Missouri/Niobrara/Verdigre Creek National Recreational Rivers Draft Environmental Impact Statement and General Management Plan

AGENCY: National Park Service.

ACTION: Availability of draft environmental impact statement and general management plan, for the Missouri/Niobrara/Verdigre Creek National Recreational Rivers located in Bon Homme, Charles Mix, and Gregory counties, South Dakota, and Boyd and Knox counties in Nebraska.

SUMMARY: Pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969, the National Park Service (NPS) announces the availability of the draft environmental impact statement (DEIS) and general management plan, for the Missouri/Niobrara /Verdigre Creek National Recreation Rivers. The DEIS responds to Public Law 102–50, which amended the Wild and Scenic Rivers Act to add 39 miles of the Missouri, 20 miles of the Niobrara, and 8 miles of Verdigre Creek to the national wild and scenic rivers system. The NPS prepared the DEIS. Cooperating agencies included the U.S. Army Corps of Engineers; the U.S. Fish and Wildlife Service; the Nebraska Game and Parks Commission; the South Dakota Department of Game, Fish and Parks; the Nebraska and South Dakota State Historic Preservation Offices; Boyd and Knox counties in Nebraska; and Bon Homme, Charles Mix, and Gregory counties in South Dakota.

The document describes five management and boundary alternatives. Alternative 1, a no action alternative, is required in order to provide a description of baseline conditions from which the action alternatives can be compared; its boundary is 1/4 mile from the riverbank, which is the interim boundary noted in the establishing legislation. Alternative 2 would provide for the preservation of the rural landscape, primarily through local management, and would establish a boundary at 200 feet from the riverbank. Alternative 3 would emphasize management to preserve and restore the biological elements of the river ecosystem; its boundary would be 200 feet from the riverbank, plus significant biological bottomland. Alternative 4 would emphasize visitor use along with resource conservation; its boundary would be 200 feet from the riverbank, plus significant biologic and public use resource areas. Alternative 5, the preferred alternative, combines the local management and philosophy of Alternative 2, some resource management and boundary of Alternative 3, and some interpretive and visitor experience aspects of Alternative 4.

Each management action alternative is expected to provide a mechanism for long-term resource protection and accommodate recreational use of the river with minimal impact on the private property owner. In each alternative, farming and ranching are considered appropriate activities within the boundaries of the recreational rivers. Each action alternative relies heavily on the cooperative efforts of property owners, local communities and the National Park Service. No alternative would require much, if any, acquisition of land; any acquisitions would be from willing sellers only.

DATES: Comments on the DEIS should be received no later than September 3, 1996. Public meetings will be held in various Nebraska and South Dakota towns and cities during August, 1996, and will be announced in local news media when schedules are final.

ADDRESSES: Comments on the DEIS should be submitted to the Superintendent, Niobrara/Missouri National Scenic Riverways, P.O. Box 591, O'Neill, Nebraska 68763.

SUPPLEMENTARY INFORMATION: Public reading copies of the DEIS will be available for review at the Department of Interior Natural Resources Library, 1849 C Street, N.W., Washington, D.C. 20240, and at public libraries and county courthouses in Center and Butte, Nebraska; and Burke, Lake Andes and Tyndall, South Dakota. Public reading copies will also be available at the public libraries in Verdigre and Niobrara, Nebraska.

FOR FURTHER INFORMATION CONTACT: Warren H. Hill, Superintendent, Niobrara/Missouri National Scenic Riverways at the above address or he can be reached at 402–336–3970.

Dated: July 3, 1996.

William W. Schenk,

Field Director, Midwest Field Area.

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DEPARTMENT OF JUSTICE

Office of the Senior Counsel for Alternative Dispute Resolution

Policy on the Use of Alternative Dispute Resolution, and Case Identification Criteria for Alternative Dispute Resolution

AGENCY: Office of the Senior Counsel for Alternative Dispute Resolution, Justice.

ACTION: Notice.

SUMMARY: This notice publishes the Alternative Dispute Resolution Policy Statements prepared by each of the civil litigating components in the Department of Justice as well as their criteria for identifying cases as potentially suitable for dispute resolution. As indicated in the introduction by the Attorney General, these documents were prepared by teams of staff attorneys within each of the components. Each document reflects the nature of the practice of that component. These documents have been provided to all staff attorneys in the Department of Justice who handle civil litigation, in Washington and in United States Attorneys' Offices, and are being published in the **Federal Register** to make clear the Department's commitment to greater use of alternative dispute resolution. Nothing in these documents, however, creates any right or benefit by a party against the United States.

FOR FURTHER INFORMATION CONTACT: Peter R. Steenland, Jr., Senior Counsel for Alternative Dispute Resolution, United States Department of Justice, Room 5708, Washington, DC 20530. (202) 616–9471.

Dated: June 17, 1996.

Peter R. Steenland, Jr.,

Senior Counsel, Alternative Dispute Resolution.

ADR Federal Register Introduction

On April 6, 1995, I issued an Order directing greater use of Alternative Dispute Resolution by the Department of Justice. In part, that Order required our civil litigating components to provide their attorneys with policy guidance on the use of Alternative Dispute Resolution techniques and directed them to develop case selection criteria for using ADR in appropriate cases. Our commitment to make greater use of ADR is long overdue. Clearly, our federal court system is in overload. Delays are all too common, depriving the public of swift, efficient, and just resolution of disputes. The Department of Justice is the biggest user of the federal courts and the nation's most prolific litigator. Therefore, it is incumbent upon those Department attorneys who handle civil litigation from Washington and throughout the country to consider alternatives to litigation.

The Guidance documents for using Alternative Dispute Resolution were prepared by teams of attorneys in each of the components. Each policy statement and set of case selection criteria reflect the many varied types of litigation in which we represent the United States, federal agencies and federal officials. Each component head has approved the policy statement and case selection criteria, and has expressed a commitment to making greater use of Alternative Dispute Resolution. Working with our Senior Counsel

for Alternative Dispute Resolution, I expect our attorneys to implement our commitment to use ADR in appropriate cases. It is also my expectation that their ability to use ADR will be given as much recognition within the Department and elsewhere as their present contributions as dedicated and resourceful litigators.

If we are successful, the outcome will benefit litigants by producing better and quicker results, and will benefit the entire justice system by preserving the scarce resources of the courts for the disputes that only courts can decide. I urge everyone to work with us in this important civil justice reform effort.

Today, I am making available all of the Department's ADR case selection criteria developed pursuant to the Order. These criteria relate to the government's voluntary participation in ADR. Nothing in these Guidance documents shall be construed to create any right or benefit, substantive or procedural, enforceable at law or in equity, by a party against the United States, its agencies, its officers or any other person. For further information contact: Peter R. Steenland, Jr., Senior Counsel for ADR, U.S. Department of Justice, Room 5708, Washington, DC 20530. Phone: (202) 616–9471.

Janet Reno,

Attorney General.

To: All Section and Field Office Chiefs, Antitrust Division.

From: Anne K. Bingaman, Assistant Attorney General, Antitrust Division.

Re: Use of Alternative Dispute Resolution Techniques.

On April 6, 1995, the Attorney General issued the attached order directing Department-wide initiatives to promote greater use of Alternative Dispute Resolution ("ADR") techniques in civil litigation. Under the AG Order, ADR techniques are defined to include arbitration, mediation, early neutral evaluation, neutral expert evaluation, mini-trials, and summary jury trials—essentially those techniques that employ the services of a third-party neutral to assist in the conciliatory resolution of a dispute. The ADR techniques addressed in the AG Order have the potential to eliminate unnecessary civil litigation, shorten the time that it takes to resolve civil disputes, and achieve better case resolutions with the expenditure of fewer resources.

General Policy

Although the Antitrust Division has an excellent record of settling its civil cases through the use of unassisted negotiations, the application of ADR techniques in appropriate circumstances to the negotiation process has the potential to provide even better results. Just as it is important for our attorneys to develop good advocacy and litigation skills, and to be accomplished negotiators during settlement discussions, it is also important that they become knowledgeable concerning ADR techniques so that the Division can take advantage of the benefits that ADR provides.

It is, therefore, the policy of the Antitrust Division to encourage the use of ADR techniques in those civil cases where time permits and there is a reasonable likelihood that ADR would shorten the time necessary to resolve a dispute or otherwise improve the outcome for the United States. Because of the time constraints imposed by the H–S–R Act and the exigencies of the merger review process in general, ADR techniques will likely be difficult to apply during the course of merger investigations. On the other hand, non-merger investigations often have more timing flexibility. In order better to assess the potential for ADR to shorten the resolution time for such investigations or otherwise to improve their outcome, I am directing the chiefs of sections and offices conducting civil, non-merger investigations to work closely with Becky Dick to identify cases where ADR can be tried at different stages of the investigative process (e.g., prior to the issuance of CIDs; during settlement negotiations) as test cases, to provide a basis for comparison and to help serve as a guide to future use of ADR by the Division.

Please be assured that in implementing this ADR policy, the Antitrust Division will recognize the contributions made by staff attorneys who handle matters in ADR by providing the same opportunities for promotion, awards, and other professional recognition as those engaged in more traditional litigation. Often, ADR will accelerate settlements, avoid trials, and provide enhanced resolution of disputes that litigation cannot provide. Those who use ADR to these ends will be evaluated on their skills in these endeavors, and they will be recognized for the contributions they have made to the Department and the public.

Case Selection Criteria

In order for this policy to work, it is necessary that our attorneys become knowledgeable about the types of ADR techniques that are available and sensitive to the possibilities that they offer for improving antitrust civil enforcement. To assist this effort, I am today issuing case selection criteria to aid in selecting the types of cases and the types of ADR techniques that are appropriate for resolving various issues and impasses that can arise during the course of civil investigations. For example, at the beginning of an investigation, prior to the issuance of a CID to the subject, it might be appropriate to engage in discussions with the subject about the nature of the Division's concerns, the type of information that we will be seeking, etc., in order to better formulate our CIDs, reduce compliance disputes, and speed the resolution of the investigation. A third-party neutral could be used to facilitate these discussions. This will not always be useful or lead to a better result, and there will be circumstances where various factors militate against employing ADR. But I believe that the best way initially to asses the value of ADR for the Division is actually to use it in some cases and evaluate the results.

Training Requirement

Acknowledging that ADR is a new concept for many Department attorneys, the AG Order requires attorneys who have substantial civil litigation responsibilities to receive regular training in negotiation and ADR techniques. We will be working with the Department's Senior Counsel for ADR to identify the training needs for Antitrust Division attorneys in this area in light of the results of our experience in the use of ADR as it develops.

In sum, ADR is another litigation tool that we have at our disposal. In appropriate circumstances it can help to enhance our investigation and negotiation efforts, conserve resources, and achieve better civil antitrust enforcement results.

Attachments

To: All Section and Field Office Chiefs, Antitrust Division.

From: Anne K. Bingaman, Assistant Attorney General, Antitrust Division.

Re: Case Selection Criteria for the Use of Alternative Dispute Resolution ("ADR") in Antitrust Division Civil Litigation.

