

REPORT FOR THE PRESIDENT

ON

THE USE AND RESULTS OF ALTERNATIVE  
DISPUTE RESOLUTION IN THE EXECUTIVE  
BRANCH OF THE FEDERAL GOVERNMENT

*Giving the American People*

*Better Results and More Value*

April 2007

A Collaborative Project of Representatives From:  
-Federal Interagency Alternative Dispute Resolution Working Group Sections  
-Federal Interagency Alternative Dispute Resolution Working Group Steering Committee  
-Agencies in the Executive Branch of the Federal Government





4. Department of Education .....	35
5. Department of Energy .....	36
6. Department of Health and Human Services .....	37
a) Agency for Healthcare Research and Quality	
b) Centers for Disease Control and Prevention	
c) Centers for Medicare and Medicaid Services	
d) Departmental Appeals Board	
e) Food and Drug Administration	
f) Health Resources and Services Administration	
g) National Institutes of Health	
h) Office of Equal Opportunity and Civil Rights	
i) Office of Hearings	
7. Department of Homeland Security .....	40
a) Civil Rights and Civil Liberties	
b) Citizenship and Immigration Services	
c) Federal Emergency Management Agency	
d) Secret Service	
e) Transportation Security Administration	
8. Department of Housing and Urban Development .....	42
9. Department of the Interior .....	42
10. Department of Justice .....	44
a) Civil Division	
b) Civil Rights Division	
c) Community Relations Service	
d) Environment and Natural Resources Division	
e) Executive Office for United States Attorneys	
f) United States Attorneys' Offices	
g) Federal Bureau of Investigation	
h) Federal Bureau of Prisons	
i) Justice Management Division, Equal Employment Opportunity Staff	
j) Tax Division	
11. Department of Labor .....	49
12. Department of State .....	49
13. Department of Transportation .....	49
a) Federal Aviation Administration	
b) Federal Highway Administration	
c) Federal Motor Carrier Safety Administration	
d) Federal Transit Administration	
e) Office of the Inspector General	
14. Department of the Treasury .....	52
a) The Alcohol and Tobacco Tax and Trade Bureau	
b) Bureau of Engraving and Printing	
c) Bureau of Public Debt	
d) Departmental Offices (Departmental Oversight Office)	
e) Financial Crimes Enforcement Network	





B. Challenges and Opportunities .....	114
1. Leadership .....	114
a) Proclamation by the President of a National Conflict Resolution Day	
b) Letter of Greetings and Commendation From the President to Federal Employees Responsible for Alternative Dispute Resolution	
c) Establishment of a Federal Council and Annual Conference for Agency Dispute Resolution Specialists	
d) Government-Wide Biennial Alternative Dispute Resolution Achievement Awards Program	
2. Performance Management .....	117
a) Conflict Management As a Selection and Performance Appraisal Criterion for Executive and Management Positions	
b) Conflict Management As a Key Element in Recruitment, Training, and Planning	
c) Programmatic Reviews and Evaluations	
3. External Promotion and Facilitation .....	119
4. Training .....	120
5. Interagency Sharing of Federal Resources .....	120
6. Management Support .....	121
a) Institutionalization of the ADR Program	
b) Integration or Coordination of ADR Programs	
VI. Conclusion .....	123



## ACKNOWLEDGMENTS

This Report to the President is a collaborative project which was undertaken by representatives from the Federal Interagency Alternative Dispute Resolution Working Group Sections and Steering Committee, and by representatives from the agencies in the Executive Branch of the federal government. Appreciation is due to all of them. The following are specially noted for their exceptional dedication and work on this effort:

- Report written by: Linda A. Cinciotta, Senior Counsel for Alternative Dispute Resolution and Director, Office of Dispute Resolution, U.S. Department of Justice; Joanna Jacobs, Deputy Director, Office of Dispute Resolution, U.S. Department of Justice; and Deirdre McCarthy Gallagher, Attorney Advisor, Dispute Resolution Service, Federal Energy Regulatory Commission
- Overall leadership and guidance: Linda A. Cinciotta, Office of Dispute Resolution, U.S. Department of Justice; Cindy Mazur, Alternative Dispute Resolution Director, Federal Emergency Management Agency, Department of Homeland Security, and Chair of the Interagency Alternative Dispute Resolution Working Group's Workplace Section; Richard L. Miles, Director, Dispute Resolution Service and the Office of Administrative Litigation, Federal Energy Regulatory Commission, and Chair of the Interagency Alternative Dispute Resolution Working Group's Civil Enforcement and Regulatory Section; Anthony N. Palladino, Associate Chief Counsel and Director, Office of Dispute Resolution for Acquisition, Federal Aviation Administration, Department of Transportation, and outgoing Chair of the Interagency Alternative Dispute Resolution Working Group's Contracts and Procurement Section; and Hon. Richard C. Walters, Administrative Judge, United States Civilian Board of Contract Appeals, and incoming Chair of the Interagency Alternative Dispute Resolution Working Group's Contracts and Procurement Section
- Portions of the report dealing with civil enforcement and regulatory matters: Richard L. Miles, Federal Energy Regulatory Commission; Kirk Emerson, Director, U.S. Institute for Environmental Conflict Resolution of the Morris K. Udall Foundation; David Emmerson, Senior Program Coordinator, Office of Collaborative Action and Dispute Resolution, Department of the Interior; Jennifer Gatlan, Attorney Advisor, Federal Maritime Commission; Thomas Louthan (currently on detail as a Legislative Fellow, Senate Finance Committee), Internal Revenue Service, Department of the Treasury; Robert C. Manley, Associate Counsel (ADR), Office of the General Counsel, Department of the Navy, Department of Defense; and Ronald Murphy, Director of the Office of Consumer Affairs and Dispute Resolution Services, Federal Maritime Commission
- Portions of the report dealing with claims against the government: Joanna Jacobs, U.S. Department of Justice; Deborah Ruth Kant, former Acting Deputy Director, Office of Dispute Resolution, U.S. Department of Justice

- Portions of the report dealing with contracts and procurement: Anthony N. Palladino, Federal Aviation Administration, Department of Transportation; Hon. Richard C. Walters, Board Judge, United States Civilian Board of Contract Appeals; John A. Dietrich, Assistant General Counsel (ADR), Office of the General Counsel, Department of the Navy, Department of Defense; Hon. Allan Goodman, Board Judge, United States Civilian Board of Contract Appeals; Elizabeth M. Grant, Defense Logistics Agency, Department of Defense; Hon. Martin J. Harty (Ret.), Armed Services Board of Contract Appeals; and Kenneth Lechter, Associate General Counsel (Dispute Resolution), Department of the Air Force, Department of Defense
- Portions of the report dealing with workplace: Cindy Mazur, Federal Emergency Management Agency, Department of Homeland Security; Doretta Bowman-Davis, Attorney (ADR), Social Security Administration (on loan to Federal Emergency Management Agency, Department of Homeland Security); Linda A. Cinciotta, Department of Justice; Kathryn A. Ellis, Senior Counsel to the Deputy General Counsel for Program Service and Agency Dispute Resolution Specialist, Office of the General Counsel, Department of Education; D. Leah Meltzer, Deputy Dispute Resolution Specialist, Securities and Exchange Commission; Sarah Rudgers, former Director, Dispute Resolution Program, National Archives and Records Administration; and Kim Snyder, Intern, Federal Emergency Management Agency, Department of Homeland Security
- Editorial assistance: Pamela Pontillo, Manager, Headquarters Mediation Program, Office of Dispute Resolution, Department of Energy
- Administrative assistance: Sylvia Covington, ADR Office Manager, Federal Emergency Management Agency, Department of Homeland Security; Currie Gunn, Confidential Assistant to the Associate Attorney General; Aloma Shaw, Staff Assistant, Office of the Associate Attorney General, Department of Justice; Krista van der Horst, Dispute Resolution Support Specialist, Office of Dispute Resolution, Department of Justice

# EXECUTIVE SUMMARY

## I. Introduction

Alternative dispute resolution (“ADR”) is an umbrella term for processes that provide an alternative to traditional litigation. ADR processes give the parties an opportunity to play a more active role in crafting a resolution to their dispute. Appendix A describes the various types of ADR processes, the best known of which is mediation. The types of ADR processes used by the agencies in the Executive Branch of the federal government are charted in Appendix B.

