

**NEW DISPUTE RESOLUTION PROGRAMS
IN THE FEDERAL GOVERNMENT
2014 Update**

I. Introduction

Under the Administrative Dispute Resolution Act, first enacted in 1990 and renewed on a permanent basis in 1996, Congress formally recognized the value of Alternative Dispute Resolution (ADR) and authorized its use by federal agencies. In 1998, President Clinton established a formal network for agencies to share information about experiences using ADR and assigned a federal interagency leadership role to the Attorney General.

Periodically, the Interagency ADR Working Group (Working Group) is required to report on its efforts to the President through the Office of Management and Budget (OMB). At a 2012 ADR Symposium co-sponsored by the Department of Justice and the Administrative Conference of the United States, Attorney General Eric Holder emphasized the importance of interagency partnership in improving the Government's "collective ability to resolve disputes effectively, equitably, and efficiently."

This report highlights key developments, innovations, and recent trends in federal use of ADR. Further detail about individual agency programs is available at www.adr.gov.

The objectives of this report are to:

- Highlight certain agencies' use of new and innovative ADR techniques;
- Provide evidence that ADR strategies can be effective across a wide range of applications;
- Identify trends in ADR over the last five-to-seven years, including:
 - Increased institutionalization of the use of ADR in the normal course of federal government business;
 - Tailoring of ADR techniques to the specific needs of agency programs;
 - Provision of immediate assistance with disputes through telephonic mediation;
 - Application of ADR techniques earlier in a dispute process as a mechanism to resolve conflicts; and
 - Increased use of online communication as a mechanism to provide ADR; and
- Fulfill the requirement of periodic reporting of ADR activities.

This report addresses five areas of ADR application, corresponding to four designated sections of the Working Group: Civil Enforcement and Regulatory Efforts; Contracts and Procurement; Litigation and other Justice Programs; and Workplace Conflict Management. It also has an additional section that describes other important developments in ADR.

II. Civil Enforcement and Regulatory Efforts

ADR is being used earlier, more widely, and more systematically in federal civil enforcement actions and regulatory negotiations, as well as in conflicts involving a cross-section of industry- and private-party stakeholders. Four regulatory and enforcement agencies provide examples of the federal Government using innovative ADR techniques to prevent and resolve disputes. Each is tailoring ADR processes and techniques to meet the needs of disputants and consumers in order to address their complaints and disputes promptly, satisfactorily, and at lower cost.

The *Surface Transportation Board* (STB) (which regulates domestic rail, truck, and water transportation) and the *Federal Maritime Commission* (FMC) (which regulates international ocean shipping) have both enhanced their mediation and arbitration programs to provide “real time” ADR. Each now provides telephonic dispute resolution services to parties. This means that entities that encounter a rail related transportation dispute can contact the STB’s Rail Customer & Public Assistance Program to obtain telephonic facilitation of their disputes. FMC similarly offers telephonic ombuds services to assist disputants within the international ocean shipping supply chain and has enhanced its ombuds services to include the use of Rapid Response Teams. That program enables ocean common carriers to designate a senior contact who works with FMC staff to facilitate resolution of disputes that arise between ocean common carriers and their customers.

In 2010, the *International Trade Commission* (ITC) implemented a new, permanent mediation program based on the success of an earlier pilot program aimed at reducing the number of issues, claims, and/or parties involved in disputes. The ITC conducts investigations into certain unfair practices in import trade involving allegations of patent or other intellectual property infringement made by private parties. The ITC’s Mediation Program provides litigants a rapid and confidential mechanism for case evaluation and an opportunity for early settlement. Mediation may also result in a larger settlement, covering not only the investigation before the ITC but also related litigation in other courts and countries. The program plays an important part in ensuring ITC’s continued success in accomplishing its mission of administering U.S. trade remedy laws within its mandate in a fair and objective manner.

As a final example, the *Federal Energy Regulatory Commission* (FERC) issued Order No. 734 in 2010, which expanded the role of FERC’s Dispute Resolution Division to handle “real time” landowner disputes pertaining to the construction and operation of jurisdictional infrastructure projects associated with non-federally sponsored natural gas pipeline facilities and hydroelectric projects. Via a dedicated toll-free helpline and email, FERC staff has timely and successfully addressed more than 630 inquiries to date. Of those inquiries, FERC guided landowners, energy companies, and other interested persons to resolve 93% (or 195 of 210) of the infrastructure disputes using voluntary ADR, including conciliation (86%), mediation (12%) and facilitative mediation/early-neutral evaluation (2%). Eighty two percent of these energy and environmental infrastructure matters were successfully concluded, which reflects ADR’s potential efficiency in leading to positive outcomes.

III. Contracts and Procurement

ADR is well established in the field of federal government contracting, but refining its use is a continuing effort. Recent refinements include incorporating ADR procedures into rules, enhancing how agencies handle protests, and using ADR in the audit process.