The Administrative Dispute Resolution Act of 1990 ("ADR Act"), Pub. L. No. 101–552, 104 Stat. 2736–48, and Attorney General Order OBD 1160.1, "Promoting the Broader Appropriate Use of Alternative Dispute Resolution Techniques," (April 6, 1995) require careful consideration of the use of alternative means of dispute resolution by Antitrust Division personnel during the course of investigating, settling, and litigating civil disputes. ADR can be defined as any technique that results in the conciliatory resolution of a dispute, including facilitation, mediation, fact

finding, minitrials, early neutral evaluation, and arbitration. While unassisted negotiation is a well understood dispute resolution technique that is frequently successfully employed within the Antitrust Division, other ADR techniques—techniques that require the use of a third-party neutral—have received much less attention. These "formal"ADR techniques are the focus of the AG Order and this policy memorandum, which is intended to provide guidance to Antitrust Division attorneys in identifying civil cases that are possible candidates to be resolved through the use of formal ADR techniques.

As you are aware, federal courts are increasingly likely to require parties to disputes to consider the use of ADR in cases that do not settle rapidly following the filing of a complaint as part of a court-annexed ADR program. However, the use of ADR may also be of real value prior to the filing of a complaint as an aid to the settlement negotiation process.[1] ADR is not intended to replace traditional one-on-one negotiations, but rather to provide attorneys with additional tools that may facilitate negotiation where traditional two-party negotiation has not produced an acceptable resolution. In appropriate circumstances, ADR techniques can be used in conjunction with unassisted negotiation to resolve particular issues if, in the estimation of the parties, such ADR techniques would likely result in a speedier resolution of the overall dispute, increase the likelihood that the dispute will be resolved short of litigation, or result in a better resolution of the dispute than would otherwise be obtained.

Available ADR Techniques

A variety of ADR techniques exist that make use of the presence of a third-party neutral to assist in the negotiation or litigation process. The following are the most common:

- *Mediation*

  - Non-binding settlement process facilitated by a neutral who does not impose a resolution.
  - Neutral has no authority to impose decision.
  - Neutral meets with parties in joint session and in separate sessions to facilitate resolution that is acceptable to all parties.
  - Can be used to narrow issues for trial.

- *Early Neutral Evaluation (ENE)*

  - Gives non-binding prediction of outcome.
  - Most useful in disputes involving specific legal issues.
  - Most useful if neutral is a recognized expert in the particular subject area or area of law.

- *Neutral Expert Factfinder*

  - Makes findings of fact on specific issues.
  - Most useful in factual disputes.
  - May be binding or non-binding depending upon agreement of the parties.
  - Can be used to narrow factual issues for trial.

- *Mini-trial*

  - Non-binding presentation of highlights of case by attorneys for each party to their decision makers in mock trial setting.
  - May include some witnesses and testimony.
  - Facilitated by a neutral who presides over presentation, engages parties in litigation risk analysis, and facilitates settlement discussions.
  - After presentation of the case, neutral meets with parties to facilitate settlement.
  - Allows decision makers to focus on and analyze their cases.

- *Arbitration*

  - Can be binding or non-binding depending upon agreement and nature of the parties.
  - Neutral or panel of neutrals who impose a decision or resolution.
  - Is most adjudication-like of ADR processes.
  - May be more costly than other forms of ADR if it involves discovery, witnesses, and the presentation of the case.

It is important to appreciate the diversity and flexibility of available ADR techniques. Some ADR techniques, such as ENE or arbitration, involve the neutral in making evaluations of the respective parties claims or the strengths and weaknesses of their legal theories or evidence. Other techniques, such as mediation, use the neutral simply to facilitate the parties' negotiations without being in any way judgmental.

Neutrals only perform those functions agreed upon by the parties, and only for so long as both parties believe that the presence of the neutral is of value. Neutrals can be brought in at the beginning of a negotiation to get the ball rolling smoothly or after a particular problem has arisen to help resolve that problem amicably, and they can be dismissed if they are not proving useful or after a predetermined period of time. Parties do not lose control by employing a third-party neutral; if anything they gain control, especially if the application of ADR techniques enable the parties to avoid the litigation process.

Factors To Consider In Selecting an Appropriate ADR Technique

In those instances where a case is a good candidate for ADR, each of the available ADR techniques can be used effectively to break a litigation or negotiation deadlock, depending on the nature of the dispute that needs to be resolved. In reaching a decision concerning the selection of a particular ADR technique in any given case, there are a number of factors to consider.

- What is the nature of the problem that is preventing a consensual resolution of the dispute?
- Hostility/lack of communication between the parties.
- Technical or complex factual issues.
- Legal issues.
- Settlement issues.
- What would it take to break the negotiation stalemate?
- Intervention by a neutral party to diffuse hostility.
- Neutral evaluation of dispositive factual issues.
- Neutral evaluation of dispositive legal issues.
- Neutral evaluation of dispositive settlement issues.
- Presentation by each side of its case to party decision makers.
- What resource constraints do the parties face?
- Is there sufficient time available to employ a given ADR technique? Can the parties agree to an extension of time in order to attempt ADR?
- Do the parties have the financial resources to employ a given ADR technique?
- What practical constraints do the parties face?

[1] In light of the congressional directive contained in the Antitrust Procedures and Penalties Act of 1974 ("Tunney Act") that consent judgments in civil antitrust cases entered into by the Antitrust Division be publicly aired and approved by a federal judge as being in the public interest, *see* 15 U.S.C. 16 (b)–(h), civil investigations that result in a determination by the Division that an antitrust violation has occurred should ordinarily not be resolved without the filing of a complaint. (Merger investigations where the proposed transaction has been abandoned and there is no reasonable likelihood of that transaction being renewed within the time period for which the existing H–S–R filing remains valid are an exception.) When the Division and opposing parties are able to agree on the appropriate resolution of a dispute prior to the institution of litigation, the disposition of that dispute through the filing of a complaint and simultaneous consent decree is consistent with the goals of the ADR Act, the AG Order, and the Tunney Act.

• Have either of the parties expressed a willingness or a hostility to engaging in ADR?

• Do either of the parties have any history of using ADR?

• Are the attorneys handling the investigation/litigation experienced with one or more ADR techniques?

Of course, not every case or situation is appropriate for the use of ADR. There are a variety of factors that can be considered as either supporting the use of ADR or making the use of ADR less likely in a particular case.

Factors Favoring ADR

The Parties

• Continuing Relationships

The United States, aggrieved persons, or other litigants are likely to have continued contact with the defendants in implementation of the remedy or in other contexts.

• Barriers to Communication

The United States or other litigants foresee impasses developing because of conflicts within interest groups, political visibility, or poor or non-existent communication among the participants (including attorneys) due to personality difficulties or past history.

• Absent Stakeholder(s)

Participation of persons or groups who are not directly involved in the legal action may be beneficial or necessary to a optimal resolution.

• Divergence of Interests

There are gains and losses to be apportioned constructively, and in which varying priorities among the parties will allow trading off of those gains and losses to permit all involved to benefit from the outcome.

• Numerous Parties

The number of parties or interested persons or groups is so numerous that a structured/facilitated negotiation process would be helpful.

Nature of the Case

• Need for Problem Solving or Development of Creative Alternatives

A thorough exchange of information and generation of alternatives and options will improve the outcome.

• Factural or Technical Complexity or Uncertainty

The parties would benefit from reliance on the expertise of a third-party expert for technical assistance and/or fact-finding.

• Need for Facilitated Private Discussions

The settlement desired may be improved by the neutral's ability to conduct frank, private discussions among the parties.

• Flexibility Desired in Shaping Relief

The United States is seeking relief with detailed implementation and/or monitoring on multiple issues or subjects that may be difficult to obtain from the Court, or is amenable to resolution through cooperation between the parties.

• Ultimate Outcome Uncertain

Litigants face uncertain outcome at the time of trial based on the law, the facts, or the decisionmaker. Also important is the likelihood of prevailing on appeal should the United States lose at trial.

• Hostile Decisionmaker

Case will be tried in front of an unsympathetic judge, or jury venire is likely to be unsympathetic or even hostile.

• Conservation of Enforcement Resources

Preparing the case for trial would require a burdensome commitment of significant resources without achieving a proportionate impact.

• Numberous Issues

Discussion of multiple issues will be assisted by a structured/facilitated negotiation process.

• Direct Settlement Negotiations Unsuccessful

The United States has attempted traditional settlement negotiations without success or an impasse has been reached and the United States believes involvement of a third-party neutral will facilitate further progress and/or final resolution.

Representation

• Need to Speak Directly to Client

The parties (or aggrieved persons) need to hear an evaluation of the case from someone other than their lawyers.

• Lawyers Are Willing To Consider ADR

The lawyers involved are knowledgeable about ADR processes and intend to participate in the chosen ADR process in a good-faith attempt to resolve the dispute.

Timing

• Facts Are Sufficiently Developed

The parties have sufficient information to permit them to make informed decisions concerning the ultimate disposition of the dispute.

• Parties Are Prepared to Discuss Settlement

The parties are willing to resolve the case short of trial.

Factors Disfavoring ADR

• Public Sanction Necessary

There is a need for public sanctioning of conduct.

• Imbalance of Power or Ability

A party or parties are not able to negotiate effectively themselves or with assistance of counsel.

• Judicial Decision Required

Development of the law is important or the imprimatur of a court decision is necessary to secure vindication of rights, enforcement, or compliance.

• Biased Selection Process of ADR Neutral

Political sensitivity of case coupled with questionable neutral selection process would likely result in selection of "neutral" with ties to interests contrary to the United States.

• Successful Summary Judgment Certain

• Case Likely To Settle Through Unassisted Negotiation in Near Future

* * *

Using these selection criteria as a guide, it should be possible to identify Antitrust Division cases that would benefit from the application of ADR, and to identify the most appropriate ADR technique to assist the investigation/litigation process. Although many civil cases brought by the Antitrust Division will not be good candidates for ADR—for example, most merger investigations will face time constraints that make the use of ADR impossible, and many of our non-merger cases move swiftly and smoothly to resolution—there will be instances where one-on-one settlement negotiations may benefit from the presence of a neutral, either from the start or once they have reached an impasse, time is available, and a third-party neutral would advance the case more effectively than simply involving higher-level Division officials or permitting a cooling-off period. There may also be instances where involving a neutral expert could resolve a factual

or legal dispute at the negotiation stage in a manner that would either speed the resolution of the case or result in a more favorable outcome for the United States than would unassisted negotiations or litigation. Such cases should be considered for the use of ADR.

The issuance by the Antitrust Division of case selection criteria for the use of alternative dispute resolution relates solely to the government's voluntary participation in ADR. Nothing herein shall be construed to limit the government's duty to participate in ADR according to court order or applicable local rules, except that Antitrust Division attorneys shall resist participation in ADR, by appropriate motion, whenever said participation would violate the United States Constitution or other governing law.

This memorandum shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity, by a party against the United States, its agencies, its officers, or any other person. This memorandum shall not be construed to create any right to judicial review involving the compliance or noncompliance of any Antitrust Division attorney with its terms.