In 1998, a Presidential Memorandum directed the Attorney General to coordinate interagency efforts to promote and facilitate the use of ADR in the Executive Branch and to report periodically on that work. The Attorney General submitted an initial report in 2000 when federal ADR was in its infancy. The Report which we now submit:

- describes the growth in the breadth, scope and depth of federal ADR since the 2000 Report was submitted;
- documents the results and benefits of federal ADR, including substantial cost savings, increased workforce productivity and accountability, timely achievement of agency goals, and delivery of reliable and efficient service; and
- discusses the future of federal ADR, including the challenges it faces and opportunities to develop its full potential.

### A. A Brief History of Federal Alternative Dispute Resolution

The first uses of ADR processes began experimentally in the 1970s as a potential remedy for disabling court backlogs, and as resolution techniques for environmental and natural resource disputes. In 1985, the Attorney General issued an order recognizing the need for ADR to reduce the time and expense of civil litigation. A few years later the Department of Justice again recognized the benefits of ADR in the Congressional testimony of its Assistant Attorney General, Office of Legal Counsel, who supported the first ADR legislation enacted by Congress in 1990.

In the 1990s, Congress passed three statutes (the Administrative Dispute Resolution Acts of 1990 and 1996, and the Alternative Dispute Resolution Act of 1998) which, collectively, required each agency to adopt a policy encouraging use of ADR in a broad range of decision making, and required the federal trial courts to make ADR programs available to litigants.

In 1996, the President issued Executive Order 12988 on Civil Justice Reform, directing federal litigation counsel to consult with the referring agency and suggest ADR where benefits might be derived from its use. On May 1, 1998, the President issued a Memorandum directing the Attorney General to lead an Interagency Alternative Dispute Resolution Working Group (“Working Group”) to promote and facilitate federal ADR.

The Working Group established four Sections to represent the major substantive areas of ADR application in civil enforcement, claims against the government, contracts and procurement, and workplace conflict. A Working Group Steering Committee was established to represent nearly 60 federal agencies. The past and current leadership of the Working Group Sections and Steering Committee is given in Appendix C, and the current membership of the Steering Committee is given in Appendix D.

The Attorney General's first report to the President, submitted in May 2000, described the first full year of interagency efforts. (The 2000 Report is reprinted in the Addendum to this Report.) Since that time, the use of ADR has become well-accepted and part of standard practice throughout the Executive Branch. This Report describes hundreds of ADR programs representing the gamut of federal executive responsibilities, from defense to education, from energy regulation to veterans' affairs. It shows how ADR has expanded to cover use in a broad range of contexts, including policy development, adjudications, rulemaking, administrative and civil judicial enforcement actions, permit issuance, and public involvement.

#### B. Overview of the Interagency Working Group Sections and Working Group Steering Committee

Since 1998, the work of the four Interagency Working Group Sections and Working Group Steering Committee has reflected the expansion of ADR programs and applications throughout the Executive Branch, and has promoted that growth.

The Working Group's Civil Enforcement and Regulatory Section was formed initially to educate and assist member agencies in using ADR as an alternative to traditional litigation and settlement methods in civil enforcement cases. The Section's coverage subsequently was expanded to include regulatory conflicts -- in such areas as environmental, business, and transactional disputes -- in recognition of the potential of ADR to make business and resource planning more cost-efficient and productive. The Section publishes a periodic Newsletter for agencies and the public to provide information on the application of ADR to enforcement and regulatory missions.

The Working Group's Claims Against the Government Section focuses on the achievement of proper balance between litigating a case where necessary and appropriate, and otherwise resolving cases through some form of ADR where practicable and in the best interests of the client. ADR is being used to resolve a wide range of civil actions brought against the United States, such as aviation and admiralty cases, medical malpractice cases, and class action workplace discrimination cases.

The Working Group's Contracts and Procurement Section addresses the need for a viable alternative to traditional litigation processes for resolving the contractual and procurement disputes of agencies and private sector companies. The Section sponsors an ongoing series of free educational programs, open to all government and private sector public contracts professionals, on a variety of ADR topics such as the legal and ethical

issues of confidentiality in public procurement ADR, and the development of guidance for federal agencies' use of binding arbitration.

The Working Group's Workplace Section assists federal agencies with workplace ADR programs covering all types of employment-related disputes. The Section sponsors a monthly Lecture Series to provide current, useful, and thought-provoking information about workplace ADR which can be implemented and utilized by ADR specialists at their respective agencies.

The Working Group Steering Committee has recently published four new guides which serve as advisory best practices in federal ADR. The guides cover: application of statutory provisions governing confidentiality in mediation of federal workplace disputes; practical ethical guidance for federal employee mediators; factors for ensuring the independence and impartiality of a federal ombuds office; and finding appropriate neutrals for agency workplace disputes. The Steering Committee meets monthly to share knowledge and experience on the facilitation of ADR in the Executive Branch.

### C. Survey of Federal Alternative Dispute Resolution Programs

The Working Group Steering Committee in mid-2005 began surveying every agency in the Executive Branch about their ADR operations. Responsive data was submitted by over 100 agencies and agency components, which are listed in Appendix E. The data have been used to prepare this Report, and the information is also helpful in identifying areas where the Working Group Sections and Steering Committee may be able to provide assistance in maximizing the success of agencies in using ADR.

## II. Alternative Dispute Resolution Programs: Enhancing Agency Missions

The ADR programs and policies of the 15 Cabinet agencies and 31 independent agencies are summarized, and the nexus between programs and the agency missions is shown, in this section of the Report. The Report demonstrates that, increasingly, agencies such as the Federal Energy Regulatory Commission are expanding their ADR options to provide a menu of resolution choices that are better able to enhance the missions of government and agencies, and serve the needs of citizens.

At both Cabinet and independent agencies, ADR processes are being used to meet agency – and government – goals of security, safety, and responsiveness, to name just a few. The agencies are using a spectrum of dispute resolution tools which are flexibly applied to meet the wide range of their needs. Here are a few examples of the types of success stories that are seen in Cabinet agencies:

- The Department of Commerce/National Oceanic and Atmospheric Administration used consensus building and public participation throughout the development of the natural resource damage assessment regulations promulgated pursuant to the Oil Pollution Act of 1990.

- The Department of Education/Office of Federal Student Aid Ombudsman works with federal student aid recipient loan holders, guarantee agencies, and schools to prevent loan foreclosures.
- The Department of Health and Human Services/Departmental Appeals Board uses ADR to provide less contentious and quicker resolution of disputes involving Medicare and Medicaid program exclusions, imposition of civil sanctions against health care providers and nursing homes, and disputes with grantees (including States and universities) concerning disallowances of funds.
- The Department of Homeland Security/Federal Emergency Management Agency provided arbitration for more than 130 Los Alamos fire claim victims who wanted an alternative to court proceedings.
- The Department of Justice/Civil Rights Division's Americans With Disabilities Act Mediation Program uses ADR to resolve, quickly and voluntarily, discrimination complaints about architectural, communication, and attitudinal barriers for people with disabilities throughout the country.
- The Department of Transportation/Federal Aviation Administration has integrated a Neutral Evaluation program into the negotiated grievance process for all labor disputes between the Air Traffic Controllers Association and the Federal Aviation Administration. The program promotes collaboration and resolution early in the process by presenting disputes to an independent neutral, with expertise in the particular subject matter at issue, to provide a non-binding advisory decision.
- The Department of the Treasury/Office of the Comptroller of the Currency's Office of the Ombudsman, through the Customer Assistance Group, addresses disputes between consumers and national banks or their subsidiaries, and provides a user-friendly Web site of resources, answers, and formal complaint forms for consumers.

The independent agencies shared a similarly impressive track record of success stories, some of which are these illustrative examples:

- The Consumer Product Safety Commission utilized mediation to resolve a major dispute involving a risk to the public of carbon monoxide poisoning.
- The Environmental Protection Agency/Office of Administrative Law Judges uses a mediation program to facilitate settlement of administrative civil penalty enforcement cases under a set of federal environmental laws. The agency's Office of the Small Business Ombudsman resolves disputes with the small business community in the development and enforcement of environmental regulations.
- The Federal Energy Regulatory Commission provides a menu of ADR options such as facilitation of collaborative pre-license processes, mediation, settlement judges, and the use of early neutral evaluation.
- The Federal Maritime Commission facilitates the flow of U.S. ocean commerce by using ADR to quickly resolve disputes involving ocean shipping transactions, violations of shipping statutes, and freight charges.

