways: either as a government regulator who will use his/her muscle to compel or coerce the parties into taking a specific action; or, as a government agent who will use the disclosures made by the parties in the ADR process to take an adverse agency action against the client. Counsel embracing either of these viewpoints will invariably view the ADR professional with extreme suspicion, thus chilling open communication, and undermining the resolution process, creating frustration for all parties involved.

In reality, the neutral has no authority to order parties to take any particular action. In fact, the neutral is barred from requiring parties to adopt a specific resolution to the matter.¹ The government has issued the following guidance for its ADR program managers:

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Mediation is based on the parties' ability to decide for themselves how they want to resolve their dispute. A mediation should not give the parties a decision nor oppose a solution decided upon by the parties. The mediator provides information about the process, raises issues and helps parties explore options, but does not render decisions, even if asked to do so by the parties.²

Both misperceptions underlie two complementary themes in the selection and use of a government neutral. First, parties must select a neutral who will meet their dispute resolution needs including: perceived authority, knowledge of the subject matter, independence, neutrality, experience, and style. Secondly, establishment of trust between the mediator and the parties is crucial to the success of the dispute resolution proceeding as counsel will need to be able to transmit sensitive information to the mediator in confidence to generate settlement dialogue and to propose potential settlement options. Counsel and neutrals share responsibility for ensuring that the neutral meets the needs of the parties and that a workable dispute resolution process is selected and is implemented. As such, there are actions that both counsel and neutrals can take to foster successful dispute resolution participation.

First, prior to the convening process, counsel should assess the dispute and the parties involved. Are the amount or issues in dispute simple or complex? Do the parties have an amicable relationship or is there significant lack of trust? Is the client reasonably sophisticated or will the client require significant supervision during the process? Answering such initial questions will be useful in helping counsel determine whether to refer the client to the ombuds process where a smaller, more informal, process may provide a quick disposition of the matter or whether formal mediation is required.

If the dispute is minor in terms of complexity and amount, counsel may wish to draft the client's request for ombuds services to ensure that the agency has an appropriate understanding of the issue. Counsel can also play a role in educating clients on the process and can

1 *A Guide for Federal Employee Ombuds, A Supplement to and Annotation of the Standards for the Establishment and Operations of Ombuds Offices*, issued by the American Bar Association, Coalition for Federal Ombudsment (CFO), and Federal Interagency ADR Working Group Steering Committee (May 9, 2006) at 9 available at www.adr.gov ("An Ombuds should not, nor should an entity expect or authorize an Ombuds to: (1) make, change or set aside a law, policy, or administrative decision; (2) make binding decisions or determine rights; (3) directly compel an entity or any person to implement the Ombuds' recommendations; (4) conduct an investigation that substitutes for administrative or judicial proceedings; (5) accept jurisdiction over an issue that is currently pending in a legal forum unless all parties and the presiding officer in that action explicitly consent; (6) address any issue arising under a collective bargaining agreement or which falls within the purview of any federal, state, or local labor or employment law, rule, or regulation, unless there is no collective bargaining representative and the employer specifically authorizes the ombuds to do so; or (7) act in a manner inconsistent with the grant of and limitations on the jurisdiction of the office when discharging the duties of the office of the Ombuds"); See also, *A Guide for Federal Employee Mediators, A Supplement and Annotation to the Model Standards of Conduct for Mediators*, Issued by the American Arbitration Association, the American Bar Association, and The Association for Conflict Resolution, and the Federal Interagency ADR Working Group Steering Committee (May 9, 2006) at 4 available at www.adr.gov ("A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes").

2 *The Federal ADR Program Manager's Resource Manual*, Chapter 7 at 3, available at: <http://www.adr.gov/guidance.html>.

work with the client to foster meaningful communication with the ombuds and other parties involved. However, from a practical standpoint, the benefit of the ombuds process is that it allows the client actively to engage in the process without excessive use of counsel leading to cost saving efficiencies for the client.

In the event counsel believes that the ombuds process will not effectively address the parties' needs due to complexity of the issue(s), party distrust, the amount in dispute, etc., it is often helpful to disclose this information to the agency ahead of time and specifically to request mediation services. In some instances, the agency will require the use of ombuds services before reverting to the formal mediation process. If that route is taken, counsel may take a more active role in the preliminary ombuds process in terms of communicating with the other party and the ombuds to facilitate resolution. In other cases, the agency may immediately assign a mediator who will convene the mediation.