CIVIL DIVISION—STATEMENT ON ALTERNATIVE DISPUTE RESOLUTION

Introduction

On April 6, 1995, the Attorney General issued an order promoting the broader use of alternative dispute resolution techniques for the Department of Justice's litigating divisions in appropriate matters. The order requires each litigating division handling civil matters to issue: a policy statement on ADR; case selection criteria identifying appropriate cases for ADR; criteria for the selection of ADR providers; training requirements in negotiation and ADR; a statement on internal procedures for authorization and funding of ADR; and finally a reporting system for statistics on each division's use of ADR.

I. POLICY

The Civil Division is fully committed to encouraging consideration of alternative dispute resolution ("ADR") in appropriate cases and implementing all aspects of the Attorney General's April 6th Order on ADR. ADR is any consensual dispute resolution process facilitated by third-party neutrals which can be utilized prior to or during litigation. ADR is not meant to replace traditional litigation or unassisted negotiation, but rather is meant to supplement them. In other words, ADR is another tool to resolve disputes and can provide unique advantages. ADR can be used when traditional negotiation is likely to be unsuccessful, has already been unsuccessful, or when it can expedite negotiations and/or allow them to proceed more efficiently. ADR can be used to resolve discrete parts of a particular case or, a series of cases; it can help narrow and/or eliminate issues; it can expedite critical discovery; and can help the parties gain a better understanding of the strengths and weaknesses of the case. ADR provides flexibility by allowing the parties to fashion their own resolutions to disputes—creative resolutions beyond what courts can offer.

In a similar vein, ADR allows the parties to fashion their procedures for resolving disputes. There are as many ADR processes as the parties can create. The most widely used ADR techniques are mediation, early neutral case evaluation, arbitration, mini-trial and summary jury trial (see attached appendix for descriptions). Consideration of whether ADR can be beneficial to a particular matter should begin as soon as a Civil Division attorney is assigned to a case, should be ongoing, and should be revisited at the watershed points in the litigation. Different forms of ADR may be useful at particular points in the case.

In analyzing a case for ADR and considering the particular component's case selection criteria, some general considerations should be kept in mind. the factors listed below for each Civil Division component will not all be relevant in any given case. Factors not listed may also be present that weigh in favor of or against the use of ADR. A threshold inquiry should be whether ADR will be beneficial to a case; that is, whether it will be more cost efficient, faster or will enhance the opportunities for a better result than would be the case with traditional litigation or unassisted negotiation. Even if the threshold inquiry is negative, consideration should still be given to whether ADR can be of benefit to a case even if it does not settle or entirely resolve the matter. For instance, if ADR can narrow the issues or expedite critical discovery, then ADR should be considered. In selecting a particular ADR process, each Civil Division component has listed a series of factors to evaluate for this selection, and there may be more than one ADR process appropriate for an individual case. Attorneys should also consider the different ADR processes that the relevant district or circuit court programs provide or require. Even where a particular district has an ADR program, Civil Division attorneys should employ the analysis in this statement.

In determining whether a case can benefit from ADR, there are no hard and fast rules. It bears emphasizing that the use of ADR is not mandated, and the determination to use ADR and the selection of the particular ADR process should be done on a case-by-case basis. Because an understanding of the nature of the particular litigation is critical to an ADR assessment, and because the Civil Division handles such a wide variety of litigation, included below is a description of each Civil Division component's caseload.

Finally, it is the policy of the Civil Division to recognize the work made by staff attorneys who handle matters in ADR by providing the same opportunities for promotion, awards and other professional recognition as those engaged in more traditional litigation. Often, ADR will accelerate settlements, avoid trials, and provide enhanced resolution of disputes that litigation cannot provide. Those who use ADR to these ends will be evaluated on their skills in these endeavors, and they will be recognized for the contributions they have made to the Department and the public.

Commercial Litigation Branch: The Commercial Litigation Branch is the largest of the litigating components, accounting for 39% of the Division's caseload. Its cases consists of both affirmative and defensive work regarding financial disputes between the government and private parties. It has four principal litigating units:

The *Fraud* unit files affirmative litigation, usually under the False claims Act. Last year it recovered over 1 billion dollars. Almost 90% of its cases settle and approximately half of those are completed prior to filing a complaint. The nature of the cases indicates that they are good candidates for ADR mechanisms.

The *Court of Federal Claims* unit defends suits brought by contractors, (usually as the result of an adverse decision by an agency contracting officer,) and defends appeals filed by government employees from decisions of the Merit Systems Protection Board. They settle approximately 30% of their cases and win the majority of the balance on motions. Both types of cases follow administrative reviews which have afforded the parties settlement opportunities. Although personnel cases can often benefit from third party neutral participation, these cases are small and are almost always disposed of in favor of the government on routine motions. In addition OPM, the client in most cases, would like to see their

decisions, which have been the result of a rather lengthy administrative process, upheld. (Cases that have merit are usually disposed of in that administrative process.) Likewise, many contract cases are weeded out by dispositive motions on the basis of the Court's limited jurisdiction. However, the remaining complex contract actions can make use of not only mediation but informal fact finding and neutral evaluation procedures. The Court of Federal Claims has a standing order that provides for two modes of ADR. Other forms of consensual ADR are encouraged by the court.

The *Corporate/Financial Litigation* unit litigates both affirmative and defensive cases, including complex contractual and financial matters, bankruptcies and large foreclosure proceedings. These cases can often benefit from ADR mechanisms.

The *Intellectual Property* unit litigates matters involving patents and copyright issues. These are highly technical. They are often complex, especially regarding damage calculations.

The Torts Branch: The Torts Branch is responsible for defending government agencies and employees in tort suits and administrative claims. It is subdivided into four litigating sections, General Torts, Constitutional and Specialized Torts, Environmental Torts and Aviation and Admiralty.

The General Torts Staff's workload includes a broad array of traditional tort litigation (automobile cases, premise liability and medical malpractice). In addition, the FTCA Staff is responsible for conducting major litigation involving claims arising from financial institution failures and AIDS related tort suits. This Staff also handles highly visible suits that are likely to set significant precedents, involve large sums or are especially sensitive because of the factual context in which they arise.

Constitutional and Specialized Torts (CST) is responsible for representing present and former high ranking officials and other employees who are personally sued for monetary damages as a result of actions taken in the course of their duties. CST handles cases filed under the National Vaccine Injury Compensation Program, which involve allegations of injuries and death which are claimed to have been caused by the administration of certain childhood vaccines. This section also reviews and adjudicates claims brought by individuals under the Radiation Exposure Compensation Program. These claims involve injuries which are alleged to have been caused by radiation exposure from atmospheric nuclear testing and from employment related to the mining of Uranium.

The Environmental Torts Section defends the United States in environmental contamination suits alleging personal injury and property damage as a result of alleged exposure to chemicals, asbestos, radiation and other environmental toxins. Typical suits allege negligence on behalf of the United States and/or its contractors in operating installations and industrial facilities throughout the nation. The cases are complex and rely heavily on expert scientific and medical evidence to protect out interests.

The Aviation and Admiralty section handles defensive and affirmative claims. Aviation litigation results from private, military and air carrier operations and accidents and from the Government's responsibility for air traffic control, airport and aircraft certification and weather information distribution. In Admiralty, on the defensive side, the cases involve collisions at sea, groundings, seaman's injury, search and rescue and other actions relating to the Government's regulation of the nation's waterways. On the affirmative side, the cases include mortgage foreclosure, oil pollution and damage to Government property. The admiralty section also handles cases filed in district courts involving maritime contracts, both defensive and affirmative.

The Federal Programs Branch: The Federal Programs Branch of the Civil Division is a large law office with a diverse civil practice representing over 100 federal agencies. The Branch defends against major suits challenging the constitutionality of statues and the constitutionality and validity under the Administrative Procedure Act of government policies and programs; major Administration initiatives; and agency decisions, orders, and regulations. The Branch also handles significant government personnel litigation, including employment discrimination claims in federal district court and adverse action challenges before the Merit Systems Protection Board (when the Department of Justice is sued) and before federal district courts. Certain APA and personnel actions are amenable to ADR, especially those involving ongoing working relationships. The Branch also personally handles significant government information lawsuits, such as those brought under the Freedom of Information Act and the Privacy Act. About ten percent of the Branch's workload involves affirmative litigation to prevent interference with government operations and enforce various statutes and regulations such as banking laws, the National Highway Traffic Safety Act, and the Ethics in Government Act.

Office of Consumer Litigation: The Office of Consumer Litigation (OCL) is responsible for enforcement of Federal consumer protection statutes, most of which provide for both civil and criminal remedies. OCL principally handles affirmative litigation. OCL receives most of its case referrals from the Food and Drug Administration, the Federal Trade Commission, the Consumer Product Safety Commission, and the National Highway Transportation Safety Administration. Approximately 73% of OCL attorney hours are spent on FDA cases (the approximately 409 pending FDA cases include both civil and criminal enforcement actions and defensive matters).[1] The Office also handles approximately 25 appellate cases per year.

Referrals from the FDA involve the illegal production, distribution, and sale of misbranded and adulterated drugs, medical devices, and foods. In pursuing these affirmative enforcement actions, OCL seeks a variety of remedies under the Food Drug and Cosmetic Act (FDCA), including seizures, injunctions, and criminal prosecutions. While OCL does not seek monetary relief in FDA affirmative cases, ADR techniques may nonetheless prove effective in obtaining expeditious civil settlements. OCL also handles a number of cases defending FDA. The majority of FDA defensive cases are administrative and constitutional challenges to FDA statutes and regulations. These cases rarely settle as both parties need a judicial resolution.

Referrals from the FTC typically involve allegations of FTC Rule violations (e.g. FTC's Franchise Rule, Used Car Rule, and Funeral Rule) or charges of false advertising. In pursuing these affirmative enforcement actions, OCL seeks a variety of remedies under the FTC Act, including civil penalties, consumer redress, and injunctions (which often require the defendants to modify and reform their consumer disclosure practices). Approximately 11% of OCL attorney hours are spent on FTC cases (the approximately 72 pending FTC cases include both FTC Rule and false advertising cases). Those cases are quite suitable for most ADR techniques.

CPSC referrals constitute a small fraction of OCL's case load. Approximately 3% of OCL attorney hours are spent on CPSC cases (the approximately 11 pending CPSC cases

[1] All statistics are for fiscal year 1994.

includes civil actions seeking civil penalties, consumer redress, and injunctions; OCL handles few CPSC criminal enforcement actions). NTSHA referrals involve criminal matters.