New Rules at the ASBCA. The *Armed Services Board of Contract Appeals* (ASBCA) has jurisdiction over contract appeals involving defense agencies. After many years of successfully using ADR under a supplementary statement to its rules called the “Notice Regarding Alternative Dispute Methods of Resolution,” the ASBCA revised its rules July 21, 2014. *See* 48 C.F.R. § 2 App. A pt. 2. The new rule directly incorporates ADR procedures into the Board’s rules of procedure.¹

Extended Debriefing. The *Department of the Air Force* has launched a new Extended Debriefing Program. In the typical process of awarding a complex federal procurement contract, offerors who do not receive a contract may ask for a debriefing.² At the debriefing, agency officials explain the basis for the selection decision so that unsuccessful offerors can better compete in the future.³ While general information may be conveyed during a debriefing, agencies usually may not provide competition-sensitive information about the awardee or the evaluation process. When agencies cite these legal restrictions and refuse to provide such details, disappointed offerors often feel compelled to file formal protests to get answers to their questions.

Extended debriefings are designed to change this dynamic by providing a legal mechanism to increase the level of information exchange. The mechanism used for several years by the Department of Transportation’s *Federal Aviation Administration* (FAA) is a protective order⁴ issued by the Office of Dispute Resolution for Acquisition.⁵ Agencies like the Air Force do not have authority to issue protective orders, so its new program uses non-disclosure agreements between the awardee, the unsuccessful offeror, and the agency. This new program emphasizes greater transparency at the debriefing to avoid the need for formal protests. The Air Force officially launched the Debriefing Program on October 1, 2013, and will continue to track its success.

Cooperative Audit Resolution for Grants. In December 2013, the *Office of Management and Budget* (OMB) issued uniform guidance for federal grants that defines, and requires the use of, “cooperative audit resolution...to improve Federal program outcomes...”⁶ Cooperative audit resolution involves auditors and agency staff working together to review problem areas and

¹ 79 Fed. Reg. 11,374 (February 28, 2014).

² *See, e.g.*, 48 C.F.R. §§ 15.505 and 15.506 (2013) (hereinafter “Federal Acquisition Regulation” or “FAR”).

³ *See e.g., Matter of Next Tier Concepts*, B-406620.3, 406620.4 (November 13, 2012).

⁴ 14 C.F.R. § 17.9 (2013).

⁵ The ODRA exercises unique statutory authority to hear protests of FAA contract awards. 49 U.S.C. 40110 (2006).

⁶ Uniform Administrative Requirements, Cost Principles, and Audit Requirement for Federal Awards, 78 Fed. Reg. 78608 (Dec. 26, 2013) (to be codified at 2 C.F.R. pt. 200).

collaborating on developing solutions. Inclusion of this requirement was sparked by work of the *Department of Education*, through its Cooperative Audit Resolution Oversight Initiative (CAROI), to use cooperative audit resolution to resolve audit findings short of litigation and administrative appeals.

IV. Litigation Section and Other Justice Programs

The *Department of Justice* has used ADR extensively since Attorney General Janet Reno's early recognition of the benefits of party-driven dispute resolution in 1995. In the almost two decades since, the Department has developed a number of robust and diverse programs which rely on ADR to advance the Department's mission and goals. ADR programs across the Department also have been successful in promoting citizen access and participation in the justice system.

Office of Dispute Resolution (ODR). ODR, which is housed within the Department's Office of Legal Policy, serves as the Department's central resource in ADR use in litigation, developing policy, providing legal opinions, and training attorneys in effective ADR practices. Civil litigators—as well as courts—across the country have come to rely on ADR to help manage growing caseloads. Case resolution through party agreement has become the rule rather than an “alternative” practice in civil litigation, saving millions of dollars in litigation costs and freeing up months of work which can be devoted to more exceptional cases that are not appropriate for settlement. Cases resolved through ADR—primarily mediation—include a broad range of litigation, from fraud to environmental, bankruptcy, and tort cases.

Civil Rights Division-Disability Rights Section. The Department's Americans with Disabilities Act (ADA) mediation program resolves ADA complaints efficiently, equitably, and voluntarily using alternative dispute resolution. The Department's application of mediation to rights-based disputes is a significant shift away from the traditional adversarial, government-directed, winner-takes-all method of problem resolution. The ADA mediation program, carried out through a federal-private partnership, has achieved remarkable results, eliminating architectural, communication, and attitudinal barriers for thousands of people with disabilities throughout the country. This allows the Department to achieve meaningful compliance with the law without having to allocate scarce resources to investigate or litigate the disputes. Because the program quickly achieves measurable results, many people with disabilities, as well as advocacy organizations, continue to request mediation to resolve ADA complaints, indicating their trust and confidence in the program. The program has successfully resolved 78% of the more than 4,000 complaints mediated.

Community Relations Service (CRS). CRS, created by the Civil Rights Act of 1964, is the Justice Department's “peace maker” for community conflicts and tensions arising from differences of race, color, and national origin. With the passage of the 2009 Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, CRS now works with communities to employ strategies to prevent and respond to alleged violent hate crimes. CRS Conciliators, located in fourteen offices

throughout the country, facilitate dialogue and provide mediation, training, consultation, and other conciliation services.

