

 Council on Licensing, Enforcement and Regulation

 **DENVER**  
2009 Annual Conference  
September 10 - 12

Session Title: **Alternative Dispute Resolution**

Presenters: **Kenneth Julien**, Director  
Office of Expedited Settlement  
Colorado Dept. of Regulatory Agencies

**Ilene Wolf Moore**  
Office of Attorney General  
First Assistant Attorney General

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**Purpose of ESP**



**To expedite the resolution of disciplinary actions and minimize the associated costs of resolving these actions.**

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**History of ESP**

- In 1995, the Colorado Legislature mandated that the Department of Regulatory Agencies and Department of Law explore alternatives to traditional means of delivering legal services in disciplinary actions.
- During the same year, the Board of Nursing responded to the mandate by designing and implementing a pilot project called the Alternative Complaint Resolution.

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### BON Success

- The Nursing Board limited the scope of Alternative Complaint Resolution to cases that involved substandard practice, felony convictions and parallel actions with other State Boards of Nursing.
- From October 1995 to January 1998, approximately 250 Disciplinary actions were processed through BON's ACR with a settlement rate of 70%.

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### It's Own Office

- The Office of Expedited Settlement was created in the Fall of 2004.
- From 2004 through 2007, ESP continued to grow. In its early stages of development, it handled select cases from various boards.

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### Statistics

- **FY 07**
  - Completed 779 cases
  - Settled 618 cases
  - Settlement Rate 79%
- **FYo8**
  - Completed 786 cases
  - Settled 625 cases
  - Settlement Rate 79%

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- In 2008, the various boards and programs within the Division of Registrations began referring all disciplinary cases to ESP .

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**Regulated Professions  
Business and Technical Boards**

- Accountancy
- Architects, Engineers and Land Surveyors
- Athletic Agents and Trainers
- Barber and Cosmetology
- Boxing
- Athletic Agents and Trainers
- Landscape Architects
- Outfitters
- Passenger tramway

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**Regulated Professions  
Health Boards**

- Medical
- Nursing
- Dental
- Chiropractics
- Pharmacy
- Nursing Home Administration
- Veterinary Medicine

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**Regulated Professions Allied Health Programs**

- Optometric
- Podiatry
- Midwives
- Hearing Aid Distributors
- Acupuncture
- Massage Therapists
- Respiratory, Physical and Occupational Therapists

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**Regulated Professions Mental Health Boards**

- Certified Addiction Counselors
- Licensed Family Counselors
- Marriage and Family Therapists
- Psychology
- Social Work
- Grievance

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**Continued Growth**

- From July 1, 2008 through June 30, 2009
- ESP completed 798 cases
- Settled 631 cases
- Settlement rate of 79%
- Cost avoided \$473,250

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### General Process

- After the Board or Director determines reasonable cause exists to believe that a violation has occurred and identifies the statutory subsection, a member of ESP shall attempt to settle the case in accordance to the Board's or Director's initial guidance.

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- If the Respondent (licensee or applicant) accepts the disciplinary sanction proposed by the Board or Director, ESP staff will draft a stipulation to resolve the case.
- If Respondent submits a counteroffer and it is accepted by the Board or Director, ESP staff will draft a stipulation with the modified terms.
- For those actions that do not settle, the case is forwarded to the Office of the Attorney General for formal disciplinary action.

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### Types of cases resolved by stipulation

- Suspension
- Probation
- Practice monitoring
- Continuing education
- Fines
- Relinquishment
- Cease Practice Agreements

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### Board Maintains Control

- ESP does not practice law and does not negotiate cases or provide legal advice
- Board guidance or disciplinary sanction is transmitted to ESP via a "transmittal form"
- ESP staff attendance at board meetings
  - Better understanding of process
  - Report on status of cases in ESP office

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### Formal Guidelines

- Accountable to Joint Budget Committee of the Colorado General Assembly
- Accountable to the Office of the State Auditor
- ESP Operating and Procedures Manual
- Statistical tracking
  - 90 day deadlines
  - Settlement rates

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### Advantages to Respondent

- Opportunity to discuss matter directly with agency before referral to OAG
- Informal approach
- More immediate resolution for respondent, may be less anxiety producing, and can save time, money and resources

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### Emergent Issues

- 5 minute referral
  - Case is handled by ESP Director
  - Resolved within 2 business days
  - If not, then forwarded to AG
- Statutory and other issues
  - Immediate to protect the health, safety and welfare
  - Summary suspensions
  - Revocations

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### Role of OAG

- In Colorado, the OAG is counsel for state agencies as designated by statute
- OAG is supportive of client's desire to resolve matters without resorting to litigation
- Continuous collaboration between ESP and AGO

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### General Duties of OAG with Respect to ESP

- Facilitate reasonable resolutions through ESP and assist to prevent unauthorized practice of law
- Provide templates for ESP staff use
- Attorneys work with ESP to assist in drafting admissions for more complex cases and review substantial changes to template language to ensure document is legally sufficient and defensible.