The Office of Immigration Litigation: The Office of Immigration Litigation (OIL) is responsible for civil trial and appellate litigation concerning immigration and nationality matters, ranging from high seas interdiction and alien detention, deportation and exclusion, visa and naturalization suits, to document fraud and litigation arising under the employer sanction provisions that affect citizens as well as aliens. OIL has both affirmative and defensive litigation responsibilities, and represents the Immigration and Naturalization Service, Department of State, Executive Office of Immigration Review, and other agencies that regulate the movement of aliens across and within U.S. borders. A number of factors and statutory obligations make this type of litigation unique and generally unsuited to most ADR programs. OIL defends government policies relating to immigration that have broad implications for the nation. They also defend against challenges to the constitutionality of statutes, regulations, and government programs, as well as agency decisions and orders. ADR techniques may be appropriate in settling suits challenging certain operational decisions in the INS districts, where the agency may have some flexibility and the outcome may be guided by existing legal precedent, or in resolving attorney fee disputes. The majority of OIL's cases, however, are: (1) statutory, constitutional, and regulatory challenges to the enforcement of immigration laws and policy which rarely settle; and (2) petitions for review challenging orders of deportation and exclusion, which are preceded by lengthy administrative proceedings during which the record is established, and where there is little to no flexibility for either outcome or relief (especially as most meritorious cases and applications for relief are resolved prior to this stage by agency adjudication), and where any opportunity for an additional procedure is more likely to result in an unwarranted delay of deportation than to speed resolution of the case.

The Appellate Staff: The Appellate Staff handles appeals in cases litigated by the individual Civil Division components, as well as by United States Attorneys' Offices. Most of the work emanates from the Torts, Federal Programs, and Commercial Litigation Branches, with a much smaller number of appeals from the Office of Consumer Litigation and the Office of Immigration Litigation. The Appellate Staff also handles petitions for direct review in the courts of appeals challenging agency actions. While most of the appeals involve defensive litigation (defending statutes, regulations, agency decisions, civil rights/personnel actions), some of the Office's appeals are based on affirmative litigation (e.g., FDA enforcement, enforcement of the federal trade laws, civil penalty actions). Many of the cases that are good candidates for ADR at the district court level are also good candidates for ADR in the Court of Appeals.

II. Case Selection Criteria

A. Criteria for the Commercial Litigation Branch

In applying the below criteria, it is important to consider the development of the facts and whether any particular ADR mechanism is appropriate at the particular time to assist in a resolution of the case, or assist in the development of the facts toward a faster and more efficient resolution. Consideration should be given throughout the litigation to appropriate ADR assistance.

1. *Factors Counseling in Favor of ADR*

(a) The Parties
(1) There is a continuous relationship
(2) There may be benefits to either client hearing directly from the opposing side
(3) Either party would be influenced by opinion of neutral third party
(4) The opposition does not have a realistic view of the case
(5) The parties have indicated that they want to settle
(6) Either party needs a swift resolution
(b) Nature Of The Case
(1) Complex Facts
(2) Technical complexity
(3) Hostile forum or decisionmaker
(4) Flexibility in desired in relief
(5) Trial preparation will be difficult, costly or lengthy
(6) Need to avoid adverse precedent

2. *Factors Counseling Against ADR*

(a) Need for precedent
(b) Need for public determination or sanction
(c) Case likely to settle soon without assistance
(d) Case likely to be resolved efficiently by motion
(e) Opposing counsel are not trustworthy

B. Criteria for ADR Use in Torts Branch

In applying the below criteria, it is important to consider the development of the facts and whether any particular ADR mechanism is appropriate at the particular time to assist in a resolution of the case, or assist in the development of the facts toward a faster and more efficient resolution. Consideration should be given throughout the litigation to appropriate ADR assistance.

1. *Factors Counseling for ADR*

(a) Seeking monetary relief is sole purpose of lawsuit
(1) Any unfavorable precedent may be established
(2) There are multiple defendants, with the United States having the greatest exposure
(3) There are no dispositive legal precedents established or desired
(4) Reasonable probability of unfavorable resolution of factual issues
(5) Where at various stages of the litigation, an evaluation shows that the future costs of discovery and litigation would be greater than the amount of the settlement
(6) In affirmative cases, there will be an unacceptable delay from the time suit is filed until payment
(7) Multiple party litigation desiring intermediate mediation to reduce the number of parties and/or issues
(8) In affirmative cases, the defendant is uninsured or under insured
(b) Non-monetary relief sought
(1) Injunctive relief is not necessary even though desired
(2) A declaratory judgment is not necessary even though desired

2. *Factors Counseling Against ADR*

(1) Need to obtain/maintain legal precedent
(2) No liability on part of United States based on facts and/or well-established precedent
(3) Case is anticipated to be one of many
(4) Subject to a motion to dismiss in lieu of answer
(5) Subject to a motion for summary judgment once facts are developed, where costs of proceeding are less than plaintiff would take in settlement
(6) Individual is sued in his personal capacity as a Government employee
(7) A case involving the seizure of property to pay a debt where the property is the only source of revenue
(8) Injunctive relief sought where no compromise or relief available
(9) Case is likely to settle soon without ADR

C. Criteria for the Office of Consumer Litigation

In applying the below criteria, it is important to consider the development of the facts and whether any particular ADR mechanism is appropriate at the

particular time to assist in a resolution of the case, or assist in the development of the facts toward a faster and more efficient resolution. Consideration should be given throughout the litigation to appropriate ADR assistance.

1. *FDA Referrals*

a. *FDA Civil Affirmative Litigation.* In civil affirmative actions under the Food Drug and Cosmetic Act (FDCA), the Government may pursue seizure remedies (*e.g.* in *in rem* actions against adulterated or misbranded food, drugs, or medical devices) and/or injunctive remedies (*e.g.* in actions against manufacturers or distributors of misbranded or adulterated food, drugs, or medical devices). Civil penalties and consumer redress are unavailable under the FDCA. While OCL does not seek monetary relief in FDA affirmative cases, ADR techniques may nonetheless prove effective in obtaining expeditious settlements.

Because FDA seizure and injunction cases almost always involve serious public health concerns, the client agency may be more receptive to ADR techniques in which the Government takes an active role in fashioning the settlement and retains the ability to accept or reject a third party neutral's recommendations. Accordingly mediation (rather than arbitration) is likely to be the ADR technique of choice. In addition, the Government is likely to favor the utilization of third party neutrals (whether U.S. Magistrates, retired Federal Judges, or private mediators) who have an expertise in food and drug or public health law.

Mediation may be particularly effective in the following situations:

(1) Mediating claimants' manner of reconditioning or destruction of adulterated or misbranded products in seizure actions.

(2) Mediating claimants' reimbursement of the Government's storage and destruction costs in seizure actions.

(3) Mediating claimants' agreement to injunctive language in consent decrees in actions initially filed as civil seizures. In contested seizures, the Government may wish to expand its scope of relief upon discovery of new facts or upon expenditure of considerable resources. ADR is of particular use in these situations as the relief sought extends beyond that prayed for in the Complaint. ADR should also be considered in settling appeals of seizure actions (a settlement which includes an injunction may prove more effective than an appellate court's affirmance of a seizure that includes no prospective relief.)

(4) Mediating terms of injunctions, including reconditioning plans, consumer notification obligations; and defendants; reimbursement of the costs of FDA inspections conducted to ensure compliance with consent decree terms.

b. *FDA Civil Defensive Litigation.* Most of OCL's defensive litigation involves administrative and constitutional challenges to FDA statutes and regulations (e.g. Administrative Procedure Act challenges to the Nutrition Labeling and Education Act). Typically, both parties in these cases seek a judicial resolution of the dispute which will result in legal precedent. Nevertheless, ADR may be effective in certain cases in which the agency may wish to avoid publicity, a judicial decision is likely to be unfavorable, or the issue at stake (e.g. whether the FDA has engaged in unreasonable delay in evaluating an applicant's new drug application) is not of precedential importance to the Government.

c. *FDA Criminal Litigation.* FDA criminal cases are inappropriate for ADR consideration because a final judicial decision (whether through a plea agreement or trial) is required.

2. *FTC Referrals*

OCL's affirmative FTC Rule violation and false advertising actions include requests for monetary relief and are often most suitable for ADR techniques. Mediation or early neutral evaluation provided by U.S. Magistrates and/or Senior Judges is the ADR methodology currently preferred by the client agency for the following reasons: (1) The FTC recommends specific parameters to OCL regarding the acceptable range of monetary relief for which it will settle (settlement ranges are provided by the FTC's Bureau of Economics and are voted on by the FTC Commissioners). Any type of binding arbitration may therefore be inappropriate, as OCL must maintain an ability to reject a settlement proposal suggested by a third party neutral that is out of the range considered acceptable by the client agency. (2) Individual FTC Rule violation cases are often part of larger enforcement initiatives. OCL must therefore retain the ability to ensure that like cases are settled for like amounts. (3) The FTC's economic statistics used to guide the Government's settlement positions are confidential. The agency would be reluctant to release those statistics to third party neutrals who are not Judicial officers. However, other non-binding ADR techniques utilizing third party neutrals should be considered.

Mediation may be particularly effective in the following situations:

(1) Mediating the terms of a consent decree for FTC Rule violations including modification of the defendant's consumer disclosure practices.

(2) Mediating the amount of civil penalties recovered.

(3) Mediating the amount of consumer redress recovered and the method for dispersing such funds among injured consumers.

3. *CPSC Referrals*

OCL's cases referred by the Consumer Product Safety Commission include civil actions seeking civil penalties, consumer redress, and injunctions. The criteria and concerns relating to civil CPSC matters mirror those relating to FTC civil enforcement actions discussed above. OCL also prosecutes a small number of criminal CPSC cases. These criminal matters are not amendable to ADR techniques as a judicial resolution is required.

4. *NHTSA Referrals*

OCL referrals from National Highway Transportation and Safety Administration (and, to a lesser extent, State Highway Patrols and the FBI) relate primarily to criminal odometer tampering prosecutions. These criminal actions require judicial resolution and are not amendable to ADR techniques.

D. Criteria for the Office of Immigration Litigation

In applying the below criteria, it is important to consider the development of the facts and whether any particular ADR mechanism is appropriate at the particular time to assist in a resolution of the case, or assist in the development of the facts toward a faster and more efficient resolution. Consideration should be given throughout the litigation to appropriate ADR assistance.

1. *Factors Counseling for ADR*

a. Lawsuits challenging INS operations other than enforcement measures controlled by statute or regulation may be amendable to ADR at various stages. (The factors regarding other types of OIL litigation identified in section 2 below, should also be considered in deciding whether ADR is appropriate for these cases.) Mediation is most likely, although other ADR methods such as early neutral evaluation may be appropriate if they are likely to reduce the time and cost of litigation in a specific case.

(1) Issue is localized or limited to a specific INS district or facility.

(2) Agency (or district) has some flexibility in resolving matters.

(3) Need exists to narrow issues, dispute is largely factual, or discovery needs to be tailored to material issues.

(4) Hostile forum (where more control of case and a fairer or more effective and favorable outcome may be obtained through mediation).

(5) Court appears to be unwilling to rule

(6) Expectations of party/parties are unreasonable (parties or aggrieved persons may benefit from an evaluation of their case by someone other than their lawyers).

(7) Statute or regulation has been rescinded.

b. Attorney Fee Disputes.

(1) Sole issue or remaining issue in the case

(2) ADR will speed anticipated settlement and avoid needless increase in attorney fees.