In situations where mediation is undertaken, the convening process is crucial to the success of the mediation; when properly handled, that phase establishes trust between the mediator and parties. It is important that counsel take a proactive role by interviewing the mediator to determine his/her mediation experience, technical expertise, potential biases, objectivity, conflicts of interest, and flexibility with regard to process. This is also the time to reinforce counsel's expectations regarding confidentiality and approach to the process as well. For example, if the client's case is weak from a legal perspective, but contains strong commercial considerations, counsel may communicate that the dispute resolution model must be *facilitative* — this is, the mediator will be required to withhold his/her personal opinion regarding the legal merits of the controversy.³ If counsel determines that a particular mediator is problematic because of approach, bias, confidentiality concerns, or conflicts of interest, it is advisable that counsel request an alternate mediator prior to initiating the first joint party mediation session. However, challenges such as lack of mediation experience or technical knowledge may sometimes be cured through use of a more experienced or knowledgeable co-mediator, and counsel should make a request to the agency to ensure that such co-mediator is provided.

In addition to ferreting out prospective problems, the convening process is also an appropriate time for counsel to partner with the mediator to: posit reality checks for the opposing side; generate the foundation for a workable dispute resolution model; and, in some instances, seek assistance from the mediator in handling a particularly difficult client. For example, a mediator may be an effective tool to posit a reality check to a client with unrealistic expectations or demands. At the same time, counsel should also be prepared to address initial reality checks posed by the mediator regarding the legal merits of the case and related consequences for failure to achieve resolution through the mediation process. Usually, such reality checks, made in private, are posed for the purpose of encouraging parties to move toward problem solving and are not an adjudication of the merits of the case.

Turning to the role of the mediator in the convening process, the mediator must use that process to interview counsel and to establish trust. While the mediator should be prepared to answer questions posed by counsel, the mediator should also use the interview as an

³ This is not to imply that the use of facilitative mediation is not beneficial to those possessing strong legal facts. It should also be noted that the use of *evaluative mediation* where the neutral provides her legal analysis of the case as a starting point for negotiation should be used with great caution as a mediator's analysis may be subject to inaccuracies.

opportunity to interview counsel to gain insight regarding party perception of the dispute, history of dealings between the parties, the clients and counsels' past experiences with the use of mediation, and special needs that may arise within the context of the mediation (e.g., special timing considerations, cultural issues, commercial challenges, etc). Such information will help the mediator craft an approach to the first session that takes into account special ground rules or methodology. While mediation statements are helpful, actual discussions with the parties provide helpful insight into personalities, cultural issues, imbalances of negotiation power, and other special considerations that may not be readily apparent from a written submission.

Further, such discussions help the mediator assess the mediation skills and experience of the parties and counsel. In many instances it will be necessary for the mediator to educate both counsel and the parties regarding the mediation process prior to the first session. Such education is helpful to empower the parties to meaningfully participate in the process and to dissipate party misperceptions regarding the mediator's role in the process.

Depending on the circumstances, it may be helpful for the mediator to assign homework to the parties in preparation for mediation. For example, as part of a mediation statement or in addition to a mediation submission, a mediator may ask parties to list and address non-legal issues and interests for consideration and to generate proposed solutions to the non-legal issues. While in most cases, the generated solutions will need tweaking through the formal mediation process, the endeavor accomplishes two distinct but related goals. First, it empowers the parties to take responsibility for resolution of all aspects the dispute. Secondly, it helps the parties to begin the long-term process of moving beyond a legalistic view of the dispute to posit creative resolution options that capture all the parties' needs. This approach is particularly helpful for situations where parties wish to maintain or rebuild damaged commercial or personal relationships.