- The Nuclear Regulatory Commission employed collaborative, facilitated ADR processes to involve the public in decision making about revision of agency rules and guidance on emergency planning in the wake of 9/11.

The Report also shows that ADR is being routinely employed – with great success – to resolve workplace conflict and result in higher morale and greater productivity in the federal workforce.

### III. Advantages of Alternative Dispute Resolution

ADR has been instrumental in promoting a citizen-centered government, managing the costs of government, and supporting the strategic management of government resources.

#### A. Promoting a Citizen-Centered Government

A citizen-centered government is one that is:

- accessible to the citizens it serves;
- responsive to the needs of the citizens it serves; and
- inclusive of the interests impacted by government initiatives.

The inherent design of ADR promotes a citizen-centered government because ADR processes facilitate early and direct communication and interaction among disputants.

Federal agencies are capitalizing on technology to enhance the contributions of ADR to citizen-centered government. The National Mediation Board is a forerunner in the use of on-line dispute resolution tools, such as document-sharing software, to bring parties together electronically in their efforts to forge agreement. The Federal Energy Regulatory Commission operates an Enforcement Hotline which gives citizens access to an early neutral evaluation for a range of disputes before complaints are formally filed with the agency. The Department of Justice Civil Rights Division has a comprehensive, interactive, and user-friendly Web site for persons with disabilities and business owners who have questions about their rights and obligations under the Americans with Disabilities Act. The Department of Defense/Department of the Air Force utilizes the Internet as a primary means of dispensing ADR information.

Numerous agencies, such as the United States Agency for International Development, are employing ombuds to provide employees and citizens an opportunity to speak directly with an agency representative about issues of concerns. The ombuds provides timely feedback to the potential disputant and, as importantly, ongoing feedback to the respective agency regarding the impact and effectiveness of its programs.

Countless agencies also are encouraging the use of consensus-building processes to let citizens participate in agency decision making. The Nuclear Regulatory Commission, for example, has convened collaborative processes for developing guidelines regarding the recycling of radioactive materials. The Department of Energy Office of Legacy

Management has developed a Public Participation process to target populations – small towns, rural areas, minority and low-income communities – that are limited in their ability to participate in environmental decisions because they lack access to information, technology, expertise, and decision-makers. Such processes serve to identify and dismantle roadblocks to agency initiatives and foster collaborative relationships between agencies and their respective stakeholders, something that can have a long-lasting impact on agency decision making and approval processes.

## B. Managing Costs

ADR contributes to the effective conservation of limited federal resources in several interrelated ways:

- controlling the costs of conflict;
- producing quicker and more durable results; and
- preserving resources for the mission of the agency.

*Controlling the costs of conflict.* Use of ADR controls the financial impact of conflicts by saving on the skyrocketing costs associated with litigation. Many agencies have documented significant costs savings in legal expenses, expert witnesses and travel costs. ADR also saves the cost of productive labor that otherwise would be dedicated to, or lost as a result of, the conflict.

*Producing quicker and more durable results.* Litigation is extremely time-consuming and results in a winner and a loser. In contrast, because ADR is inherently flexible, it gives the parties a unique opportunity to craft the process and solution which are tailored to their own needs. They can decide when to meet and they can decide on the terms of a mutually-beneficial outcome that best serves their respective interests. The resolution they reach is likely to last much longer than a hierarchical decision imposed by an outside forum.

*Preserving resources for the mission of the agency.* The use of ADR preserves resources for agencies. Rather than funneling resources to manage ongoing disputes, agencies employing ADR are able to apply resources to achieving the mission of the agency.

## C. Managing Strategically

ADR contributes to the strategic management of government resources, both monetary and human, by:

- maximizing resources;
- promoting innovation; and
- fostering continuous improvement and expansion.

*Maximizing resources.* Use of ADR maximizes resources. The issues at stake in some cases demand litigation or a more formal administrative process. Maximizing agency

resources requires the assessment and identification of those cases which are appropriate for ADR and those which require a more formal disposition. As the Federal Election Commission reported, early disposition of cases to ADR liberates resources for those cases that necessitate a more formal process.

*Promoting innovation.* Use of ADR promotes innovation by giving the parties a chance to craft a resolution that captures their needs and interests in a way that may not be possible through a more formal process. As the Federal Maritime Commission explains, ADR processes provide flexibility to the parties involved in shipping transaction disputes so they can draft innovative solutions that reflect their own needs as well as the state of the market.

*Fostering continuous improvement and expansion.* Use of ADR promotes continuous improvement and expansion by encouraging agencies to identify opportunities for more and better ADR successes. The growth of ADR programs throughout the federal government, in a wide range of areas, reflects the need for this improvement and expansion as agencies strive to develop programs that better serve party needs.

#### IV. Areas of Alternative Dispute Resolution Programs and Use

This section of the Report discusses the specific contributions of ADR to good government, as viewed through the lens of the four major substantive areas of federal ADR applications: civil enforcement and regulatory; claims against the government; contracts and procurement; and workplace.

##### A. Civil Enforcement and Regulatory

*Promoting a Citizen-Centered Government.* In civil enforcement and regulatory disputes, unassisted negotiations and litigation have focused traditionally on which party has the stronger position. Today, many agencies fulfill their statutory mandates with the use of ADR, which is used as a supplemental tool to avoid protracted litigation when unassisted negotiations fail. The public interest is often better served when citizens, non-governmental organizations, corporations, state and federal agencies, tribal nations, and other entities participate directly in an ADR process that includes them in the development of a result that meets the interests of all concerned. Stakeholders who work toward a shared, positive outcome often achieve better results than they would have received in court and can create long-term productive working relationships.

A few examples show how ADR is supportive of citizen-centered government by promoting accessibility, responsiveness, and inclusiveness:

- The Environmental Protection Agency Brownfields Mine-Scarred Lands Initiative is a multi-level effort to engage a broad range of federal partners and local community members in addressing mine-scarred lands across the country.

- The Department of Energy Office of Environmental Management is using ADR to involve stakeholders early and often in decision making regarding the nuclear weapons complex cleanup program.
- The Small Business Administration National Ombudsman acts as a “trouble shooter” between small businesses and federal agencies on problems perceived as unfair and excessive regulatory enforcement.
- The Department of the Interior Office of Environmental Policy and Compliance is advancing greater use of consensus-based decision making in the implementation of the National Environmental Policy Act to engage local communities throughout the analysis process including developing the preferred alternative.

*Managing Costs.* ADR programs enable better control over resources expended, as well as better outcomes, as these examples reflect:

- The Department of Homeland Security/Federal Emergency Management Agency notes that for every lawsuit avoided, the agency can save thousands of dollars, thus leaving it better able to manage its resources.
- The Federal Energy Regulatory Commission reports faster processing and savings in hydroelectric proceedings where settlement agreements are reached during the pre-filing period.
- The Securities and Exchange Commission, while unable to agree to settlements during the mediation session (because of the need for review and authorization by the Commissioners), emphasizes the benefits that can flow from the process of mediation. For example, the Commission reports that mediation routinely helps to streamline discovery and focus the parties on key issues so that they are able to reach settlement shortly after the mediation concludes.

*Managing Strategically.* Agencies are building internal capacity to maximize the benefits of ADR, as shown by these practices:

- The Department of the Treasury/Internal Revenue Service Appeals office has an incentive-based training program which enhances the competitiveness of Appeals Officers trained for collateral duty mediation, and 400 of them have been trained as mediators.
- The U.S. Institute for Environmental Conflict Resolution has a national roster of pre-qualified neutrals, searchable on-line, that is used by federal agencies to locate environmental conflict resolution practitioners.

#### B. Claims Against the Government

Cases involving claims against the government are cases in which the United States is a defendant in a civil action. Since the federal district courts are required to offer some form of ADR, its use is fairly common in many of the cases. Additionally, many agencies make an initial determination as to whether to settle a civilian claim before a

lawsuit is actually filed. Agencies use mediation to some degree at these initial stages; however, without the rights to discovery which accrue with the formal filing of the lawsuit, the parties may not yet have enough factual information to support a knowledgeable settlement at this stage.