2. *Factors Counseling Against ADR*

a. Petitions for review of deportation orders in the courts of appeal and petitions for habeas corpus for judicial review of exclusion orders in the district court under 8 U.S.C. 1105a, or exercise of enforcement authority and discretion delegated to INS district directors or other officials:

(1) Statute provides the "exclusive" procedures for judicial review.

(2) Prescribed outcomes or statutory remedies are inflexible.

—Grounds for exclusion and deportation are determined by statute

—Requirements for relief are determined by statute

(3) There has been prior extensive administrative process

—Review is limited to the administrative record, and facts of these cases are rarely in dispute by the time case reaches federal court

—Actual challenge is to the agency's evaluation of facts, exercise of discretion, or other elements entitled to deference by the courts

(4) Additional procedure would most benefit the alien who seeks to delay his inevitable departure or to stall for the time he lacks to minimally qualify for relief such as suspension of deportation and 212(c) waivers.

(5) Actual error can be corrected by motion to remand to BIA or reconsideration by agency.

b. Litigation challenging implementation of the immigration laws, including new legislative initiatives, Executive orders, government policy, amended regulations, and enforcement actions under existing authority, statutes and regulations:

(1) Judicial resolution or precedent is needed.

—case involves significant legal, policy, or constitutional issues where there is little or no likelihood of flexibility in the government's position

—case involves issue of first impression and is important to development of a particular area of law

—favorable facts make the case a good vehicle to establish legal ruling in development of law

—judicial resolution is unavoidable because statutory or regulatory program is at stake

(2) Injunctive relief is sought and delay would cause prejudice.

(3) Agency is exercising its judicially recognized exclusive authority over issues of immigration and needs to respond to changed circumstances.

(4) Executive Branch must be able to fully preserve its ability to respond to events that may implicate relations with other nations.

(5) Law enforcement function cannot be compromised.

—goal of opponent's suit is to undermine or minimize adverse consequences prescribed by Congress

—challenge is to principles so fundamental that productive negotiation is unrealistic

—nongovernmental party has an incentive to stall

(6) Issue needs uniform treatment.

—issue has nationwide impact

—similar suits pending or anticipated

—aliens' advocates are bringing similar actions in different courts in search of a sympathetic forum

—no legitimate reason to settle with one party or plaintiff group

—need to maintain established policies or consistent results between individual cases

—need to discourage similar suits

(7) Law is settled.

—no compromise or relief is available

—strong likelihood of success on the legal issues

—case is likely to be disposed of by summary judgment or other dispositive motion

—case is frivolous, dispute is different from actual grievance (i.e., due process claim when alien is ineligible for relief), or only discernible purpose is delay

(8) Case is likely to settle or settle faster through unassisted negotiation without ADR

(9) Parties are not willing to negotiate or prepared to settle case

(10) Government official, officer or other individual is sued in his personal capacity

(11) Parties are not represented by counsel

(12) Opponent is untrustworthy, his credibility is a disputed issue, or United States has reason to believe that he is engaging in fraudulent or criminal behavior

E. Criteria for the Federal Programs Branch

Among the Branch cases which appear most amenable to ADR are personnel actions, particularly those involving factual disputes and parties which have an ongoing work relationship. Less amenable as a group are the constitutional and major APA challenges, since the cases the Branch chooses to personally handle involve the most visible government policies and programs which impact not just the parties directly involved in the lawsuits but often have broad implications for the whole of society. These are often the cases whose policy determinations are considered the most important by the defendant agencies and for which flexibility in terms of settlement options is quite limited. Consideration of ADR may be appropriate, however, for routine APA challenges where there is more flexibility in the agency, substantial legal precedent already exists, and the use of a third-party neutral may be beneficial to expedite the settlement process.

In applying the below criteria, it is important to consider the development of the facts and whether any particular ADR mechanism is appropriate at the particular time to assist in a resolution of the case, or assist in the development of the facts toward a faster and more efficient resolution. Consideration should be given throughout the litigation to appropriate ADR assistance.

1. *Factors Counseling for ADR*

(a) Continuing relationships between plaintiffs and agency.

(b) Case involves largely a factual dispute.

(c) Relief sought is money damages.

(d) Agency is essentially a stakeholder, with plaintiffs or co-defendants trying to impose on agency diametrically opposed relief or requirements (this element may appear in some APA and other policy type cases); similarly, where there are many parties to the lawsuit with divergent interests which hamper standard negotiation efforts.

(e) Plaintiffs and agency are interested in seeking resolution but personality conflicts or poor communication

between opposing counsel adversely affects settlement negotiations.

(f) There are underlying issues which are not formally part of the complaint and which cannot be resolved by the relief legally available, but which are the catalyst for the lawsuit.

(g) Apparent unwillingness of court to rule on matters which would advance the case toward resolution.

(h) Where you expect to settle eventually, most likely on the "courthouse steps."

(i) Where plaintiffs' demands, or the agency's view of the case, are unrealistic, and a realistic appraisal of the situation by a neutral third party may help unlodge the recalcitrant party.

(j) Where there is a need to avoid adverse precedent but traditional settlement negotiations have reached an impasse.

2. *Factors Counseling Against ADR*

(a) Case involves significant legal, policy, or constitutional issues where there is little or no likelihood of flexibility in the government's position.

(b) Where judicial resolution is necessary for precedential value.

(c) The case can likely be efficiently disposed of by summary judgment or other dispositive motion.

(d) The case is likely to settle in near future without need for neutral assistance.

F. Criteria for the Appellate Staff

The criteria listed below are suggested as a starting point for analyzing whether a case on appeal could benefit from ADR. While each attorney should also examine the criteria of the trial component from which the appeal arose, other criteria come into play or take on a different degree of importance at the appellate level. For instance, the role of precedent at the court of appeals level is much greater. Attorneys should consider what if any ADR efforts were attempted earlier in the case, and whether and how the case has changed from its posture at the trial level, both factually and legally. The ADR techniques that are likely to be used by the Appellate Staff are mediation and case evaluation, because at the appellate level the issues are largely legal ones that would not benefit from the more fact-intensive techniques such as mini-trials.

1. *Factors Counseling for ADR*

(a) Predominantly factual case where government faces clearly erroneous standard.

(b) Monetary cases without significant precedential concerns.

(c) Risk of adverse precedent or publicity. E.g., case is poor vehicle to establish favorable legal precedent, circuit has poor track record on type of issue, risk of circuit split and Solicitor General unlikely to authorize certiorari, loss on the issue may create poor precedent for other government agencies.

(d) Need for swift resolution. E.g., agency has programmatic needs that cannot await the usual length of the appellate process, the appeal is only one part of multi-issue litigation with the potential for future remands and appeals.

(e) Continuing relationships. E.g., ongoing federal/state relationship, ongoing relationship between agency and regulated entity, continued contact in implementation of remedy or class action.

(f) Numerous parties and issues.

(g) Need to avoid increased attorneys fees or post-judgment interest that unsuccessful appeal will incur.

(h) Need for problem solving or development of creative alternatives or flexibility in shaping relief e.g., suit is only one facet of a deeper dispute involving other issues court may not be able to address.

(i) Other parties are willing to consider ADR.

(j) Certain statutory, regulatory, or constitutional cases e.g., no continuing importance because statutes or regulations have been amended, constitutional challenge such as due process actually masks some underlying issue capable of resolution such as plaintiff's desire for expungement of record or consideration for job opening.

(k) Case is one which should have been settled in district court but was not.

2. *Factors Counseling Against ADR*

(a) Need for judicial precedent. E.g., need to establish legal ruling in development of a particular area of law and favorable facts make case a good vehicle, judicial resolution unavoidable because nothing short of validity of statutory/regulatory program is at stake.

(b) Need for uniform treatment. E.g., many similar suits pending and no legitimate reason to settle with only one party.

(c) Need to discourage similar suits.

(d) Need for continuous monitoring of compliance by court or public judicial decision in certain enforcement cases.

(e) Likelihood of success is great and relief sought is significant.

III. Which ADR Techniques Are Appropriate for a Case

A. Mediation

1 There is a continuing relationship among the parties.

2 The disputed facts are not technical, requiring subject-matter expertise.

3 There are multiple defendants, with the United States having the greatest exposure.

4 Risk of unfavorable precedent.

5 In affirmative cases, there will be an unacceptable delay from the time suit is filed until payment.

6 Either side can benefit from hearing directly from the client.

7 Opposition needs a realistic view of the case.

8 Flexibility in desired relief.

B. Early Neutral Case Evaluator/Expert

1 Know at the outset that case can be settled.

2 The parties disagree on the amount of damages.

3 Factual issues requiring expert testimony may be dispositive of liability or damage issues and use of an expert neutral is cost effective.

4 A resolution of the factual issue will assist in settlement.

5 Opposition needs a realistic view of the case.

C. Arbitration

1 The parties disagree on the amount of damages.

2 It is a District where the arbitrators are well-respected.

3 There are no complex factual issues involving several areas of expertise and the parties disagree on the facts.

D. Mini Trials

1 In affirmative cases, there will be an unacceptable delay from the time suit is filed until payment.

2 There are simple factual issues which do not necessarily require expert testimony, but would take an excessive amount of time to present in a traditional forum.

3 There are complex factual issues which are generally explained with expert testimony.

4 The attorneys can equably summarize the facts to the fact-finder, without the necessity of lengthy cross-examination.

IV. Criteria for the Selection of ADR Providers

In selecting an ADR provider for a case, Civil Division attorneys should consider the non-exclusive factors set out below. When assessing these factors, attorneys may also consider whether an ADR provider meets the requirements of the relevant state or federal court rules for neutrals. Attorneys may wish to interview the prospective neutral and obtain their resumes in ADR experience

where appropriate. Attorneys may also wish to consult other attorneys who have used the prospective neutral in other cases. In finding prospective ADR providers, attorneys may consult the Senior Counsel for Dispute Resolution, other attorneys in their office, division, or in the Department for such providers.

1. Neutrality, and Related Ethics Standards—Is the ADR provider unbiased, acting in good faith, diligent, and not seeking to advance his or her own interest at the expense of the parties? Will the ADR provider deal fairly with the parties, be reasonably available to the parties, show no personal interest in the content of the settlement? Does the neutral know counsel, and if so, what is the nature and context of that knowledge? Is the neutral subject to disqualification on grounds analogous to those found within 28 U.S.C. 455. Check Society of Professional for Dispute Resolution's Ethical Standards.

2. Training—What kind and extent of training for the particular ADR process has the neutral received? Has the neutral been trained by a well-recognized program?

3. Experience—

(a) *ADR Experience:* number of cases in which the neutral has employed the particular dispute resolution process or related processes, dollar amount in controversy, diversity of processes, complexity of the issues, years of experience in a particular process(es), breadth of experience in types of disputes, experience in multi-party and/or multi-issue disputes, affiliation with court-annexed programs.

(b) *Litigation Experience:* Is the neutral an attorney? Type of legal practice, years of experience, complexity of cases and issues, experience in government litigation.

