Program D
"Convening" an ADR Process

Program Overview

This educational program is designed to explore the many purposes for which lawyers and clients can use a "convening conference" with a neutral to select or design an ADR process that best fits the needs and circumstances of a particular case – and then to take the steps, in advance of the ADR session, that promise to maximize its productivity.
In a convening conference lawyers (and, in appropriate cases, clients) can consider, with the guidance of an experienced neutral, the pros and cons of various forms of ADR: facilitative mediation, evaluative mediation, early neutral evaluation, arbitration (binding or non-binding), summary jury or court trials, mini-trials or settlement conferences. The host of the convening conference (which can be held by phone, video conference or in person) can help the parties select the most appropriate process model – or can help them fashion a hybrid or unique process protocol that incorporates elements or concepts from one or more of the well-established forms of ADR.

After helping the parties select or design a process, the neutral can help them identify and plan to complete the tasks that need to be done in advance of the ADR session in order to make full use of its potential. As part of this process, the neutral can make sure that everyone understands what the process will consist of, what rules (e.g., re confidentiality) will apply, who is expected to attend and what kinds of authority must be secured in advance. During the convening conference the neutral also can help the participants determine whether settlement proposals might include some non-monetary components and, if so, make sure the parties do the homework necessary to determine which kinds of non-monetary terms could be accessible and what the costs and benefits of each of those terms might be (e.g., reinstatement of an employee in a former or a new position, components of a retirement package, terms of a new joint venture, content of a joint press release, terms on which a license or an assignment of rights might be offered, differing tax consequences of different ways of moving value from one party to another, etc.).

The parties also can use a convening conference to identify and schedule any additional discovery, or any focused motion practice, that should be completed before the ADR session. In addition, they can decide what information they should provide the neutral prior to the ADR event and whether it would advance the purposes of the ADR process if the neutral had *ex parte* conversations or communications with the parties before the main session.

The educational program that is built around this topic can demonstrate the richness of the convening opportunity and can open participants to thinking creatively about how they might use it to assist lawyers and the courts to better serve litigants. Because the issues related to convening an ADR process are too numerous and broad-ranging to address adequately in a short program, the program organizers must limit the issues or

allocate more time than the traditional 90-minute format. This program module provides three options to address this issue.

Program Objectives

1. To learn more about convening – selecting, setting up and structuring – an ADR process
2. To explore the questions raised by the convening process related to initiating ADR, designing an ADR process, confidentiality and relationship issues
3. To learn the views of experienced plaintiff, defense lawyers and mediators on these questions
4. To have an opportunity to explore convening issues in specific cases described by the participants

Time for the Program

Option One (120-minute program)

Activity	Time
Moderator's introductory comments	5 minutes
Panelists' presentation of the convening issues	15 minutes
Demonstration of convening process	30 minutes
Small group discussions	45 minutes
Small group reports & discussion	20 minutes
Concluding remarks	5 minutes
Total time	**120 minutes**

Option Two (90-minute program, substantially narrowing the issues)

Activity	Time
Moderator's introductory comments	5 minutes
Panelists' presentation of the convening issues	10 minutes
Demonstration of convening process	20 minutes
Small group discussions	35 minutes
Small group reports & discussion	15 minutes
Concluding remarks	5 minutes
Total time	**90 minutes**

Option Three (90-minute program, without discussion groups)

Activity	Time
Moderator's introductory comments	5 minutes
Panelists' presentation of the convening issues	15 minutes
Demonstration of convening process	40 minutes
Questions and responses	15 minutes
Panelists' concluding remarks	10 minutes
Moderator's concluding remarks	5 minutes
Total time	**90 minutes**

Program Presenters

1. **Moderator**: The moderator should have experience with court-related ADR issues, perhaps as an administrator or judge who is involved in the administration of the court's ADR program or as a neutral in the court's ADR program.