The goal of ADR in these cases is consistent: offering expedient alternatives to citizens while at the same time pursuing the best interests of the government. As a Department of Justice attorney said in describing the obligations of representing the United States: “Our mission is to zealously represent the United States in suits brought against it or in suits brought on its behalf...However, we also owe a responsibility to our citizens to act fairly to those litigating with the United States.” ADR can further both the mission and the responsibility of the government, while yielding these benefits:

- savings in costs associated with trials, such as fees and travel expenses for experts and other witnesses;
- savings in time of attorneys, staff and parties who are federal employees;
- quicker resolutions than a trial would offer and therefore fewer days that the parties have spent under the cloud of a pending lawsuit;
- creative resolutions acceptable to the parties, but which a court could not impose;
- lower monetary judgments than a jury or judge might impose; and
- a durable and voluntary agreement without any appeals.

The use of ADR in appropriate claims against the government also allows the agencies more control over agency resources. Savings in money, time, and labor resources are significant when discovery and litigation costs are reduced or eliminated through the use of ADR to settle claims, but the impact can be realized even when the claim is not resolved through ADR. As the Department of Justice/Civil Division reports, even when a case does not settle, the use of ADR often results in a narrowing of contested issues and the scope of discovery.

Finally, the use of ADR in appropriate claims against the government enables agencies to maximize the limited government resources that are available to defend a case. As the Department of Justice pointed out: “By resolving cases that can be resolved through ADR, attorneys are able to focus their resources and work efforts on the cases that need to be fully litigated...and on the core missions of their agency rather than on time-consuming litigation.”

### C. Contracts and Procurement

The application of ADR to contracts and procurement disputes has increased in recent years, as more agencies – and more contracting companies – realize the value of ADR in achieving prompt and fair resolution of contract and procurement-related disputes.

*Promoting a Citizen-Centered Government.* Agencies across the board are utilizing technology to promote ADR, and as these examples show, that approach is allowing

individuals and private sector entities to do business with a government that is accessible, responsive, and inclusive:

- The Department of Defense (the Department of the Air Force, the Department of the Navy, and the Defense Logistics Agency) has developed user-friendly Web sites that provide information on ADR processes, sample forms, and training in how to engage in interest-based collaborative problem solving.
- The Department of Transportation/Federal Aviation Administration has developed a similar citizen-centered Web site.

*Managing Costs.* The use of ADR in contracts and procurement disputes has resulted in savings of both time and money:

- The Department of Defense/Department of the Air Force reports that its “ADR First” policy in contract disputes has enabled it to avoid an average of \$57.6 million in liability in each of the most recent five years (FY 2002 through FY 2006).
- The Department of Transportation/Federal Aviation Administration reports that the use of ADR has resulted in shorter resolution timeframes for the agency: bid protests are resolved through ADR in an average of 24 calendar days, while contract disputes have been resolved by ADR in an average of 67 calendar days.

Perhaps most importantly, agencies report that resolutions reached through ADR are more durable because they reflect the needs and concerns of the parties at the table, including the government. The Department of Veterans Affairs says that as the result of its ADR program, decisions are made with “greater certainty in achieving the Department’s mission.”

*Managing Strategically.* Use of ADR is enhancing the effective allocation of resources while promoting innovation in both process and outcome:

- The Department of Defense/National Guard is maximizing its resources by providing contracting officers and other Guard personnel with Claims Avoidance workshops which have contributed to a reduction in problems and disputes arising from the implementation of contracts.
- The Department of Agriculture maximizes resources through ADR process efficiencies such as using internal neutrals, consolidating travel assignments, and using telephonic and video-conferencing in place of travel where possible.
- The Department of Transportation/Federal Aviation Administration provides ADR to parties *before* they file formal bid protests which enables them to resolve concerns before the dispute escalates, and reports that of 79 “pre-dispute” cases where ADR was employed only three proceeded to formal litigation.

In 2002, upon the recommendation and with the support of the Interagency ADR Working Group Contracts and Procurement Section, the Office of Management and Budget's Office of Federal Procurement Policy established an annual Federal Procurement ADR Awards Program for agencies and their private sector business partners who effectively employ ADR to avoid and resolve procurement-related disputes. The public sector award winners to date have included the Department of Defense (Department of the Air Force, the Armed Services Board of Contract Appeals, the Army Corps of Engineers, the Defense Logistics Agency, and the Department of the Navy), the Department of Transportation/Federal Aviation Administration, and the General Services Administration Board of Contract Appeals.

#### D. Workplace

Across the federal government, agencies have found that the availability of workplace ADR increases the ability of employees and managers to resolve internal disputes quickly and effectively, at the earliest possible time, and at the lowest possible level. This is especially important in the workplace, where festering disputes may distract an employee or manager from fulfilling essential work responsibilities. Use of ADR is cost-effective, saving money and time because resources are not spent on long investigations and protracted litigation, but rather on resolving disputes more quickly outside of the courtroom. In addition, agencies have found that involvement in the ADR process often forces supervisors to deal directly with the outcome of their, or their subordinate's, actions. This results in important lessons being learned that have long-term positive effects on the organization's efficiency. Additionally, direct supervisor interaction with employees often opens avenues of communication that had been closed, resulting in better working relationships and improved productivity.

*Background History of Workplace ADR.* Early and pioneering workplace ADR programs at the Equal Employment Opportunity Commission and the U.S. Postal Service launched a number of lessons learned that still serve as linchpins for managing workplace conflict:

- On the whole, many managers felt less threatened when they participated in a "problem solving" mediation to resolve a work-related dispute, rather than being put on the defensive in response to allegations of illegal discriminatory conduct.
- The earlier the mediation occurs, the better the chances are that the parties will reach a voluntary settlement, and that the collateral negative impact of the dispute on co-workers and the organization as a whole will be minimized.
- Mediation should be made available at many different stages of a dispute so that it is at all times a viable alternative to continuing with the formal dispute process.
- Voluntary agreements reached through mediation provide a more enduring solution to the issues underlying the dispute than any outside adjudication could do.

*ADR Programs Are Successful in Resolving Workplace Disputes.* Agencies report ADR settlement rates all above 50% and some reaching 75% and above, with significant cost savings. By comparison, the Equal Employment Opportunity Commission reported the national settlement rate of EEO cases through ADR was 49%.

*ADR Programs are Cost-Effective.* ADR programs conserve human capital by creating loyalty and longevity in the agency's work environment, and increase productivity.

*ADR Saves Agency Funds.* Federal agencies report considerable savings of monetary resources through workplace ADR programs:

- The Social Security Administration calculated that the average costs of processing an EEO complaint through a traditional process was approximately \$40,000, while the costs of mediating an EEO complaint ran from \$50 (if a shared neutral is used) to \$1500 (if an outside vendor is used).
- The General Services Administration noted that for every EEO case resolved through mediation, the agency saved \$3500 - \$4500 in investigation fees alone.
- The Department of Justice/Federal Bureau of Investigation calculated that it cost the agency over \$2,600 for each EEO investigation and over \$250,000 for a Final Agency Decision, but only \$1,800 on average for each case resolved through mediation.

*ADR Saves Agency Time.* Agencies report a substantial time savings through the application of ADR to workplace disputes:

- The Department of Defense/Department of the Air Force reports, for example, that workplace disputes resolved through mediation take an average of 27–40 days, as opposed to an average of 390 days for EEO cases which proceed to the administrative phase.
- The Department of Defense/Washington Headquarters Service reported that ADR processes took an average of 39 days, as opposed to EEO formal complaints (federal-wide) which took an average of 469 days in Fiscal Year 2004.
- The Department of Housing and Urban Development reports that processing time is reduced from 802 days in formal EEO cases to 53 days in ADR.

*ADR Programs Are Essential to Strategic Management of the Workplace.* The availability of ADR options gives both internal and external benefits to the agencies by:

- demonstrating an agency's concrete commitment to fostering a positive long-term working environment for all employees;
- improving relationships between federal managers and employees;

- increasing employee productivity;
- reducing costs with interagency sharing of in-house neutrals; and
- increasing efficiency with interagency sharing of expertise.