Overall, empowering parties to examine potential legal and non-legal solutions in preparation for mediation sets the stage to avoid party expectations or fear of a mediator-adjudicator. One small caveat to this rule involves situations where parties specifically request *evaluative* mediation, that is, situations where the mediator provides a legal assessment of the case as a starting point for negotiations. While an *evaluative* mediation provides a legal assessment of the case, depending on the parties' desires and needs, it may still be advisable to request that each party assess non-legal interests and solutions to find workable resolutions. For example, an evaluative mediator may conclude that a particular party's actions contravene regulations or standard commercial practices, but the parties may be able to generate a remedy that meets commercial or social needs of both parties that may not otherwise be available through strict adherence to legal rights and remedies. As such, mediators should treat evaluations of the case as mere starting points to the negotiation process rather than as a definitive adjudication of the merits of the controversy, and they should encourage parties to take a holistic approach to the dispute, as appropriate.

Myth #2: The neutral's primary responsibility is to the government, and neutrals share information with other agency bureaus or offices.

This myth has gained substantial notoriety in the field and has generated needless concern among counsel. First, it is important to note that the government has strict requirements regarding a neutral's independence from agency influence. The federal government, as a whole, requires a neutral to commit himself/herself to the ADR process and to the principles of competence, impartiality, self determination of the parties, confidentiality, and a commitment to avoid exposing parties to harm as the result of mediation.⁴ This commitment to the neutral's independence from the agency is set forth in guidance provided to federal government mediators, which requires a government mediator to recuse him/herself if he/she suffers from undue agency pressure or influence :

If a federal employee determines he/she is unable to maintain and exhibit impartiality because of agency efforts to influence inappropriately the mediator's conduct or otherwise compromise the mediator's impartiality, the mediator should withdraw from the mediation.⁵

Coupled with the requirement that the neutral be divorced from agency policy or influence, federal law bars the mediator from sharing confidential information with other agency bureaus once a dispute resolution proceeding has commenced under the general confidentiality requirements.⁶ Further, federal law bars the use of impermissible disclosures of a dispute resolution communication as evidence in future proceedings that relate to the issues in controversy with respect to which the protected confidential communication was made.⁷ Thus, the agency as well as an adverse party would be barred from the benefit of protected communication.

Despite the apparent protections afforded by federal law, a thorny issue for counsel involves the issue of whether, and when, a protected dispute resolution proceeding has commenced, as communications that are not generated as part of the proceeding are not protected. A common, practical example of unprotected information would involve a party's refusal to participate in the FMC's modified ombuds process, where the party is involved in defrauding shippers or other industry entities. The FMC has taken the position that in extreme circumstances, it may refer such matters to the FMC's Bureau of Enforcement to protect the shipping public against fraudulent activity. Generally, an aggrieved shipper, faced with the prospect of the other party's refusal to deal, will request that the matter be referred to the

4 See *supra*, note 2 at 3.

5 *A Guide for Federal Employee Mediators, A Supplement to and Annotation of the Model Standards of Conduct for Mediation*, issued by the America Bar Association, Coalition for Federal Ombudsment (CFO), and Federal Interagency ADR Working Group Steering Committee at 9. (May 9, 2006) available at <http://www.adr.gov/guidance.html>, Federal Guidance Note 1.

6 5 U.S.C. § 574.

7 5 U.S.C. § 574(c)(barring the use of prohibited disclosures in future proceedings) *See also*, 5 U.S.C. § 571 (defining a dispute resolution communication as "any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication").

FMC's Bureau of Enforcement or another federal agency, and, as such, referrals do not contravene confidentiality requirements.⁸ The underlying rationale is that due to a party's refusal to engage in the process, the information involving the dispute is not protected. Another practical example of a non-dispute resolution proceeding context is where a competitor calls FMC's CADRS to complain about a competing entity when there is no underlying dispute between the competitors. In these instances CADRS may refer the complaining individual to the appropriate agency program office.⁹

In sharp contrast with instances where a party refuses to participate in the ombuds or mediation process, once a party agrees in good faith to participate in the process, a government neutral will not share confidential information with any entity, including other individuals or offices within the involved agency. This is particularly true with respect to admissions made to a neutral regarding regulatory violations as well as other sensitive information provided to the neutral.¹⁰ It is also important to note that confidentiality is maintained even if the dispute resolution proceeding fails to resolve the matter. As such, counsel need not be concerned with disclosure or exposure with regard to the neutral.