4. Subject-Matter Expertise In The Type of Dispute and/or Issues—Factors Favoring Subject-Matter Expertise:

(a) Highly technical areas of law are central for understanding the dispute and/or issues and the fashioning of the options for resolution of the dispute (e.g. patent, subspecialities of science or medicine).

(b) Issue is one of damages—when offers are far apart, expertise in typical damage awards and in standard components of damage calculation may bring parties; offers closer (e.g. certain attorney fees, personal injury disputes).

(c) When the parties and attorneys are hesitant to use ADR for a particular case, and expertise will build credibility for them.

(d) There is an impasse over discrete factual and/or legal issues.

(e) Expertise is central to a particular Kind of ADR process—e.g. case evaluation on factual issues, mini-trial, arbitration.

V. Training

Each Civil Division attorney will be trained in a basic, but comprehensive, 6-hour ADR course. The course will be skills-based and interactive. Classes should be comprised of 30–35 attorneys from a variety of Civil Division components. The small class size will permit an interactive focus and discussion format, while the class composition will facilitate a cross-pollination of experiences and ideas among the components. As many of the instructors as possible will be Civil Division litigators with substantial ADR experience. The agenda for the basic ADR training course is envisioned as follows:

A. ADR TECHNIQUES, CASE SELECTION CRITERIA, SELECTION OF PARTICULAR ADR PROCESS (lecture/discussion 1½ hours).

B. CONCRETE EXAMPLES BY GOVERNMENT LITIGATORS OF ADR AND HOW IT WORKS (lecture/discussion 30 minutes).

C. NEGOTIATION SKILLS (lecture 1 hour).

D. INTERNAL PROCEDURES, AUTHORIZATION & FUNDING OF NEUTRALS, SELECTION OF NEUTRALS (lecture 30 minutes). This section will include guidance on how to find an appropriate neutral and how to assess whether the prospective neutral will be a good fit for the case.

E. ATTORNEY PREPARATION FOR ADR (lecture 30 minutes)—includes discussion of case and client agency preparation for ADR, and pre-settlement & settlement authorization.

F. ADR ROLE-PLAYS (2 to 2½ hours)—class may be divided into smaller groups. Each member of the small groups will have the opportunity to participate in the role-play. Instructors and participants will have the opportunity to critique and give feedback both during and after the role-plays. The fact patterns for the role-plays will be chosen to reflect the Civil Division's diverse litigation responsibilities, for example, torts, contract, EEO, and an APA challenge. Every effort will be made to match the participant with a role-play relevant to their litigation caseload.

At the conclusion of the course, participants will be asked to complete and evaluation form. On the basis of those evaluations, comments from the instructors and our actual experiences with ADR, the Civil Division will continue to modify and refine the basic course. All new Civil Division attorneys will also be required to take the course. Once experience with the basic ADR training occurs, the Civil Division will be able to develop supplemental ADR training as needed. This training will be coordinated with the Office of the Senior Counsel for ADR.

VI. Procedures for Authorization and Funding of Neutrals

These procedures supplement the instructions issued by the Office of Senior Counsel for Alternative Dispute Resolution (SCADR) in the Associate Attorney General's Office. Civil Division attorneys shall request authorization and funding for neutrals in accordance with these procedures. Prior to using these procedures you should make arrangements with the opposing party and third party neutral and execute a proposed ADR agreement (available from your ADR representative).

The revised Form OBD–47, Request for Authorization, and Agreement for Fees and Expenses for Witnesses and Alternative Dispute Resolution Neutrals will be used. This document will serve as the formal contract with the third party neutral.

STEP 1—It is impractical to obtain full and open competition for ADR in most cases. However, before the OBD–47 is completed, the case attorney must negotiate the best neutral rate possible.

STEP 2—Once the OBD–47 has been completed and approved by the branch director, forward the OBD–47, the ADR agreement, and any additional supporting documentation to Raziya Clouser of the Contracts and Procurement Branch (Room 7110, Todd Building) for processing. Contracts and Procurement Branch will obtain a commitment of funds from SCADR for each request; a neutral should not begin work in advance of a fully approved request.

STEP 3—After the Contracts and Procurement Branch has returned the approved agreement, the case attorney should sign it, obtain the neutral's signature, and return a copy of the fully executed agreement back to the Branch. It is not necessary for the case attorney to forward a copy of the signed agreement to the SCADR; the Contract and Procurement Branch will perform this task.

STEP 4—The neutral should forward all invoices to the case attorney for review and certification. Because of Prompt Payment Act requirements, it is critical that invoices are date stamped when they are received by the attorney. It is also vital that the case attorney review the invoice and (1) reject it, if it is defective, or (2) certify it for payment,

if it is proper, within seven days of the invoice's receipt (refer to the Civil Division directive on expert witnesses, CIV 2110A, § d. *Payment of the Expert Witness* for more detailed invoice rejection and certification instructions).

STEP 5—Once a neutral's invoice has been certified for payment, it should be forwarded along with a copy of the signed OBD–47 to Frank Free of the Office of Planning, Budget, and Evaluation (Room 7032, Todd Building) for payment.

Questions regarding the procurement of third party neutrals should be directed to Ms. Clouser at 606–0786. Questions regarding payment should be directed to Mr. Free at 307–0842.

VII. Coordination, Reporting, and Evaluation

The Civil Division ADR committee shall coordinate ADR activities on behalf of the Division. The committee consists of Stephen Altman (Chair), Deborah Kant (Vice Chair), Susan Cavanagh, Mary Doyle, Vince Faggioli, Debra Kossow, Cindy Lebow, Emily Radford, Deborah Smolover, and Sandy Schraibman and Kim Humphries.

A system of reporting on cases in ADR shall be established. A reporting form of one page shall be filled out when an ADR process is considered or used, and the data shall be included in the computerized data bank maintained by the Civil Division's Management Programs component.

In addition, a system of evaluation will be instituted that allows for civil division attorneys using ADR providers to give immediate feedback to a centralized data base. Attorneys using ADR providers' services will be asked to rate the provider on the general standards set out above in the selection of neutrals section. These evaluation forms should then be made available to any potential future users of an ADR provider's services. When any providers consistently receive poor evaluations, this information will be included in the data bank and made available to civil division attorneys.

VIII. Miscellaneous

The Civil Division's Statement On ADR relates to the government's voluntary participation in ADR. Nothing herein shall be construed to limit the government's duty to participate in ADR pursuant to court or applicable local rules, except that Civil Division attorneys shall resist participation in ADR, by appropriate motion, whenever said participation would violate the United States Constitution or other governing law.

This Statement shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity, by a party against the United States, its agencies, its officers, or any other person. This Statement shall not be construed to create any right to judicial review involving the compliance or noncompliance of a Civil Division attorney with its terms.

Appendix

"Alternative Dispute Resolution" ("ADR") means any procedure, involving a "neutral," that is used in lieu of trial to resolve one or more issues in controversy, and includes but is not limited to the following "ADR techniques";

1. *Mediation* means a flexible, nonbinding process in which a neutral third party, the mediator, facilitates negotiations among the parties to help them reach a settlement. In doing so, the mediator may expand traditional settlement discussion and broaden resolution options, often by going beyond the legal issues in controversy or incorporating nonparties in discussions. Theoretically, the mediator does not provide an opinion as to how the case should be resolved, but merely helps the parties settle the case among themselves.

2. *Early neutral case evaluation,* unlike mediation, on liability and/or damages. The evaluator usually has subject-matter expertise. The opinion is non-binding and generally occurs early in the lawsuit. The parties may have the option of asking the evaluator to continue to mediate the dispute.

3. *Neutral expert evaluation* is similar to early neutral case evaluation; however, the evaluation does not necessarily occur early in the litigation. The expert is chose based on the expertise needed to resolve some factual dispute in the case. The export provides a non-binding opinion.

4. *Arbitration* usually consists of a panel of one or more arbitrators who listen to the parties present their respective views of the case in an expedited, adversarial hearing format. The formality varies and may involve presentation of documents and witnesses or simply a summary by counsel. A decision is rendered that addresses liability and damages, if necessary. As of this time, it is non-binding on the United States and either party may request a trial *de novo.*

5. *Minitrial* means a flexible, nonbinding hearing, generally reserved for complex cases, in which counsel for each party informally presents a shortened form of its case to settlement-authorized representatives of the parties in the presence of a presiding judge, magistrate judge, or other neutral, at the conclusion of which the representatives meet, with or without the judge or neutral, to negotiate a settlement, failing which the case proceeds to trial.

6. *Summary bench trial* means, in any case not triable by a jury, a pretrial procedure intended to facilitate settlement consisting of a summarized presentation of a case to a Judicial Officer whose decision and subsequent factual and legal analysis serves as an aid to settlement negotiations.

7. *Summary jury trial* means a flexible nonbinding procedure, usually reserved for trial-ready cases in which protracted jury trials are anticipated, and involving a short hearing in which evidence is presented by counsel in summary form, following which a jury returns an advisory verdict that forms the basis for settlement negotiations.

Civil Rights Division, Alternative Dispute Resolution, Case Screening Factors

Alternative Dispute Resolution ("ADR"), as used here, is any dispute resolution process facilitated by a third-party neutral. The Civil Rights Division resolves consensually many of its civil cases through traditional two-party negotiation and will continue to do so. ADR is not meant to replace traditional negotiation, but rather to provide attorneys with additional tools that may facilitate communication and resolution of matters where party-to-party negotiations have been or are likely to be unsuccessful.

In evaluating whether an ADR process may be useful, there are no hard and fast rules. Attorneys should consider whether ADR might be helpful in a particular case at the beginning of the litigation and revisit the question throughout the progress of the case taking into account the ADR processes that may be available through or imposed by the court in a particular district or circuit as well as the private ADR providers available in the relevant market. The following is a brief description of the major ADR processes.

1. *Mediation.* An impartial third party facilitates confidential discussions or negotiations among the parties to help them reach settlement. Mediation is a creative, flexible process that may broaden resolution options, often by going beyond the legal issues in controversy.

2. *Neutral Evaluation.* Neutral evaluation is a confidential conference where the parties and their counsel present the factual and legal bases of their case and receive a non-binding assessment by an experienced neutral with subject-matter expertise and/or with significant trial experience in the jurisdiction. This assessment can form the basis for settlement discussions facilitated by the evaluator if the parties so choose.

3. *Joint Fact-Finding.* This term encompasses various processes in which facts relevant to a controversy are examined and determined by a neutral third party. Typically, the parties appoint a neutral expert to resolve complex factual, technical, scientific, or legal questions and agree in advance whether the findings will be treated as advisory or binding.

4. *Mini-Trial/Summary Jury Trial.* An informal hearing-like presentation by the parties of their best case in shortened form to settlement-authorized representatives. Following the hearing, the parties and representatives meet, with or without a neutral advisor, to negotiate a settlement. If a jury is used, the jury's non-binding verdict is used as a basis for subsequent settlement negotiations.

5. *Arbitration.* One or more arbitrators issue a judgment on the merits (binding or non-binding) after an expedited adversarial hearing.