*Workplace ADR Programs Create Collateral Benefits for the Agency.* The benefits to ADR extend beyond the immediate dispute:

- Effective communication, a key ingredient of ADR, enables management to get key input from the employees working with issues that can potentially pose problems for the agency as a whole.
- Addressing causes of employee dissatisfaction can increase productivity.
- ADR processes identify and address recurring issues that lead to systemic problems, making it more likely that similar disputes can be avoided in the future.

*E-Government Makes Workplace ADR Accessible to All.* Workplace dispute resolution programs are utilizing electronic tools to multiply the use and application of ADR through:

- information dissemination to educate agency employees and increase the use of ADR services;
- use of electronic tools for training in ADR techniques and use of the ADR process itself; and
- use of ADR processes to elicit staff input in converting to e-government.

## V. The Future of Alternative Dispute Resolution

### A. Capitalizing on the Potential of ADR

Alternative dispute resolution has become well-accepted in federal agencies as an effective and efficient method for resolving disputes and has been readily adopted as part of a sound business model. All of the agencies responding to the survey convey the fundamental belief that conflict is reduced wherever and whenever communication is improved and acknowledge the positive impact of ADR on both reducing conflict and enhancing communication.

However, the agencies in the Executive Branch are still a long way from employing ADR to its full potential. Alternative dispute resolution is still being used to “fix problems” as they occur, and needs to grow into a system of pro-active conflict management. The key to reducing conflict is early intervention and anticipatory dispute resolution which prevent the escalation of disagreement. A number of agencies have developed programs to focus on early intervention, including: the Federal Aviation Administration Early Dispute Resolution Center; the Federal Energy Regulatory Commission Dispute Resolution Service and Enforcement Hotline; the Department of the Interior CORE PLUS Program for managing any workplace conflict; the Department of Justice Mediation Program for disability rights; the Department of Transportation Center for

Alternative Dispute Resolution; and the U.S. Institute for Environmental Conflict Resolution work with the other federal agencies on engaging stakeholders early in the process of resource planning or environmental review.

All agencies can learn from these trailblazers to recognize the positive power of conflict. Successful conflict resolution programs value the diversity of viewpoints, and are based on a belief that more creative and responsive resolutions can emerge when more minds tackle a problem. Conflict is thus transformed from a negative interaction into a cooperative activity which can infuse value, flexibility, and adaptability into business decisions.

## B. Challenges and Opportunities

The Report offers a roadmap of challenges and opportunities that could assist in fulfilling the promise of ADR in the coming years:

*Leadership.* Expressions of leadership commitment would be valuable in maximizing the beneficial impact and results of ADR through the Executive Branch. Possibilities include:

- proclamation by the President of a National Conflict Resolution Day recognizing the societal value of conflict management (Appendix G);
- letter of greetings and commendation from the President to federal employees responsible for alternative dispute resolution (Appendix H);
- establishment of a Federal Council and annual conference for agency Dispute Resolution Specialists; and
- government-wide biennial ADR achievement awards program.

*Performance Management.* The uses and successful outcomes of ADR are more likely to be maximized if the agency performance management structure includes conflict management elements, for example:

- conflict management as a selection and performance appraisal criterion for executive and management positions;
- conflict management as a key element in recruitment, training, and planning; and
- programmatic reviews and evaluations to show measures of improvement and progress in implementing ADR programs.

*External Promotion and Facilitation.* Agencies should educate the entities subject to their jurisdiction about how ADR works and the benefits it can produce, and promote and facilitate their use of ADR in appropriate cases.

*Training.* At a minimum, agencies should provide communication skills training for all new employees, and communications skills and conflict management training for all new

managers and supervisors. Agencies should explore means of saving training expenses by using and sharing federal trainers and training resources.

*Interagency Sharing of Federal Resources.* With leadership and coordination, agencies should consider sharing in many interagency projects, including ADR tracking and evaluation tools.

*Management Support.* Agencies should institutionalize their ADR programs by providing leadership commitment and continuity of staff and funding. Regardless of whether their ADR programs and operations are centralized or decentralized, agencies should ensure that ADR is integrated into the way people do business in all areas of the agency's responsibilities where use of ADR is appropriate.

## VI. Conclusion

Alternative dispute resolution is a tool for appropriate cases, not a panacea for all cases. The interests of the United States often are unique. Federal officials can resolve cases only in ways that will not undermine important legal issues, jurisdictional defenses, or policy interests. In appropriate cases, ADR has become a common sense option for the federal agencies. It is cost-effective, time-efficient, it gives the parties control over the outcome, and it involves stakeholders in decisions that affect them.

# **I. Introduction**

Although it is human nature to avoid conflict where possible, conflict is not all bad. Conflict can be constructive and a catalyst for growth. It also is inevitable, so the real question is how best to manage conflict. In our world, litigation too often has been the primary game plan for dealing with conflict. But the need for an alternative to litigation was evident at least 150 years ago, when Abraham Lincoln said: “Discourage litigation because the nominal winner often is a loser, in both time and money.” It took a long time after President Lincoln’s admonition before a new framework was constructed that recognizes litigation is not, and should not be, inevitable. That framework is alternative dispute resolution (“ADR”).

Less than ten years ago, in May 1998, a Presidential Memorandum directed the Attorney General to coordinate interagency efforts to promote and facilitate the use of ADR in the Executive Branch of the federal government and requested a periodic report on that work. The Attorney General submitted an initial report in 2000 when federal ADR was in its infancy. The Report which we now submit:

- describes the growth in the breadth, scope and depth of federal ADR since the 2000 Report was submitted;
- documents the results and benefits of federal ADR, including substantial cost savings, increased workforce productivity and accountability, timely achievement of agency goals, and delivery of reliable and efficient service; and
- discusses the future of federal ADR, including the challenges it faces and opportunities to develop its full potential.

Successful managers in every federal agency are embracing and institutionalizing alternative dispute resolution – and the results are dramatic. Throughout the federal government, the use of ADR is delivering concrete and measurable results to the American people who rely on the resources of the federal government, including:

- ✓ substantial cost savings;
- ✓ increased workforce productivity;
- ✓ increased workforce accountability;
- ✓ timely achievement of specific agency goals; and
- ✓ delivery of reliable, efficient, and high quality service.

ADR is an umbrella term encompassing a range of processes that provide alternatives to traditional litigation. ADR processes, in general, give parties the opportunity to play a more active role in collaborating to create mutually agreeable decisions or crafting a

resolution to their disputes. Mediation, a commonly used ADR process, highlights the benefits of this opportunity. Through mediation, those individuals who best know the facts, the issues, and the vested interests involved in an issue or dispute are the very people balancing priorities and crafting a resolution that reflects their interests. The result is a durable resolution, created and endorsed by those who will implement it. Oftentimes, the result also includes improved relations between the parties to a dispute, particularly important for parties who have ongoing business relationships.

The range of ADR processes employed throughout the federal government is varied, reflecting the needs of the respective agencies and their constituencies. However, all of the ADR processes give parties a greater opportunity to engage with their government in decisions that directly impact them. Attached in Appendix A is a list of some of the various processes that fall within the ADR umbrella, along with descriptions of the elements of each one. Attached in Appendix B is a description of the types of alternative dispute resolution processes employed by each federal agency.

## A. Brief History of Federal ADR

The use of ADR processes in the federal government is not a new phenomenon. Its genesis was in the 1970s. In the 30-plus years since it took root, ADR has experienced exponential growth. Let us look back at those tentative early efforts, and the catalysts that have led ADR to its current status as part of the business of the federal government.

In the mid-1970's, ADR use was championed as a potential remedy for overwhelming and disabling court backlogs. Countless cases were delayed – many for two years or more for lower court adjudication – leaving litigants languishing, their access to effective justice essentially denied. The initial federal implementation of ADR aimed to address this problem by offering litigants a quicker route to resolution in appropriate cases. The experiment offered great promise and delivered tangible results. The effective use of ADR also demonstrated over time that there are other distinct advantages to using these processes beyond merely shrinking court backlogs. Disputes addressed through ADR often are resolved more quickly, more effectively, and at less cost, both in terms of money and human resources, than disputes addressed through traditional processes, primarily litigation or formal administrative proceedings. Additionally, the voluntary agreements reached with ADR often are better received and, correspondingly, more durable than adjudicated outcomes.