As always, however, there are steps that both counsel and neutrals should take in working with disputing parties to preserve the integrity of sensitive information. First, parties should communicate to the agency their good faith willingness to participate in a dispute resolution proceeding. In conjunction with such communication, as previously discussed, counsel should use the convening process to address questions and concerns regarding confidentiality with the neutral. In some instances, a separate confidentiality agreement between the mediator and the parties is appropriate.

One important caveat is that while counsel is often concerned about the neutral's confidentiality, he/she often ignores the role of the other party in the dispute resolution process. For example, voluntary statements made by a party in front of all mediation or ombuds participants are not necessarily protected (especially in the absence of a separate confidentiality agreement).¹¹ As such, counsel should advise clients to avoid offering sensitive or harmful information in front of other parties. In the event that disclosure of certain information is necessary to explore resolution options, in most instances it is best to vet such information through the neutral within the context of a private caucus. The neutral will then work with the party to use the information for resolution purposes without exposing the sensitive confidential information. For example, the mediator may take confidential information and frame resolution options without ever exposing the content of the confidential disclosure. This is particularly helpful in situations where it may be difficult to ascertain another party's position or underlying interest.

8 Interview with Ronald D. Murphy, Director, Federal Maritime Commission, Office of Consumer Affairs and Dispute Resolution Services in Washington, D.C. (September 15, 2009).

9 See *supra*, note 7.

10 While federal law permits an exception to statutory confidentiality protections for court ordered testimony involving a party's admission of a "violation of law" pursuant to 5 U.S.C. § 574, federal agencies interpret this provision to mean a violation of criminal law. See *supra*, note 8. Thus, communication regarding civil regulatory violations would fall within the statutory protection.

11 One apparent exception to this rule involves regulatory protection afforded to parties in rail rate mandatory mediation sessions. See 49 C.F.R. § 1109.4(d) ("(d) The entire mediation process shall be private and confidential. No party may use any concessions made or information disclosed to either the mediator or the opposing party before the Board or in any other forum without the consent of the other party").

In addition to counsel, neutrals in ombuds and mediation proceedings also have a role in dispelling party concerns regarding disclosure of confidential information. Confidentiality requirements should be thoroughly addressed with each party within the context of the ombuds intake process or mediation convening process. Further, each session should begin with reaffirmation of confidentiality requirements. However, explanation of confidentiality is not enough. Government neutrals must take affirmative action to avoid actual or inadvertent disclosures to other agency offices and/or personnel and should avoid even the potential appearance of disclosure. For example, as a best practice, neutrals should ensure that information and notes pertaining to a particular dispute resolution are kept separate and apart from other agency record keeping. Further, neutrals may wish to destroy mediation notes and documentation upon the conclusion of a mediation and should relay this intent to the disputing parties as part of the convening process. In instances where the parties and mediator sign a confidentiality agreement, it may be prudent to include destruction of mediator's notes as part of the agreement.

In addition to the role of the neutral in avoiding appearances of undue agency influence, the agency itself also has an obligation to avoid the appearance of potential conflicts. For example, agencies should refrain from having neutrals report to a manager who also oversees a program that may be the subject matter of a particular dispute (e.g. licensing, enforcement, hearing offices, etc.) as such a structure may create a chilling effect on the use of the programs or the dissemination of information necessary to resolve a particular dispute.

Myth #3: Neutrals are limited in their ability to resolve disputes; they act as a mere go-between the parties.

Whereas some parties believe that government neutrals may spurn adverse agency action, other parties overlook government ombuds and mediation programs believing that they have little to offer. Essentially, the belief is that the ombuds or mediator is a powerless go-between who parrots arguments and that communication is more effectively achieved exclusively through the use of counsel. In many instances, this belief is premised on either a lack of understanding of the ADR process or a distrust of the skills or abilities of a particular neutral. However, regardless of rationale, such a view is short-sided and may be detrimental to the attorney's client as it fails to take into account the available, useful tools that may be implemented to advocate a party's cause.