The following is a non-exclusive list of factors to assist attorneys in determining whether to use ADR in a particular case. Not

all factors listed will be relevant to a given case, and factors not listed below may weigh in favor of or against use of ADR in a particular instance.

Factors Favoring Use of ADR

The Parties

• *Continuing Relationships.* The United States, aggrieved persons, or other litigants are likely to have continued contact with the defendants in implementation of remedy or in other contexts.

• *Barriers to Communication.* The United States or other litigants foresee impasses developing because of conflicts within interest groups, political visibility, or poor or non-existent communication among the participants (including attorneys) due to personality difficulties or past history.

• *Absent Stakeholder(s).* Participation of persons or groups who are not directly involved in the legal action may be beneficial or necessary to optimal resolution.

• *Divergence of Interests.* There are gains and losses to be apportioned constructively, and in which varying priorities among the parties will allow trading off of those gains and losses to permit all involved to benefit from the outcome.

• *Numerous Parties.* The number of parties or interested persons or groups is so numerous that a structured/facilitated negotiation process would be helpful.

• *Litigation Against Other Government Agencies.* Involvement of a third-party neutral may assist in sorting through and/or evaluating "public interest" claims of various governmental components (among federal agencies or between federal and state or local entities), provided non-Departmental litigants are acting in good faith.

Nature of the Case

• *Need for Problem Solving or Development of Creative Alternatives.* A thorough exchange of information and generation of alternatives and options will improve the outcome.

• *Factual or Technical Complexity or Uncertainty.* The parties would benefit from reliance on the expertise of a third-party expert for technical assistance and/or fact-finding.

• *Need for Facilitated Private Discussions.* The settlement desired may be improved by the neutral's ability to conduct frank, private discussions among the parties.

• *Flexibility Desired in Shaping Relief.* The United States is seeking relief with detailed implementation and/or monitoring on multiple issues or subjects that may be difficult to obtain from the Court, or is amenable to resolution through cooperation between the parties.

• *Ultimate Outcome Uncertain.* Litigants face uncertain outcome at the time of trial based on the law, the facts, or the decisionmaker. Also important is the likelihood of prevailing on appeal should the United States lose at trial.

• *Hostile Decisionmaker.* Case will be tried in front of an unsympathetic Judge, or jury venue is likely to be unsympathetic or even hostile.

• *Conservation of Enforcement Resources.* Preparing the case for trial would require a burdensome commitment of significant resources without achieving a proportionate impact.

• *Numerous Issues.* Discussion of multiple issues will be assisted by a structured/facilitated negotiation process.

• *Direct Settlement Negotiations Unsuccessful.* The United States has attempted traditional settlement negotiations without success or an impasse has been reached and the United States believes involvement of a third-party neutral will facilitate further progress and/or final resolution.

Representation

• *Need To Speak Directly to Client.* The parties (or aggrieved persons) need to hear an evaluation of the case from someone other than their lawyers.

(For example, a case that appears to be headed for trial merely because a defendant does not understand the applicable law.)

• *Lawyers Are Willing To Consider ADR.* The lawyers involved are knowledgeable about ADR processes and intend to participate in the chosen ADR process in a good-faith attempt to resolve the dispute.

Timing

• *Facts Are Sufficiently Developed.* The parties have sufficient information to permit them to make informed decisions concerning the ultimate disposition of the dispute.

• *Parties Are Prepared To Discuss Settlement.* The parties are willing to resolve the case short of trial.

Factors Disfavoring Use of ADR

• Public Sanction Necessary. There is a need for public sanctioning of conduct.

• Imbalance of Power or Ability. A party or parties are not able to negotiate effectively themselves or with assistance of counsel.

• Judicial Decision Required. Development of the law is important or the imprimatur of a court decision is necessary to secure vindication of rights, enforcement, or compliance.

• Biased Selection Process for ADR Neutral. Political sensitivity of case coupled with questionable neutral selection process would likely result in selection of "neutral" with ties to local political powers or parochial interests contrary to the United States. (This situation may be dealt with by insisting that the United States have power to overturn final selection of neutral.)

• Successful Summary Judgment Certain To Resolve Case Conclusively.

• Case Very Likely To Settle Through Unassisted Negotiation in Near Future.

Civil Rights Division, Alternative Dispute Resolution, Case Screening Factors

Alternative Dispute Resolution ("ADR"), as used here, is any dispute resolution process facilitated by a third-party neutral. The Civil Rights Division resolves consensually many of its civil cases through traditional two-party negotiation and will continue to do so. ADR is not meant to replace traditional negotiation, but rather to provide attorneys with additional tools that may facilitate communication and resolution of matters where party-to-party negotiations have been or are likely to be unsuccessful.

In evaluating whether an ADR process may be useful, there are no hard and fast rules. Attorneys should consider whether ADR might be helpful in a particular case at the beginning of the litigation and revisit the question throughout the progress of the case taking into account the ADR processes that may be available through or imposed by the court in a particular district or circuit as well as the private ADR providers available in the relevant market. The following is a brief description of the major ADR processes.

1. *Mediation.* An impartial third party facilitates confidential discussions or negotiations among the parties to help them reach settlement. Mediation is a creative, flexible process that may broaden resolution options, often by going beyond the legal issues in controversy.

2. *Neutral Evaluation.* Neutral evaluation is a confidential conference where the parties and their counsel present the factual and legal bases of their case and receive a non-binding assessment by an experienced neutral with subject-matter expertise and/or with significant trial experience in the jurisdiction. This assessment can form the basis for settlement discussions facilitated by the evaluator if the parties so choose.

3. *Joint Fact-Finding.* This term encompasses various processes in which facts relevant to a controversy are examined and determined by a neutral third party. Typically, the parties appoint a neutral expert to resolve complex factual, technical, scientific, or legal questions and agree in advance whether the findings will be treated as advisory or binding.

4. *Mini-Trial/Summary Jury Trial.* An informal hearing-like presentation by the parties of their best case in shortened form to settlement-authorized representatives. Following the hearing, the parties and representatives meet, with or without a neutral advisor, to negotiate a settlement. If a jury is used, the jury's non-binding verdict is used a basis for subsequent settlement negotiations.

5. *Arbitration.* One or more arbitrators issue a judgment on the merits (binding or non-binding) after an expedited adversarial hearing.

The following is a non-exclusive list of factors to assist attorneys in determining whether to use ADR in a particular case. Not all factors listed will be relevant to a given case, and factors not listed below may weigh in favor of or against use of ADR in a particular instance.

Factors Favoring Use of ADR

The Parties

• *Continuing Relationships.* The United States, aggrieved persons, or other litigants are likely to have continued contact with the defendants in implementation of remedy or in other contexts.

• *Barriers to Communication.* The United States or other litigants foresee impasses developing because of conflicts within interest groups, political visibility, or poor or non-existent communication among the participants (including attorneys) due to personality difficulties or past history.

• *Absent Stakeholder(s).* Participation of persons or groups who are not directly

involved in the legal action may be beneficial or necessary to a optimal resolution.

• *Divergence of Interests.* There are gains and losses to be apportioned constructively, and in which varying priorities among the parties will allow trading off of those gains and losses to permit all involved to benefit from the outcome.

• *Numerous Parties.* The number of parties of interested persons or groups is so numerous that a structured/facilitated negotiation process would be helpful.

• *Litigation Against Other Government Agencies.* Involvement of third-party neutral may assist in sorting through and/or evaluating "public interest" claims of various governmental components (among federal agencies or between federal and state or local entities), provided non-Departmental litigants are acting in good faith.

Nature of the Case

• *Need for Problem Solving or Development of Creative Alternatives.* A thorough exchange of information and generation of alternatives and options will improve the outcome.

• *Factual or Technical Complexity or Uncertainty.* The parties would benefit from reliance on the expertise of a third-party expert for technical assistance and/or fact-finding.

• *Need for Facilitated Private Discussions.* The settlement desired may be improved by the neutral's ability to conduct frank, private discussions among the parties.

• *Flexibility Desired in Shaping Relief.* The United States is seeking relief with detailed implementation and/or monitoring on multiple issues or subjects that may be difficult to obtain from the Court, or is amenable to resolution through cooperation between the parties.

• *Ultimate Outcome Uncertain.* Litigants face uncertain outcome at the time of trial based on the law, the facts, or the decisionmaker. Also important is the likelihood of prevailing on appeal should the United States lose at trial.

• *Hostile Decisionmaker.* Case will be tried in front of an unsympathetic Judge, or jury venire is likely to be unsympathetic or even hostile.

• *Conservation of Enforcement Resources.* Preparing the case for trial would require a burdensome commitment of significant resources without achieving a proportionate impact.

• *Numerous Issues.* Discussion of multiple issues will be assisted by a structured/facilitated negotiation process.

• *Direct Settlement Negotiations Unsuccessful.* The United States has attempted traditional settlement negotiations without success or an impasse has been reached and the United States believes involvement of a third-party neutral will facilitate further progress and/or final resolution.

Representation

• *Need To Speak Directly to Client.* The parties (or aggrieved persons) need to hear an evaluation of the case from someone other than their lawyers. (For example, a case that appears to be headed for trial merely because a defendant does not understand the applicable law.)

• *Lawyers Are Willing To Consider ADR.* The lawyers involved are knowledgeable about ADR processes and intend to participate in the chosen ADR process in a good-faith attempt to resolve the dispute.

Timing

• *Facts Are Sufficiently Developed.* The parties have sufficient information to permit them to make informed decisions concerning the ultimate disposition of the dispute.

• *Parties Are Prepared To Discuss Settlement.* The parties are willing to resolve the case short of trial.

Factors Disfavoring Use of ADR

• *Public Sanction Necessary.* There is a need for public sanctioning of conduct.

• *Imbalance of Power or Ability.* A party or parties are not able to negotiate effectively themselves or with assistance of counsel.

• *Judicial Decision Required.* Development of the law is important or the imprimatur of a court decision is necessary to secure vindication of rights, enforcement, or compliance.

• *Biased Selection Process for ADR Neutral.* Political sensitivity of case coupled with questionable neutral selection process would likely result in selection of "neutral" with ties to local political powers or parochial interests contrary to the United States. (This situation may be dealt with by insisting that the United States have power to overturn final selection of neutral.)

• *Successful Summary Judgment Certain To Resolve Case Conclusively.*

• *Case Very Likely To Settle Through Unassisted Negotiation in Near Future.*

September 11, 1995.

ADR Criteria—Environment and Natural Resources Division

The Environment and Natural Resources Division ("ENRD") proposes the following ADR criteria for use by its attorneys.

ENRD has made substantial progress in developing an ADR docket. Approximately 18 months ago, we began to require each section regularly to review its docket for potential ADR cases and to make reports to the Assistant Attorney General. In this time, the sections have identified approximately 200 cases as candidates for resolution through ADR; of those matters, approximately 150 cases are now in an ADR process or have been resolved through ADR or otherwise.