2. **Panelists:** The panel is comprised of three members: a defense lawyer and a plaintiffs' lawyer, who practice in the district's courts, and a mediator who mediates in the district's ADR program or has otherwise mediated district court cases. The panelists make very brief introductory presentations to frame the program's issues; they demonstrate a convening process; and they present concluding remarks.

Room Set-up and Seating: The moderator and panelists should sit on a dais or stage in order to be visible to participants. The participants will form small (4-5 person) discussion groups. They should be seated theater style in chairs they can move or at round tables that seat 8-10, so that they can easily move their chairs to form small groups. If the program organizers eliminate the small discussion groups, the participants can sit theater style.

Instructions for the Program: The abundance of convening-related issues requires the program organizers to make careful choices in the planning stage. They should offer a longer, two-hour program or strictly limit the issues for the program's focus. Any attempt to cover all of the possible convening issues will result in the superficial treatment of the issues. (For a list of convening-related issues, see the *"Program Notes for Moderator and Panelists,"* included at the end of this program module.)

1. Options One and Two (with small group discussions)

a. **Moderator's Introductory Comments (5 minutes):** The program opens with the moderator's presentation of an overview of the program and the program objectives. The moderator then introduces the panelists and gives introductory comments about the convening issues.

b. **Panelists' Presentation of the Convening Issues (15 minutes, 120-minute program/10 minutes, 90-minute program):** Panel members make brief presentations in which they give their perspectives on issues that typically arise in convening an ADR process. The program organizers may encourage the panelists either to discuss the same issues from their different perspectives (this approach is specially recommended for the 90-minute program) or raise different issues. They should focus on issues that are the most relevant to the district's programs and litigation profile, as determined by the program organizers.

c. Role Play Demonstration of an ADR Convening Conference (30 minutes, 120-minute program/20 minutes, 90-minute program): Panelists role play an ADR convening conference facilitated by a mediator. The purpose of the

demonstration is to portray convening-related issues that the panelists raised in their presentations, other issues identified in the "Program Notes for Moderator and Panelists" (included at the end of this program module) or any other issues the program organizers determine to be most significant to the district's judges and lawyers. The panelists may create their own scenario for the demonstration or use the "Demonstration Role Play Instructions" (included at the end of this program module).

d. **Small Group Discussions (45 minutes, 120-minute program/35 minutes, 90-minute program)**: The moderator introduces the small group discussions by explaining that the purpose of the discussions is to allow participants to explore convening-related issues, to share their experience and knowledge concerning the convening of ADR processes in the district and to think creatively about convening. The moderator instructs participants in the small group activity, as follows:

- Divide into groups of 4-5 to discuss issues to enhance the learning opportunity of this program.
- Strive for a diverse group: plaintiff and defense lawyers, judges, court administrative staff and, especially, mediators, who can provide the mediator perspective on convening issues.
- Select a scribe, who will take notes of ideas and insights from the group for presentation back to the large group.
- Select a group member to facilitate the discussion and keep time.
- The attorneys in the group will present brief descriptions of cases that have been or could be litigated in the district or will identify specific issues or problems they have encountered when trying to choose or prepare for an ADR process. The cases may be hypothetical or real. The group will then brainstorm ADR convening issues regarding these cases.
- Decide, as a group, how the group will use the time allotted for this exercise. One choice is to use your time to focus more deeply on one or two cases. Another choice is to divide the time among all the attorneys who choose to volunteer a case for the group's consideration.
- Once the group has decided upon its approach, the facilitator allocates the time accordingly, and participants begin the discussion.

After the moderator gives the instructions, the moderator and facilitators distribute the "Participant Instructions for Small Group Discussions" (provided with this program module) to each table and then join a small group to participate in discussions or move from group to group to observe or provide guidance where it is needed.