From a practical standpoint, a government neutral has an enhanced pallet of tools that may be accessed by the parties. For example, a government neutral with the consent of the disputing parties, may be able to cut through federal and international governmental red tape in order to facilitate the release of detained cargo. As part of the resolution process, the neutral may use his/her governmental status to facilitate action between agencies to effectuate release. In many instances, such specific performance will provide a greater tangible benefit to a party than awaiting uncertain compensation in monetary compensation or damages in litigation. Further, government neutrals are trained to use different techniques to work through impasse and to empower the parties to generate resolutions that may go beyond the parties' strict legal entitlements. For example, in certain situations, release of cargo and/or compensation coupled with confidentiality, agreements to partake in future business or to deepen business relations, or other mechanisms generate greater overall satisfaction for the parties than strict monetary solutions.

Another helpful use of the neutral is to level the playing field between parties with disparate commercial or legal bargaining power. Essentially, a party can use the neutral to ensure that its voice and interests are heard and considered within the dispute resolution process whereas attempts outside the ombuds or mediation process may not otherwise be successful or cost effective. Similarly, there are additional challenges posed in disputes involving various international parties, which involve discreet cultural needs. Many neutrals are familiar with the cultural intricacies and challenges of dealing with international parties and may be helpful in navigating successful approaches to dispute resolution. Further, in response to certain cultural or personality driven needs, neutrals often are used as a buffer to "save face" in negotiating and implementing workable solutions, whereas concerns regarding community standing, professional reputation, or similar considerations may otherwise stall or undermine resolution to a particular dispute. The governmental status of the trained neutral may also assist with this endeavor, as international parties may be more apt to receive suggestions from a respected and trusted governmental source.

In addition to macro considerations, there are important micro-level uses of the neutral to achieve successful resolution. Neutrals are trained to provide certain housekeeping functions that are effective within the context of framing and resolving the dispute. For example, disputing parties often have a difficult time identifying and organizing issues for resolution purposes, and often issues are incorrectly framed due to lack of information or misinformation. Neutrals are trained to work with parties to organize the dispute and to frame the issues in a meaningful and manageable way. Through cooperation with the neutral, what may originally appear to be a stalemate issue may be reframed upon consultation with both parties into either one workable issue or, in the alternative, the neutral may be used to carve out workable issues and leave unworkable issues for another session or litigation. Such issue carving provides certain cost saving economies to parties who may ultimately limit litigation or arbitration to a more focused issue or set of issues.

Other micro functions include working with the parties to brainstorm solutions, acting as a cheerleader for the parties in moving beyond impasse, avoiding abuse of the process, and providing reality checks for solutions that are proposed by the parties. Such concepts will be discussed in greater detail further on.

In terms of best practices, counsel should be aware of the various creative tools offered by neutrals and should not hesitate to approach neutrals regarding the potential need for a particular approach. For example, if counsel is aware of sensitive cultural or personality issues, it would be advisable to raise these issues within the convening process or in private caucus if such issues become apparent within the mediation session. Similarly, neutrals are trained to identify such issues and may automatically formulate an approach as certain cues or issues are raised within the dispute resolution proceeding.

Myth #4 Neutrals "Split the baby" in terms of potential settlement agreements

There is a common misperception that ombuds and mediation services merely resolve disputes by splitting the baby, that is, by dividing the disputed amount in half. In reality, neutrals brainstorm with the parties to formulate potential workable solutions that may involve various types of relief. Resolutions are limited only by the will and imagination of the parties. As such, counsel must work with clients and the neutral to generate potential resolution options to the conflict.

Counsel bears responsibility for setting the initial framework for dispute resolution solutions with the client. This endeavor spans from the basic function of empowering clients to become effective participants in the process as well as pre-session brainstorming to bring ideas for resolution to the table. First, advocates should ensure that they educate clients regarding the process and that clients are comfortable with the workings of the process. The advocate and client must work together to develop meaningful opening statements and to formulate questions for the other side to obtain additional information and to generate progress. In addition, the client should be prepared to answer certain questions that may be raised by the other party and should understand the nuances associated with the questions asked.