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**Duties of OAG at Meetings with Respect to ESP**

- Participate in discussions with ESP, analyze proof issues, provide counsel on counteroffers
- Assist board in articulating basis for discipline, statutory violation, rule violation and required admissions
- Attorney must be mindful of privilege issues to protect client

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**Cases referred to OAG**

- Cases not appropriate for ESP
  - Legal requirements in statute or rule that require immediate filing in court
  - Companion cases already referred to the OAG for legal action
  - Other cases of special circumstances

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**OAG support of ESP**

- Process allows attorneys to focus on legal issues and more complex cases
- Continuous dialogue between ESP and OAG to ensure process is working, specific program issues are being resolved and each agency is performing with maximum efficiency

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## Success

- **Rico Munn**, Executive Director of DORA
- **Rosemary McCool**, Director of Registrations
- **John Suthers**, Attorney General

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## Contact Information

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## Contact Information

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- Office of the Attorney General
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**Session Title: Alternative Dispute Resolution**

  
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Presenters: O.C. Chet Robbins  
Executive Director, Texas Funeral Service Commission.  
Past President, International Conference of Funeral Service Examining Boards

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**What is ADR?**

- Alternative dispute resolution generally refers to a closed, confidential proceeding in which a neutral third party facilitates the resolution of a dispute.
- ADR may be used in a variety of disputes a few of which include civil law suits, business and contract disputes, employment grievances, peer review in schools, and administrative disputes before government bodies.

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**What Types of ADR exist?**

- ADR refers to various forms of dispute resolution methods. The common form which is binding on the parties is arbitration under the Texas General Arbitration Act or the U.S. Arbitration Act.
- Non-binding forms include mediation, mini-trial, moderated settlement conference, nonbinding arbitration and summary jury trial. Other types of nonbinding ADR procedures can be created by agreement of parties.

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### What is the difference between mediation and arbitration?

- Mediation is the ADR method used whereby a neutral third party (the mediator) directs and facilitates the mediation process. The mediator is not a decision-maker and has no opinion or interest in the dispute or its outcome.
- Arbitration is the ADR method used whereby the neutral third party (the arbitrator) listens to brief presentations of the cases of the respective "sides" to the dispute and renders a decision.

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### What are the benefits of ADR?

- ADR processes tend to be informal, quick, economical, flexible and less traumatic than more formal procedures.
- Because parties generally participate more directly in resolving the disputes, ADR generally yields practical and creative agreements and more satisfied clients.

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### If 90% of cases settle prior to trial, why the need for ADR?

- Parties tend to wait until shortly before trial to commence serious negotiations. Earlier settlements save time, money, and emotional expenditure.
- The ADR process can also aid attorneys seeking an appropriate way to illustrate for clients the practical possibilities and limitations of a case.
- ADR also provides attorneys the opportunity to advocate a process that is likely to preserve ongoing relationships between parties and lead to creative and practical solutions.

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**Why is it that ADR tends to result in voluntary settlements?**

- Under the 1987 Texas ADR Act, ADR is a confidential and non adversarial process for constructive negotiations.
- The ADR neutral, acting as an agent of reality, facilitates negotiations by ensuring that all points of view will be considered, establishing other procedures which free attorneys and clients to focus on mutually acceptable settlements.

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**How do you obtain participation of the other side in an ADR procedure?**

- The appearance of the other side for an ADR procedure can be obtained by personal request or by court order subject to the right of the other side to make timely and reasonable objection.
- The actual participation in good faith at an ADR proceeding is essentially at the discretion of the other side.

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**What if a party is unable to pay its share of ADR costs?**

- Many ADR neutrals accept some pro bono cases; others will adjust their fees on a sliding scale or on a case-by-case basis.
- Dispute Resolution Centers are available in many communities to provide ADR services at minimal cost.
- Some government agencies provide staff neutrals, at no cost, for cases pending before the agency.

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**What cases are not appropriate for ADR?**

- Most civil disputes and administrative law disputes are appropriate for referral to an ADR proceeding.
- Cases involving a gross disparity in bargaining power (such as cases involving spouse or child abuse) should not attempt an ADR procedure.
- Cases involving questions of constitutional rights or other test cases may not be suitable for ADR.

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**Does a request for or participation in an ADR hearing imply weakness?**

- No. A settlement initiative based on careful research of the case is generally considered a strong move.
- No adverse inference whatsoever can be drawn from participation in a court-ordered ADR proceeding under the ADR Act.

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**What if the other side participates in an ADR procedure but does not make any offer?**

- Under the ADR Act, there is no requirement that ADR participants make any offer and there are no consequences for not doing so.

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- What Training is Required to Become a Mediator?
- What is the Salary of a Mediator?

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**LIABILITY**

- Are mediators Liable?
- Are rules established at mediation?

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**EXAMPLES OF CASES SETTLED AT MEDIATION**

1. Cremation Case
2. Legislative Representative and Death Certificates
3. Overcharged Consumer  
\$1300 (refund) All Violations Stand
4. Funeral Director and Alcohol

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<h3>Contact Information</h3> <ul style="list-style-type: none"><li>• O.C. "Chet" Robbins Executive Director Texas Funeral Service Commission.</li><li>• <a href="mailto:crob@tfsc.state.tx.us">crob@tfsc.state.tx.us</a></li><li>• Telephone: (512)936-2474</li><li>• Toll Free: 1-888-667-4881</li><li>• Fax: (512)479-5064</li></ul>		

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