Program organizers should provide adequate supplies for recording the small group discussions, ideally, easels with pads and markers or, at least, pads and pens for taking notes.

e. **Debrief Small Group Discussions and Respond to Questions (20 minutes, 120-minute program/15 minutes, 90-minute program)**: The panelists and the moderator return to the dais. The moderator invites the scribes from each small group to present a brief report in which they describe a case the group discussed – and summarize the ideas and insights the group members developed as they explored convening-related issues. Following the reports, the moderator invites the panelists and participants to comment or pose questions to any of the scribes or small groups.

f. **Concluding Remarks (5 minutes):** The moderator thanks the panelists and participants and states what he or she believes to have been the value of the program.

2. Option Three (without Small Group Discussions) (90 minutes)

a. **Moderator's Introductory Comments (5 minutes):** Same as Options One and Two

b. **Panelists' Presentation of the Convening Issues (15 minutes):** Same as Option One

c. **Role Play Demonstration of an ADR Convening Conference (40 minutes):** Same as Options One and Two, except for the time allotted

d. **Discussions and Questions (15 minutes):** The moderator invites participants to comment or pose questions to any of the panelists.

e. **Panelists' Concluding Remarks (10 minutes):** The panelists each briefly comment on the program and encourage participants to continue to think about how they might use the convening process more creatively and effectively in their district court cases.

f. **Concluding Remarks (5 minutes):** Same as Options One and Two

<u>Written Materials</u>

1. Program Notes for the Moderator and Panelists
2. Participant Instructions for Small Group Discussions
3. Demonstration Role Play Instructions

Publications

1. Cohen, Judy, "Convening for Enhanced Self-Determination and Access to the Process," 18 The Texas Mediator 2 (Summer 2003).
2. Porter, Patricia, "Maximizing Effective Participation," 21 Alternatives 6 (June 2003).

" Convening" an ADR Process
Program Notes for the Moderator and Panelists

This section identifies many of the issues that might arise in connection with "convening" an ADR process. The list will help the program organizers plan the program and will help the moderator and panelists prepare their presentations.

Initiating an ADR process

1. What are the primary goals or purposes the parties will be using the ADR process to pursue? What are the parties' most important for the ADR session?
2. What type of ADR process is most appropriate for this case – non-binding arbitration, mediation (and what approach, e.g., facilitative or evaluative), early neutral evaluation, a settlement conference, summary jury or bench trial, mini-trial or med-arb?
3. What can lawyers do to address the fear that if they raise the topic of ADR first, their opponents will take it as a sign of weakness (fear of being the first to blink)?
4. What are common sources of reluctance and resistance to discussing or even considering ADR? How can opposing lawyers, judges or mediators help overcome a lawyer's or party's resistance to trying an ADR process?
5. When should the ADR process be held? What are the timing issues?
6. If mediation is chosen, what kind of mediator will be best for the case, taking into consideration the mediator's approach to mediation and personal style? Do you have a particular mediator in mind?

Designing an ADR process

1. Should the ADR process be focused on only some of the issues, seek to resolve the entire case, or seek to resolve related cases?
2. Could the convening process, with the help of a neutral, be used to plan the case development process or to determine how to integrate or coordinate the ADR process with other aspects of pretrial preparation?
3. How can parties work together collaboratively with a mediator to design the ADR process?
4. Should the ADR process consist only of joint sessions or should it include private caucuses?
5. If the entire case cannot be resolved in an ADR process, can ADR be used to narrow the issues for trial?
6. Are strategic issues a consideration, including
   Litigation strategies?
   - Potential impact on or from other related or similar cases?
   - Public policy issues that extend beyond the litigation that may be better addressed within an ADR process?
   - Business strategies that extend beyond the litigation?
   - Leverage for some other purpose?
7. What kind of discovery plan should be pursued?

8. Will parties give the mediator a mediation statement? If so, what will it cover? Will it be confidential to the mediator or shared?
9. Who will attend the mediation? Who must be present for the case to settle? How can we assure that persons with the requisite authority will participate?
10. Are there special issues, such as those involving a public entity, which must be considered in convening an ADR process?
11. Would the purposes of using ADR in this case be advanced if expert witnesses or consultants participated?