Also in the 1970s, use of ADR began to take hold for resolution of environmental and natural resource disputes. Then, in 1985, the Attorney General issued an order recognizing the need for ADR to reduce the time and expense of civil litigation. A few years later the Department of Justice again recognized the benefits of ADR in the Congressional testimony of its Assistant Attorney General, Office of Legal Counsel, who supported the first ADR legislation subsequently enacted by Congress.

It was the initial positive experience with ADR that led to its further development and expanded use in the courts and throughout the federal government. In 1990, Congress

moved toward institutionalizing federal agency ADR with the passage of the Administrative Dispute Resolution Act, which required each agency to adopt a policy to encourage use of ADR in a broad range of decision making. Initially, the Act included a sunset provision as well as other provisions protective to the government in ADR processes. In 1996, however, the statute was reenacted permanently without the earlier restrictions. Also in 1996, the President issued Executive Order 12988 on Civil Justice Reform, directing federal litigation counsel to consult with the referring agency and suggest ADR where benefits might be derived from its use. Two years later, in 1998, Congress mandated that the federal trial courts develop and implement ADR programs in every district throughout the country. It was slowly becoming clear that dispute resolution no longer was just a narrow response to a particular legal problem, but a widely applicable tool for effective conflict resolution.

In response to the burgeoning use of ADR throughout the federal government, the Interagency Alternative Dispute Resolution Working Group (“Working Group”) was established by Presidential Memorandum on May 1, 1998. The President directed the Attorney General to lead the Working Group’s mission of assisting Executive Branch agencies in exploring ADR as a more effective and efficient way to handle disputes involving the federal government. The Working Group also was tapped to monitor and coordinate ADR use and report periodically to the President on the current state of federal use of ADR. The initial organizing meeting of the Working Group established four Sections, described in detail below, to represent the major substantive areas of ADR application. A Working Group Steering Committee was established to represent nearly 60 federal agencies. The past and current leadership of the Working Group Sections and Steering Committee is given in Appendix C. The current membership of the Working Group Steering Committee is in Appendix D.

The Attorney General submitted a brief initial federal ADR Report to the President on May 8, 2000 (“the 2000 Report,” attached as the Addendum) when federal ADR was still in its infancy. The 2000 Report concluded the important first full year of interagency efforts to promote and facilitate federal ADR. At that time, the largest and most successful use of federal ADR was the U.S. Postal Service’s REDRESS<sup>®</sup> Program, which focused on Equal Employment Opportunity (“EEO”) complaints. The statistics presented in the 2000 Report detailed the obvious advantages of ADR and the agency’s extraordinary accomplishments in that area. The early use of ADR in contracting also had begun to show promise. Today, the use of ADR is well accepted and part of standard practice in those areas. Since the submission of the 2000 Report, there has been a major expansion in the use of ADR in other areas, including enforcement and regulatory, and claims against the government.

The growth in breadth, scope, and depth of the ADR programs developed since 2000 is described at length in this Report. The use of ADR has grown to encompass a broad range of contests, including policy development, adjudications, rulemaking, administrative and civil judicial enforcement actions, permit issuance, and public involvement. This Report seeks to measure and evaluate that exponential growth and provide a harbinger of the potential for ADR to realize the goal of good government --

government that is both results-oriented and responsive to the needs of the American people.

## B. Overview of the Interagency Working Group Sections and Working Group Steering Committee

The 2000 Report focused on the initial challenge of promoting and assisting in the establishment of an ADR program in every federal agency. Since that time, the use of ADR has expanded across and within many federal organizations. For example, agencies which once concentrated their ADR efforts solely on workplace disputes have effectively leveraged their positive experiences to expand ADR to procurement and regulatory disputes. Correspondingly, the goals of the Working Group Sections and Steering Committee have expanded in broadening support for the continued development of ADR programs and application of ADR in a multitude of areas. This Report captures the unprecedented advances of the years following submission of the 2000 Report and reflects an extraordinary overall decade of federal leadership in the field of ADR. The compilation of innovative ADR programs thoughtfully designed in over a hundred federal agencies and sub-agencies in recent years - many of which are built on the foundations described in the 2000 Report – demonstrates ADR’s potential to deliver government accessibility, services, and justice to the American people.

In mid-2005, the Working Group Steering Committee began the process of surveying hundreds of ADR programs throughout the federal government in order to evaluate and measure progress achieved in the use of ADR. Surveys were distributed to every agency within the Executive Branch. The data provided by those agencies (listed in Appendix E) offer concrete information to illustrate the past successes and future potential of ADR, and confirm that ADR has both delivered on its promises and offered realistic hope for further successes.

Before delving into the survey results, addressed in length in the subsequent sections, we have described below some of the other specific areas of accomplishment of each of the substantive areas covered by the four Working Group Sections and Steering Committee.

### CIVIL ENFORCEMENT AND REGULATORY SECTION

When initially formed, the goal of the Civil Enforcement Section was to educate and assist member agencies in the use of dispute resolution techniques in civil enforcement and compliance cases as an alternative to traditional litigation and settlement methods. This goal remains the same today but with an expanded focus, to reflect the realization that there are other, related areas where ADR has great potential to make business and resource planning more cost-efficient and productive in appropriate instances. Accordingly, in the autumn of 2002, the scope of the Section’s coverage was expanded to include regulatory conflicts, and its name was changed to the Civil Enforcement and Regulatory Section. Active agency representatives in this Section come from the: Federal Energy Regulatory Commission, Securities and Exchange Commission, Federal



ADR. The focus is on reaching the proper balance between litigating a case where it is necessary and appropriate and otherwise resolving cases through some form of ADR where it is practicable and in the best interests of the client. The federal government has used ADR successfully in aviation and admiralty cases, medical malpractice cases, class action and individual workplace discrimination cases, water rights and Native American land disputes, and a vast array of other civil actions brought against the United States.

## CONTRACTS AND PROCUREMENT SECTION

The goal of the Contracts and Procurement Section is to address the need of agencies and private sector companies to find a viable alternative to traditional litigative processes for resolving contract and procurement disputes.

This Section has actively promoted the use of ADR through an ongoing regular series of free educational programs on a variety of ADR topics. The Section has co-sponsored, along with the American Bar Association, twenty educational programs from 1999 to the present. The programs are open to all government and private sector public contracts professionals, giving them an opportunity to pro-actively identify potential problems of future contract interpretations and develop programs to explore areas subject to future disagreements. The programs have been exceptionally well-received with attendance often exceeding one hundred participants, with an equal or greater number participating by teleconference. A few of the topics include: “Unique Aspects of Mediating Government Construction Contract Disputes”; “Developing Guidance for Federal Agency Binding Arbitration”; and “Confidentiality in Public Procurement ADR – Legal and Ethical Issues.” The series is continuing and will include program topics suggested by the membership as topical and pertinent to contracting issues.

In 2002, the Section worked with the Office of Federal Procurement Policy and the Procurement Executives Council to develop and implement an award program recognizing federal agencies and private sector companies that have used ADR effectively to resolve government contracts disputes. The award winners are selected by an independent panel of public and private sector ADR experts. Government award winners to date have included: the Air Force; the Army Corps of Engineers; the Federal Aviation Administration; the Defense Logistics Agency; the Armed Services Board of Contract Appeals; the General Services Administration Board of Contract Appeals; and the Department of the Navy. A special award was presented in 2003 to the American Bar Association Public Contract Law Section. The award program recognizes agencies and contractors who have distinguished themselves in their effective use of ADR in federal procurement disputes and serves to encourage other agencies and companies to utilize ADR in resolving public contracting disputes.

The Section also has facilitated mentoring among federal agencies on the appropriate use of ADR to resolve procurement disputes. In this area, the Section has been actively working with individual agencies to develop or improve their ADR processes and procedures. Section members have worked directly with and conducted ADR seminars

and training sessions for twenty different agencies and have worked with many more on an informal basis to optimize their ADR programs and usage.