Counsel and clients should also meet for a pre-session brainstorming session that identifies the clients' underlying interests, wants, needs, and risks as well as those of the opposing party(s). Counsel and the client should use this rubric to generate various potential solutions to the dispute. In framing potential options, counsel should encourage clients to "think outside the box" to satisfy commercial and other needs. In many instances, a successful mediation may allow a client to attain relief that is otherwise unattainable through an administrative or court proceeding. For example, a party may want compensation for injuries, but it may also have an interest in furthering a relationship. In other instances where a party feels particularly wronged, it may seek an apology or statement from the opposing party. In certain cases, a client may attain greater satisfaction with a slightly reduced monetary amount coupled with an apology. If the matter were to go to litigation, the parties may be subject to uncertain monetary rewards and liabilities, and the apology or other face-saving statement may not be available as a remedy. However, in working through this process, it is also important to manage the client's expectations. While mediators are trained to manage party expectations, there are times when unmovable, unreasonable, and unrealistic demands may serve further to alienate the other party and frustrate the process.

One final consideration for counsel involves preparing the client to be flexible and open to the mediator's and the other party(s)'s suggestions in formulating potential resolutions to the dispute. There are times when the mediator is privy to information that may not be available to your client. Instead of dismissing ideas outright, ask meaningful questions of the mediator and/or other party to try to explore the risks, benefits, and feasibility of such suggestions. Also, use private caucus sessions as appropriate to ferret out nuances in suggestions made.

In tandem with the initial steps, mediators must maintain a big picture assessment of the dispute and should formulate a plan that allows parties to generate early agreement and successes to build momentum for tackling the more complex issues to the dispute. For example, it is always helpful for the mediator to point out common interests, common ground, or desired rapport between the parties as a mechanism to achieve party buy-in and momentum to tackle larger issues in dispute. Similarly, the mediator may broach creative solutions with parties during the convening stage or in private caucus to assist in planting seeds for party suggestions or proposals in mediation.

In terms of formulating resolution options, mediators should work with parties to take a holistic view of the dispute in formulating proposals. For example, it is very easy for parties to become bogged down with the financial value of a case where in certain circumstances an apology or commitment to do business in the future in itself will resolve a dispute. In other scenarios, a reduced financial offer coupled with a promise of confidentiality or other commitment will successfully resolve a matter. Alternatively, parties may turn to specific performance that may not be available in administrative action, such as release of a container or completing shipping services.

Myth #5: Agreements Made in Mediation are Unenforceable.

Counsel often disparage mediation as a waste of time believing that agreements made in mediation are unenforceable by the agency. While it is true that an agency will not enforce the terms of a mediation settlement agreement, it does not mean that parties are barred from enforcement mechanisms.

As a general rule, parties should always reduce agreements, even interim agreements made within the mediation process, to writing. Such written agreements should: be jointly drafted by counsel; should reflect the terms and conditions of the settlement agreement; and, provide liquidated damages and equitable relief clauses to promote compliance with the terms of the agreement.

One helpful suggestion for counsel is to ensure that there is boilerplate on hand that may be crafted by the parties into an Agreement in Principle for use until a final agreement is achieved, or in instances involving a simple matter, a boilerplate may be adequate for use as a final agreement.

In drafting, modifying, and executing any settlement instrument, counsel and the mediator should ensure that each signatory has the requisite authority to bind the parties and to perform under the terms of the settlement agreement. Equally important, it is helpful for the mediator to walk through the terms with the parties in open session to pose reality checks, to ensure that all parties understand the agreement and the risks associated with performance, and to achieve final buy-in for the resolution. As a final consideration, the mediator should provide reality checks regarding potential effects regarding the need to obtain authority for certain action from third parties who are unrepresented at the settlement table.

Conclusion

Counsel and neutrals share the important role of educating and empowering parties participating in government-sponsored ADR proceedings. However, the ability successfully to represent and guide parties through the dispute resolution process hinges upon the trust developed between the parties, counsel, and the neutral. In this regard, counsel and neutrals must begin this process prior to the advent of a dispute. Counsel must, as appropriate, demonstrate support for the ADR option and educate clients regarding ADR options early on in the client-counseling process. In addition to the demonstrative support of counsel, government neutrals have an important responsibility to the regulated industries and parties which they serve. In order to further the support of and use of government sponsored programs, neutrals must also serve as effective advocates for the government programs that they serve by providing educational outreach programs that demonstrate the neutrals' competency, skills, neutrality, and trustworthiness.