Confidentiality and relationships

1. How do federal and state law, and the court's local rules, address confidentiality? Which confidentiality law will control?
2. What are the parties' needs regarding confidentiality:
    - In terms of evidentiary protections for the mediation discussions and any documents prepared for mediation?
    - In terms of the confidentiality of separate caucuses?
    - In terms of privacy or secrecy of the discussions in mediation?
3. Does the case present special confidentiality issues?
4. Is a governmental entity a party, and, if so, do sunshine laws or open meeting provisions apply?
5. Is the case high profile, and are parties concerned about publicity?
6. Does the ADR process that would be used raise concerns or issues about preserving the confidentiality of communications between lawyers and clients, or about preserving work product protections?
7. Are there issues related to the parties' or the lawyers' relationships that are important to consider in designing the ADR the process, including the following:
    - Are the parties presently in a continuing relationship, and are they interested in repairing it?
    - Were the parties previously in a close or successful relationship, and are they interested in restoring/repairing it?
    - Is there high conflict between parties?
    - Is there high conflict between lawyers?
    - Do the lawyer and client have communication problems??

"Convening" an ADR Process
Participant Instructions for Small Group Discussions

Set-up

1. Divide into groups of 4-5 to discuss issues related to convening an ADR session. Strive for a diverse group: plaintiff and defense lawyers, judges, court administrative staff and, especially, mediators.
2. Select a scribe, who will take notes of ideas and insights from the group for presentation back to the large group.
3. Select a group member to facilitate and keep time.

Description of the case: Attorneys in the group: Present brief descriptions of several cases that you have or are now litigating in the district (or hypothetical cases, if you prefer).

Discussion of ADR convening-related issues

1. Decide, as a group, how the group will use the time allotted for this exercise. One choice is to use your time to focus more deeply on one or two cases. Another choice is to divide the time among all the attorneys who choose to volunteer a case for the group's consideration.
2. Timekeeper: allocate time according to the group's decision.
3. Decide the order in which the group will discuss these cases.
4. Identify and discuss ADR convening-related issues raised in the cases.

Summary and preparation of the scribe: In the last few minutes, discuss which insights and ideas the group would like the scribe to convey to the large group during the report and discussion period.

"Convening" an ADR Process
Demonstration Role Play Instructions

Mediator's Role

You are to act as mediator in a brief demonstration role play of an ADR convening conference. The purpose of the demonstration is to explore the advantages of giving serious attention to the process of "convening" and to help the audience appreciate the contributions that a neutral can make through a "convening conference."

You have been hired by the attorneys to assist them in sorting through their issues regarding the potential use of ADR for their case and, if they choose to use ADR, how to design an appropriate process. They may, or may not, ask you to consider mediating the case following this convening conference. You are an experienced former civil litigator, with more experience on the plaintiffs' side but quite a few years in the civil division of the State Attorney General's office. You have been doing full-time neutral work for 15 years. Your style relies heavily on building relationships with attorneys and parties and facilitating their conversations. You will occasionally give parties an evaluation of the case, but only in caucus and as a last resort to help settle a case that you believe should settle. Contrary to the approach that begins with a brief joint session followed by separate caucuses, you rely on joint sessions to build the relationships necessary to see the case as a joint problem to be solved. Because of your extensive civil litigation experience, you are often called upon to help design ADR processes and particularly discovery plans.

The case arises under the Federal Tort Claims Act. The plaintiffs are a young couple whose baby was born with serious birth defects and subsequently died. The husband has been a commercial fisherman all his life, having begun working at a young age with his father who was also a commercial fisherman. Both parents took extensive blood tests following the birth in an effort to determine what may have caused the birth defects. These tests showed extremely high levels of mercury in their blood. They allege that the defendant, the US Environmental Protection Agency, ignored scientific evidence and agency regulatory procedures and protocols in setting limits on mercury pollution that would line up with the Bush administration's free-market approaches to power plant pollution.