## WORKPLACE SECTION

The purpose of the Workplace Section is to assist federal agencies in the development and implementation of workplace ADR programs which provide faster, more cost-effective and more satisfying opportunities for employers and employees to address and to resolve all types of employment-related disputes. In addition, many agency workplace programs cover more than simply current employees; some programs cover contractors, former employees and even applicants for positions with the agency.

The Workplace Section has focused its efforts on educating all federal agencies about ADR and advancing the use of ADR in the federal workplace. The Workplace Section facilitates, encourages, and coordinates the use of ADR to resolve workplace conflict and disputes. To support this effort, the Workplace Section has convened a panel of dispute resolution mentors to assist and motivate agencies with creating and improving workplace ADR programs.

A critical component of the Section's education process is information dissemination. The Workplace Section has organized a Lecture Series (generally held on a monthly basis) on federal workplace ADR to provide the most current, useful, and thought-provoking information affecting the workplace. The popularity of these presentations has steadily expanded since the first session in 1999, with growing participation and interest in the series. Each month, the ADR speakers at these sessions share their knowledge, experience, theories, and techniques. This medium for educating the federal ADR community has proven to be quite successful. It is expected that much of the information presented can be implemented and utilized by ADR specialists at their respective agencies.

## STEERING COMMITTEE

In July 2006, the Steering Committee posted on the interagency Web site an updated governance document which outlines the mission of the Interagency Working Group Sections and Steering Committee, and describes their authority, structure, interrelationship, and decision making process. The governance document is available on the interagency ADR Web site at [www.adr.gov](http://www.adr.gov) (click on left "Working Group" navigation button, click on "Governance").

In 2006, the Steering Committee published three new guides to serve as advisory best practices in federal ADR. Two of the guides cover confidentiality and federal employee mediation ethics. The third guide, on ombuds programs, is a joint publication by the Steering Committee and the Coalition of Federal Ombudsman. The three guides are intended to bridge the gap between the Administrative Dispute Resolution Act's legislative intent to promote ADR and the difficult, practical questions facing federal government administrators in developing workable dispute resolution programs. Prior to



“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”  
(May 2006)

The Steering Committee’s Guide for Federal Employee Ombuds is intended to be read in conjunction with the American Bar Association’s “Standards for the Establishment and Operation of Ombuds Offices,” and describes more fully the underlying factors intended to ensure the independence and impartiality of a federal ombuds office. The guide focuses on the importance of determining whether a conflict of interest may exist between the ombuds’ responsibility of independence on the one hand and the employee’s duties to the agency/employer on the other hand. The guide is available on the interagency ADR Web site at [www.adr.gov](http://www.adr.gov) (click on left “Guidance” navigation button.)

“Finding Neutrals Handbook”  
(May 2005)

The Steering Committee’s Finding Neutrals Handbook assists agencies in obtaining the services of neutrals and assessing the type of neutral needed for a particular workplace dispute. This guide provides basic and comprehensive information about: the various types of neutrals available for use by federal agencies, including both government employees and privately employed neutrals; the various settings in which government neutrals operate; the advantages and disadvantages of each type of neutral for particular cases; the primary vehicles for procuring private neutrals; and an overview of some of the related issues of concern under federal procurement law. The Handbook also serves as a guide for balancing a government neutral’s professional obligations against the Executive Branch’s responsibilities to operate in the public interest and with fairness. The Handbook is available on the interagency ADR Web site at [www.adr.gov](http://www.adr.gov) (click on left “Guidance” navigation button.)

### C. Survey of Federal Alternative Dispute Resolution Programs

As noted above, the Steering Committee in mid-2005 initiated a detailed survey of ADR programs in the Executive Branch of the federal government. The goal of the Steering Committee’s survey was to gather information about programs and plans. The survey elicited valuable feedback and statistics, submitted by over 100 agencies and sub-agencies, which quantify and evaluate existing federal ADR programs and which form the basis of this Report.

This Report details the current state of ADR within the federal agencies and their efforts to measure results and determine the effectiveness of ADR. However, because each

agency has a unique mission, the use of ADR is extremely variable. Additionally, standardization is difficult because each agency is in a continuous process of implementing new programs and adjusting old programs to better fit its changing needs. If there is a single guiding principle in ADR, it is that the process requires flexibility. It is clear that in ADR “one size does not fit all.” The agencies not only have been expanding the substantive areas in which they use ADR, but they also have been developing creative new applications of the various ADR processes, as well as new hybrid combinations. In fact, it is this essence of tailoring the process to meet the individual parties’ particular needs and goals which inspires and guarantees the parties’ personal accountability in the resolution itself. Thus, development of uniform standards for measuring success of each of varying programs, within a particular agency and among the many agencies, is an enormous challenge.

This Report applies the agencies’ own measurements of success where they have developed agency goals and guidelines for results. As we note, agency targets and measures still are under development in some of the newer ADR programs, as well as in some existing ADR processes where specialists face challenges in maximizing their potential. Part of the focus of this Report is to identify areas where the Steering Committee may be able to provide assistance to agencies in their efforts to develop goals and measurements of success for their programs, and to maximize that success.





























































































































- The mediator alerted the agency to a weakness in its case that had not been sufficiently considered.

Additionally, because of the nature of ADR in focusing on improved communication and party control over outcome, resolutions emerging from ADR processes generally are more durable and informative. For example, the **Department of Education** noted that the use of dispute resolution services has helped to resolve long-standing audits in a way that both promotes collaboration among participants in the audit resolution process and encourages a resolution of audit issues that is responsive and effective, thus preventing recurrence of the audit finding. This approach improves the administration of federal education funding by state and local educational agencies.

The **U.S. Institute for Environmental Conflict Resolution** leadership is developing and implementing a multi-agency performance evaluation system on environmental conflict resolution which will directly contribute to assuring long-term improvements in performance within the federal government. The environmental conflict resolution processes themselves are designed to improve environmental decision making by engaging interested and affected parties in deliberating constructively with shared, comprehensive information about potential impacts and relative benefits of a given governmental decision (see the table below). The agency’s performance evaluation initiative will build upon and enhance these processes.

### Capturing the Value of Environmental Conflict Resolution

Savings Realized and Benefits Accrued				
		<i>Tangible</i> -----	<i>Less Tangible</i>	
<i>Short-term</i>		Saved on <i>direct process costs</i> (e.g., the process costs to mediate were less than litigation)	Avoided inflaming relations and escalating the conflict with litigation or unattended conflict	Avoided or reduced negative on-the-ground impacts (e.g., environmental, social, economic)
		Likely reduced or avoided the <i>direct cost of appeals</i> (e.g., the solution is less likely to be contested)	Better outcomes were crafted (e.g., less costly settlements, timely project progression, innovative solutions, reduced monitoring)	Improved stakeholder commitment to the agreement and its implementation
<i>Longer-term</i>		Created efficiencies that reduce future <i>indirect process costs</i> (e.g., field staff time dealing with conflict)	Case used as a prototype for resolving other similar problems or conflicts	Created the potential for stakeholders to work together productively on related issues in the future















































































Use of Alternative Dispute Resolution Processes Reported by Agencies 2005-06

Appendix B:	Mediation	Arbitration <i>(other than labor union grievances)</i>	Facilitation	Settlement Judges	Consensus Building/ Public Participation	Partnering	Conflict Coaching	Negotiated Rule Making	Ombuds
<b>CABINET AGENCIES</b>									
Department of Agriculture	x		x	x	x	x	x	x	
Department of Commerce	x		x	x	x			x	
Department of Defense:									
1. Department of the Air Force	x	x	x	x	x	x	x		x (some)
2. Department of the Army	x		x	x	x	x	x		x (some)
3. Army Corps of Engineers	x		x	x		x			
4. Department of the Navy	x	x	x	x	x	x	x		x
5. Defense Commissary Agency	x		x	x					x
6. Defense Contract Audit Agency	x								
7. Defense Contract Management Agency	x		x	x	x				x
8. Defense Finance and Accounting Service	x		x	x					
9. Defense Information Systems Agency	x			x					x
10. Defense Logistics Agency	x		x	x		x			x
11. Department of Defense Education Activity	x		x			x			x