V. Workplace Conflict Management

Most federal agencies have long had ADR programs that address employee satisfaction and fair process. This discussion is thus limited to emerging ADR practices in these workplaces. Chief among those, more ADR offices are now utilizing upstream tools to prevent and reduce conflict before it becomes problematic. In particular, individual coaching requests to ADR offices are increasing, while mediation requests have been decreasing. Agency departments (e.g., human resources, organizational development, and training departments) are reaching out to their ADR offices to provide leadership and performance coaching, as well as conflict coaching. Workplace coaching is being utilized in many innovative ways. Coaching can accelerate learning, support change in workplace culture, assist with transitions, and facilitate new initiatives. Agencies are implementing coaching to enhance communication, teamwork, strategic planning, and customer service.

The *Office of Personnel Management* (OPM) is spearheading the development of an interagency workgroup of coaches called the Federal Coaching Network. While coaching has traditionally been offered at the senior level, this network seeks to offer coaching to emerging and future leaders, as well. This new coaching program will ultimately be available to federal employees at all levels. This network will help develop the talents and careers of federal employees.

Coaching invokes ADR skills such as active listening, posing powerful questions, creative problem solving, and generating options. ADR coaches build on their experience in helping people handle difficult people and sensitive conversations. One advantage of the OPM initiative is that it creates a partnership with ADR offices, which results in significant cost savings for the agency while leveraging existing internal talent. ADR offices are well-positioned to be part of this development in coaching programs.

Several other trends of note include the addition of ombuds offices in many agencies to augment the agency's tools for situational awareness, problem solving, and conflict resolution at early stages. Additionally, some agencies, seeking to reduce costs and travel time, are developing virtual ADR Programs and promoting virtual platforms to carry out their programs. ADR conferences and trainings are also being offered nation-wide through virtual technology in order to reach the widest possible audience at the lowest possible cost.

Finally, many ADR offices are conducting climate assessments to prevent and address organizational and group discord. These assessments involve administering surveys, facilitating focus groups, and conducting one-on-one, structured interviews. The principles of neutrality and confidentiality offered by ADR offices enable group members to participate candidly. At the conclusion of an assessment, a report identifying organizational/work unit strengths and challenges is generated and shared with key stakeholders. The agency ADR office compiles

employee recommendations for improvement of the organization's health and then may be asked to monitor and support progress in implementing the recommendations. The office may also later administer a post-assessment evaluation to measure organizational improvement.

VI. Other ADR Developments

There have been a handful of other important developments in the use of ADR that are worth noting, including in the administration of environmental programs, in negotiations involving Native American tribes, and in Freedom of Information Act (FOIA) efforts.

Environmental. There have been several steps taken to improve the use of environmental conflict resolution (ECR). First, OMB and the Council on Environmental Quality (CEQ) have issued policy direction to all agencies that require the use of ECR to prevent and resolve environmental conflicts. In 2012, OMB and CEQ created a revised version of the original 2006 OMB-CEQ ECR Policy Memo which added the word "collaboration" to the definition of environmental conflict resolution. Agencies continue to report annually to OMB and CEQ on their use of ECR under this memo.

Second, the *Environmental Protection Agency* (EPA), an early adopter of ADR, introduced new technology that allows EPA to provide a full suite of online collaborative ADR services, thereby significantly reducing the need for delays associated with the expenses of travel. Video conferencing equipment installed throughout EPA supports online collaboration, staff access to online meeting and collaboration tools, and technological guidance for staff. The collaborative technology infrastructure enables EPA to conduct effective and inclusive mediations, facilitations, and public engagement sessions and is a valuable evolution in agency ADR and collaborative practice.

Tribal Matters. The increased use of regulatory negotiation for situations involving tribes has been another new development. The *U.S. Institute for Environmental Conflict Resolution* has recently provided neutral resolution support for successful regulatory negotiations in the development of rules for Indian oil valuation and for two regulatory negotiations addressing tribal implementation of the "No Child Left Behind" law. One reason for this trend is that tribes are requesting that Congress require such regulatory negotiation in legislation that affects tribes as a way of protecting self-government.

Freedom of Information Act. The *National Archives and Records Administration's* Office of Government Information Services (OGIS), which opened in 2009, was created by Congress to apply ADR to the process of requesting records under FOIA. Since opening in 2009, OGIS has offered mediation services to FOIA requesters and 100 Executive Branch agencies, assisting thousands of requesters and dozens of agencies in resolving disputes, some of which otherwise would have led to costly litigation. OGIS helps FOIA professionals throughout the government use ADR techniques to make the FOIA process work better for both agencies and requesters.

Also, OGIS collaborates with other agencies in the development and delivery of ADR-related training for FOIA professionals across the federal government.

VII. Conclusion

Federal agencies continue to expand, refine, and improve their ADR processes. The examples described above demonstrate the ongoing efforts of agencies to develop creative, efficient, and cost-effective ADR solutions. The examples also demonstrate that ADR use is widespread and the methods have become an integral part of resolving disputes across a wide range of federal government activities. ADR use in the federal government is here to stay and will continue to be an important tool to help agencies fulfill their missions.