Plaintiffs also allege that EPA staff members were instructed by administrators, all of whom were political appointees to set modest limits on mercury pollution and then to work backward from those limits to justify a regulatory proposal. Mercury is a toxic metal released as a byproduct by coal-burning power plants and other industries, and it is known to have a range of harmful health effects, especially on young children and pregnant women. You had a brief telephone discussion with the plaintiffs' attorney and the Justice Department attorney assigned to the case, in which you received a brief overview of the case and scheduled this design conference.

"Convening" an ADR Process
Demonstration Role Play Instructions

Plaintiffs' Attorney Role

You are to act as plaintiffs' attorney in a brief demonstration role play of an ADR convening conference. The purpose of the demonstration is to explore the advantages of giving serious attention to the process of "convening" and to help the audience appreciate the contributions that a neutral can make through a "convening conference."

The case arises under the Federal Tort Claims Act. Your client is a young couple whose baby was born with serious birth defects and subsequently died. The husband has been a commercial fisherman all his life, having begun working at a young age with his father who was also a commercial fisherman. Both parents took extensive blood tests following the birth in an effort to determine what may have caused the birth defects. These tests showed extremely high levels of mercury in their blood. Your complaint alleges that the US Environmental Protection Agency ignored scientific evidence and agency regulatory procedures and protocols in setting limits on mercury pollution that would line up with the Bush administration's free-market approaches to power plant pollution. Your complaint also alleges that EPA staff members were instructed by administrators, all of whom were political appointees, to set modest limits on mercury pollution and then to work backward from those limits to justify a regulatory proposal. Mercury is a toxic metal released as a byproduct by coal-burning power plants and other industries, and it is known to have a range of harmful health effects, especially on young children and pregnant women.

You and the Justice Department attorney assigned to the case have hired a mediator to assist you in sorting through the issues regarding the potential use of ADR for the case. The Justice Department attorney asked you to agree to this procedure following a deposition of your clients, in which they were superb. If you and the Justice Department attorney decide to use some ADR procedures, you will also consider how to choose a mediator and how to design an appropriate process. You may, or may not, ask the mediator to consider mediating the entire dispute following this convening conference.

You have had a brief telephone discussion with the mediator and the Justice Department attorney assigned to the case to give the mediator a brief overview of the case and schedule this conference. You are very interested in pursuing similar cases with other clients, seeing mercury poisoning as a potential hot spot for innovative tort litigation that is important to you as a strong environmentalist. You believe, however, that the Justice Department may be willing to settle this particular case early because of the severity of the damages to your very strong and attractive clients. You believe the government may see the case as a political landmine. You are particularly concerned that your case will involve difficult and controversial scientific evidence as well as testimony from an EPA staff member who resigned in protest when the mercury rules were issued.

You are interested in considering whether it is appropriate to include your scientific expert in the ADR process.

Your clients are, understandably, extremely emotionally distraught by what happened, and you may have difficulty convincing them to settle, particularly the husband who believes that his family's historical livelihood is threatened by mercury pollution and wants to launch a crusade around the issue. You believe that the case has strong jury appeal, given your clients and their loss; however, the scientific proof regarding causality is extremely complex and may not survive a motion for directed verdict. In addition, your clients' hospital bills are horrendous, and they desperately need money.

You are torn as to whether it is more important to mediate the case with a mediator who has highly developed relational skills to work with your clients or whether to seek an early neutral evaluation process with an experienced litigator or retired judge to educate your clients about the risks of proceeding with the case. If you decide to mediate rather than have an early neutral evaluation, you would like the mediation to come only after you have had an opportunity to develop your case in discovery. You believe that your case will only get stronger through discovery and that you may acquire information that will be valuable in future similar cases. Thus, your main reason for agreeing to a conference at this early stage is to use the conference to create an expedited discovery plan. You believe the government lawyers are giving settlement signals because they do not want you to have access to some potentially explosive information that could lead to a rash of similar lawsuits.