	Mediation	Arbitration ( <i>other than labor union grievances</i> )	Facilitation	Settlement Judges	Consensus Building/ Public Participation	Partnering	Conflict Coaching	Negotiated Rule Making	Ombuds
12. National Geospatial- Intelligence Agency	x								
13. National Guard Bureau	x		x	x	x	x			
14. National Security Agency	x		x			x	x		
15. Uniformed Services University of the Health Sciences	x								
16. Washington Headquarters Service	x		x						
Department of Education	x		x		x	x	x	x	x
Department of Energy	x		x	x	x	x	x		x
Department of Health and Human Services									
1. Agency for Healthcare Research and Quality	x			x		x			x
2. Centers for Disease Control and Prevention	x		x			x	x		x
3. Centers for Medicare & Medicaid Services	x		x			x			
4. Departmental Appeals Board	x		x	x			x	x	x
5. Food and Drug Administration	x		x	x	x	x	x	x	x
6. Health Resources & Services Administration	x								
7. National Institutes of Health	x		x		x	x	x		x

	Mediation	Arbitration (other than labor union grievances)	Facilitation	Settlement Judges	Consensus Building/ Public Participation	Partnering	Conflict Coaching	Negotiated Rule Making	Ombuds
8. Office of Equal Opportunity and Civil Rights	x								
9. Office of Hearings	x								
Department of Homeland Security	x		x	x	x		x		x
1. Citizenship and Immigration Services	x								
2. Civil Rights and Civil Liberties	x								
3. Federal Emergency Management Agency	x	x	x			x	x		
4. Secret Service	x			x			x		x
5. Transportation Security Administration	x		x	x	x	x			x
Department of Housing and Urban Development	x		x	x		x	x	x	x
Department of the Interior	x		x		x	x	x		x
Department of Justice									
1. Civil Division	x	x		x					x
2. Civil Rights Division	x			x					x
3. Community Relations Service	x		x		x	x	x		x

	Mediation	Arbitration ( <i>other than labor union grievances</i> )	Facilitation	Settlement Judges	Consensus Building/ Public Participation	Partnering	Conflict Coaching	Negotiated Rule Making	Ombuds
4. Environment and Natural Resources Division	x	x		x					x
5. Executive Office for United States Attorneys	x								X
6. United States Attorneys Offices	x	x		x					
7. Federal Bureau of Investigation	x		x						X
8. Federal Bureau of Prisons	x		x	x	x	x			X
9. Justice Management Division	x								
10. Tax Division	x			x					X
Department of Labor	x			x					
Department of State	x		x						X
Department of Transportation	x	x	x		x		x	x	

	Mediation	Arbitration ( <i>other than labor union grievances</i> )	Facilitation	Settlement Judges	Consensus Building/ Public Participation	Partnering	Conflict Coaching	Negotiated Rule Making	Ombuds
Department of									
Treasury									
1. Alcohol and Tobacco, Tax and Trade Bureau	x				x			x	x
2. Bureau of Engraving and Printing	x		x		x	x	x		
3. Bureau of the Public Debt	x		x		x	x			
4. Departmental Offices (Department Oversight Office)	x		x						
5. Financial Crimes Enforcement Network	x		x	x	x	x	x		
6. Financial Management Service	x		x			x			
7. Internal Revenue Service	x								
8. Internal Revenue Service Appeals	x	x	x		x	x		x	
9. Office of the Comptroller of the Currency	x		x			x			x
10. Treasury Inspector General for Tax Administration	x			x					
11. United States Mint	x		x			x			x

	Mediation	Arbitration <i>(other than labor union grievances)</i>	Facilitation	Settlement Judges	Consensus Building/ Public Participation	Partnering	Conflict Coaching	Negotiated Rule Making	Ombuds
Department of Veterans Affairs	x		x	x		x			x (some)
<b>INDEPENDENT AGENCIES</b>									
Commodity Futures Trading Commission	x								
Consumer Product Safety Commission	x		x	x	x	x	x		x
Corporation for National and Community Service	x		x				x		
Environmental Protection Agency	x		x	x	x		x	x	x
Equal Employment Opportunity Commission	x		x	x				x	
Export-Import Bank of the United States	x			x					
Federal Communications Commission	x	x			x			x	

	Mediation	Arbitration ( <i>other than labor union grievances</i> )	Facilitation	Settlement Judges	Consensus Building/ Public Participation	Partnering	Conflict Coaching	Negotiated Rule Making	Ombuds
Federal Deposit Insurance Corporation	x	x	x		x				x
Federal Election Commission	x								
Federal Energy Regulatory Commission	x	x	x	x	x				
Federal Maritime Commission	x	x	x	x	x	x	x		x
Federal Mediation & Conciliation Service	x		x		x				
Federal Reserve Board	x								x
Federal Trade Commission	x		x		x		x		
General Services Administration	x	x	x	x	x	x	x		
National Archives and Records Administration	x		x						

	Mediation	Arbitration <i>(other than labor union grievances)</i>	Facilitation	Settlement Judges	Consensus Building/ Public Participation	Partnering	Conflict Coaching	Negotiated Rule Making	Ombuds
National Labor Relations Board	x		x	x	x	x			
National Mediation Board	x		x				x		x
National Science Foundation	x		x						
Nuclear Regulatory Commission	x	x	x	x	x	x	x	x	
Office of Personnel Management	x		x						
Peace Corps	x		x						
Pension Benefit Guaranty Corporation	x	x					x	x	
Securities and Exchange Commission	x		x				x		
Small Business Administration	x						x		x
Social Security Administration	x		x	x					

	Mediation	Arbitration <i>(other than labor union grievances)</i>	Facilitation	Settlement Judges	Consensus Building/ Public Participation	Partnering	Conflict Coaching	Negotiated Rule Making	Ombuds
Tennessee Valley Authority	x		x	x	x	x			
United States Agency for International Development	x		x	x	x	x	x		X
United States Institute for Environmental Conflict Resolution of the Morris K. Udall Foundation	x		x	x	x		x	x	
United States Office of Government Ethics	x		x		x				
United States Postal Service	x			x			x	x	X











































**c. Department of the Navy**

The Department of the Navy embraces the use of alternatives to litigation in procurement disputes. The formal policy of the Navy is:

Using ADR to the Maximum Extent. ADR techniques shall be used as an alternative to litigation or formal administrative procedures to the maximum extent practicable. Use of these techniques may resolve the entire issue in controversy or a portion of the issue in controversy. The goal is to resolve disputes and conflicts at the earliest stage feasible, by the fastest and least expensive method possible, and at the lowest possible organizational level prior to litigation. Every issue in controversy, regardless of the subject matter, is a potential candidate for ADR.

SECNAV Instruction 5800.13A, "Alternative Dispute Resolution (ADR) Policy and Mission of the DON ADR Program Office," 22 December 2005, at ¶7.a.

Protests, Claims and Appeals

The table below summarizes procurement ADR activity for several past fiscal years for claims, appeals and protests.

	FY99	FY00	FY01	FY02	FY03	FY04	FY05	Totals
Early Neutral Evaluation			7		1			8
Facilitation		2			0			2
Mediation	12	6	6	4	4	4	2	38
Non-binding Arbitration			2	2	0			4
Settlement Judge	1			1	3	1		6
Summary Trial	10		4	5	2	7	4	32
Other		7	3	3	2	1		16
Resolutions	22	14	18	13	12	13	6	98
Resolution Rate	96%	93%	82%	87%	100%	100%	100%	92%

(Table 1)

While recognizing that the language of FAR Part 33 could support counting cases that settle without the services of a neutral, the DON generally only tracks those cases that use a neutral of some sort. The trend in numbers is downward, but at the same time, it should be noted that across the government, appeals at the Boards of Contract Appeals are down.

The DON ADR program estimates that ADR achieves significant process savings. As shown in table 2, for 35 cases analyzed, the program estimated about \$1.4 million in direct expenses that were avoided by using the ADR processes, and another \$1.7 million saved if the trial schedule had proceeded as expected.

<b>Quantified Costs Avoided FY01 04</b>	
Testimony Expenses Avoided	\$987,138
Travel Expenses Avoided	139,500
Other Expenses Avoided	327,100
Less: ADR Unique Costs Incurred	(30,131)
<b>Total Costs Avoided</b>	<b>\$1,423,607</b>
Estimated Interest Avoided	\$1,720,366
<b>Total Quantified Expenses Avoided</b>	<b>\$3,143,973</b>













