"Convening" an ADR Process
Demonstration Role Play Instructions

Justice Department Attorney Role

You are to act as defense attorney in a brief demonstration role play of an ADR convening conference. The purpose of the demonstration is to explore the advantages of giving serious attention to the process of "convening" and to help the audience appreciate the contributions that a neutral can make through a "convening conference."

The case arises under the Federal Tort Claims Act, and you are in the civil division of the Justice Department. The plaintiffs are a young couple whose baby was born with serious birth defects and subsequently died. The husband has been a commercial fisherman all his life, having begun working at a young age with his father who was also a commercial fisherman. Both parents took extensive blood tests following the birth in an effort to determine what may have caused the birth defects. These tests showed extremely high levels of mercury in their blood. They allege that the US Environmental Protection Agency ignored scientific evidence and agency regulatory procedures and protocols in setting limits on mercury pollution that would line up with the Bush administration's free-market approaches to power plant pollution.

Plaintiffs allege that EPA staff members were instructed by administrators, all of whom were political appointees, to set modest limits on mercury pollution and then to work backward from those limits to justify a regulatory proposal. Mercury is a toxic metal released as a byproduct by coal-burning power plants and other industries, and it is known to have a range of harmful health effects, especially on young children and pregnant women.

You have asked the plaintiffs' attorney to consider an early ADR process for the case. You made this request soon after you deposed the plaintiffs. You were extremely impressed with them as potentially powerful witnesses with strong jury appeal. In addition, the damages could be very large because of the death of their baby and the fact that their mercury poisoning likely means they cannot safely have children. You were surprised that your superiors in the Justice Department responded quickly and positively to your memo alerting them to the danger of the case, even though the science is quite controversial. They instructed you to do everything reasonably possible to settle the case as quickly as possible. You surmise that this means there are some troubling documents that could surface during discovery and might lead to political problems for the Bush Administration and a rash of similar lawsuits.

You know from previous experience with the plaintiffs' attorney that s/he is likely very interested in pursuing similar cases with other clients and, no doubt, sees mercury poisoning as a potential hot spot for innovative tort litigation. You and the plaintiffs' attorney agreed to hire a mediator to assist in sorting through the issues regarding the potential use of ADR for the case. If you and the plaintiffs' attorney decide to use some ADR procedures, you will also consider how to choose a mediator and how to design an

appropriate process. You also are interested in considering whether it is appropriate to include a scientific expert from EPA in the ADR process. You may, or may not, ask the mediator to consider mediating the case, following this convening conference. You have had a brief telephone discussion with the mediator and the plaintiffs' attorney to give the mediator a brief overview of the case and to schedule this conference.

You would like to see the case go through an early neutral evaluation that could educate and discourage the plaintiffs regarding the risks of trial and the shakiness of the underlying science. You are hopeful that if that happens, the case will settle. Your biggest concern, however, is to settle the case before discovery. You know that to please your superiors you must do everything possible to limit the discovery process, including asserting executive privilege and other evidentiary objections regarding the process the agency used to set the mercury levels.

"Convening" an ADR Process
Feedback Form

After you have reviewed this module or used it to plan and/or present a program, we would appreciate your feedback. Please fax (415-556-6179) or mail this completed form to Robin Donoghue, Asst. Circuit Executive – Legal Affairs, Office of the Circuit Executive, 95 Seventh Street, Suite 429, San Francisco, California 94103-1526. Please feel free to attach additional pages.

Name: _____

Tel. no.: _____ E-mail address: _____

Location of the program: _____

1. How did you use the module? If you presented a program, was the program well received?

   What factors likely account for its success or lack of success?

   - Presenters? Please explain.
   - Content? Please explain.
   - Format? Please explain.

2. How can we improve the module?

3. How can we improve the Program Guide?

4. Please suggest additional issues relating to convening an ADR process that we might add to this module?

5. Was the demonstration role play successful? Do you have any suggestions for improving the role play?

6. Please provide suggestions for future ADR program modules.