We have several ideas for building on these initial successes. Principally, we seek to encourage the use of ADR in new types of cases and to increase the number of attorneys who are actively involved in ADR and who have ADR expertise. For our purposes, the ADR criteria should be inclusive, rather than exclusive, and should encourage attorneys to be creative in the use of ADR. The criteria are not intended to be utilized as a "checklist" of factors that must be present for an ADR process; rather, they are offered as some reasons among many others to use ADR. Further Division experience with ADR processes will likely allow refinement of these criteria.

We therefore propose that ENRD attorneys should use a single criterion and several factors in evaluating the use of ADR:

ADR Criterion: ENRD attorneys should consider and use ADR techniques in their cases whenever ADR may be an effective way to reach a consensual result that is beneficial to the United States.

ADR Factors: In its use of ADR thus far, ENRD has found that ADR can be helpful in achieving a beneficial settlement in various situations, some of which are identified below. ENRD attorneys should look to these factors as some reasons why ADR might be useful in their cases. Even cases that do not exhibit these factors are often appropriate for ADR.

One of the advantages of ADR is that it gives the parties to a dispute the flexibility to fashion their own procedures for resolving the dispute. There are almost as many kinds of ADR as there are parties and disputes. Thus, in evaluating whether ADR processes may be useful, there are no hard and fast rules. Attorneys should begin considering whether ADR might be helpful in a particular case at the beginning of the litigation and should continue to revisit the question throughout the progress of the case. Such analysis must take account of the ADR processes that may be available through or imposed by the court in a particular district court or circuit. Attorneys should keep in mind that many different kinds of ADR are available both through the courts and independent of the courts.

As ENRD gains more experience with ADR, we intend to amend and add to these factors:

—Ability of neutral to conduct frank, private discussions may improve the outcome.

—Range of issues are broad enough, or can be creatively made broad enough, to allow tradeoffs and creative generation of options presented, especially when some options cannot be ordered by a court. For example, in a NEPA dispute, underlying resource management decisions are likely the crux of concern, but cannot be reached by a court. Addressing concerns with respect to the underlying dispute can resolve the issue at hand, and may forestall future litigation. Money disputes can often be more complex than they first appear.

—A neutral may be helpful in facilitating negotiations by breaking through impasses that develop because of:

—Conflicts within interest groups;

—Technical complexity or uncertainty;

—Political visibility;

—Poor communication among the participants due to personalities or past history.

For example, a neutral can defuse tension with a citizens' group angry about a particular agency project by presenting negotiating proposals from all sides in an even-handed manner. If appropriate, a neutral or other joint expert might offer technical expertise on a given issue.

—Thorough exchange of information will improve the outcome. For example, a neutral can help to ensure that all issues are addressed, and that the heat of negotiating has not caused the parties to overlook an item that may be crucial to settlement implementation.

—Participation of parties not directly involved in a legal action is necessary or beneficial to the settlement. For example, numerous citizens' groups may be interested in a particular agency project; addressing the concerns only of the group that sued may be short-sighted, and invite future litigation from others.
—Number of parties and issues numerous, such that a facilitated, structured settlement process would be helpful, and no party is willing or able to take on his role. For example, CERCLA allocation disputes often involve multiple parties and issues, and a neutral who provides a structure for allocation can assist the parties in reaching a global settlement.

* * * * *

This document relates to the United States' voluntary participation in ADR. Nothing here shall be construed to limit the United States' duty to participate in ADR pursuant to court order or applicable local rules, except that Division attorneys shall resist participation in ADR, by appropriate motion, whenever such participation would violate the United States Constitution or other governing law.

This document shall not be construed to create any right or benefit, substantive or procedural, enforceable at law or in equity, by a party against the United States, its agencies, its officers, or any other person. This document shall not be construed to create any right to judicial review involving the compliance or noncompliance of a Division attorney with its terms.

Executive Office for United States Attorneys' Policy Statement and Practice and Procedure Guide on the Use of Alternative Dispute Resolution

This Policy Statement and Practice and Procedure Guide ("Guide") is distributed to all United States Attorneys (USAs) nationwide pursuant to paragraph 7 of Department of Justice Order OBD 1160.1, dated April 6, 1995, and entitled, "Promoting the Broader Appropriate Use of Alternative Dispute Resolution Techniques." This Guide should be distributed immediately to all Assistant United States Attorneys (AUSAs) and Special Assistant United States Attorneys (SAUSAs) handling civil litigation in state or federal courts.

I. Introduction

The purpose of this Policy Statement and Practice and Procedure Guide is to encourage the use of Alternative Dispute Resolution (ADR) and to foster and develop alternatives to the traditional adversarial techniques used to resolve civil legal disputes involving the United States. Pursuant to the Department of Justice Order OBD 1160.1, the civil litigating components of the Department of Justice (DOJ) are expected to use ADR techniques in appropriate civil cases in an effort to resolve or avoid litigation. The USAs have the opportunity to take the lead in formulating and implementing ADR methods in order to promote less time consuming, more effective resolution of civil litigation.

The April 6, 1995 Order, requires each component of the Department of Justice, including the Executive Office for United States Attorneys (EOUSA) to:

(1) issue a policy statement concerning and promoting the use of ADR and to cooperate with court-annexed or court-sponsored ADR programs;

(2) create a set of criteria to be used in identifying specific cases appropriate for resolution through settlement negotiations or formal ADR techniques, identifying the most suitable methods of ADR for specific case categories and developing a criteria for selection of independent neutrals;

(3) implement a component-wide comprehensive basic training program in negotiation and ADR that shall be mandatory for all attorneys handling civil matters with periodic supplemental training;

(4) issue a complete explanation of the internal procedures attorneys should follow in obtaining authorization and funding for the use of formal ADR techniques;

(5) designate person(s) within the component who shall have primary responsibility for coordinating the component's ADR efforts so that a network of individuals with ADR expertise is established, and

(6) collect and maintain statistics regarding component use of ADR and report these statistics annually to the Associate Attorney General.

All attorneys within the litigating components of the DOJ, including AUSAs, who handle civil litigation, are urged to consider the appropriate use of ADR in each matter handled. Alternative Dispute Resolution should be used in conjunction and association with traditional settlement processes found within the litigation process.

Civil AUSAs will be responsible for reviewing their respective cases and matters to determine whether ADR is appropriate and what ADR process is most suitable for each case or matter in accordance with each district's approval procedures. Assistant United States Attorneys with primary case responsibility, with approval and oversight of the district's ADR Officer, will be responsible for analyzing the matter or case in light of the following guidelines.

It is important to the concept of Access to Justice that the courts provide for swift resolution of conflict for civil litigants. As the courts continue to be saturated with criminal matters and significant civil litigation, appropriate ADR will serve to reserve judicial time and court expense to the truly intractable issue.

II. General Civil Litigation Policy Statement

A. *Settlement Objectives.* The goal of USAs as participants in ADR and during other settlement discussions shall be as follows: In consultation with the client, to weigh the magnitude and likelihood of all costs, risks, and benefits associated with nonsettlement versus participation in ADR and to consider the best interests of the client and the government, and—through voluntary settlement and/or ADR, if possible and cost-efficient—to achieve the most favorable result reasonably obtainable under the circumstances on behalf of the client, consistent with applicable law and the highest standards of fairness, justice and equity.

B. Although the interest of the government in participating in ADR is compelling, this Guide is intended neither to compel ADR nor any ADR technique in any particular case or category of cases, nor is it to compel pretrail settlement. Nothing in this Guide shall be construed to obligate the United States to offer funds to settle any case, to accept a particular settlement or resolution of a dispute, to alter its standards for accepting settlements, or to alter any existing delegation of settlement or litigating authority.

C. This Guide relates to the government's voluntary participation in ADR. Nothing herein shall be construed to limit the government's duty to participate in ADR pursuant to court order or applicable local rules, except that USAs shall resist participation in ADR, by appropriate motion, whenever said participation would violate the United States Constitution or other governing law.

D. The USAs are encouraged to recognize contributions made by AUSAs who handle matters in ADR by providing the same opportunities for promotion, awards and other professional recognition as those engaged in more traditional litigation.

E. This Guide shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity, by a party against the United States, its agencies, its officers, or any other person. This Guide shall not be construed to create any right to judicial review involving the compliance or noncompliance of the USAs with its terms.

III. Purposes

The purposes of this Guide include the following:

A. To designate various categories of cases as generally "appropriate for ADR" according to cause of action and nature of disputed issues.

B. To designate various other categories of cases as generally "inappropriate for ADR."

C. With respect to those categories of cases designated as "appropriate for ADR," to suggest preferred ADR techniques, without limiting the discretion of the USA to employ other ADR techniques.

D. To identify, by way of example but not limitation, various circumstances under which the USA might wish to participate in ADR, notwithstanding that the particular case may fall outside a category designated as "appropriate for ADR" or may be designated as generally "inappropriate for ADR."

E. Generally to promote the broader appropriate use of ADR techniques by United States Attorneys through enhanced awareness, training, and recordkeeping, among other things.

IV. Definitions

The following definitions shall apply throughout this Guide [1]

A. *"Alternative Dispute Resolution" ("ADR") means any procedure, involving a "neutral," that is used in lieu of trail to*

[1] Most of the definitions set forth herein have been excerpted, with minor adaptions, from National ADR Institute for Federal Judges, *Judge's Deskbook on Court ADR* (Harvard Law School, November 12–13, 1993).

resolve one or more issues in controversy, and includes, but is not limited to the following "ADR techniques":

1. *"Arbitration"* means a flexible adjudicatory dispute resolution process in which one or more arbitrators issue a nonbinding judgment on the merits after an expedited, adversarial hearing. The nonbinding decision of the arbitrator(s) addresses only the disputed legal issues and applies legal standards. Either party may reject the nonbinding ruling and request a trial *de novo.*

2. *"Early neutral evaluation"* means bringing all parties and their counsel together early in the pretrial phase of litigation to present summaries of their cases and receive a nonbinding assessment by an experienced, neutral evaluator with subject-matter expertise, usually an attorney, who may also provide case planning guidance and, if requested by the parties, settlement assistance.

3. A *"judicial settlement conference"* means a settlement conference before a judge or magistrate judge, who, upon hearing summaries of each party's case and applicable law, may articulate opinions about the merits of the case or otherwise facilitate the trading of settlement offers by mediatory or other techniques aimed at improving communication among the parties and eliminating barriers to settlement. Because the judicial settlement conference constitutes a more traditional litigation mechanism, judicial settlement conferences will not be reported as an ADR mechanism for statistical purposes.

4. *"Mediation"* means a flexible, nonbinding process in which a neutral third party, the mediator, facilitates negotiations among the parties to help them reach a settlement. In doing so, the mediator may expand traditional settlement discussion and broaden resolution options, often by going beyond the legal issues in controversy or incorporating nonparties in discussions.

5. *"Minitrial"* means a flexible, nonbinding hearing, generally reserved for complex cases, in which counsel for each party informally presents a shortened form of its case to settlement-authorized representatives of the parties in the presence of a presiding judge, magistrate judge, or other neutral, at the conclusion of which the representatives meet, with or without the judge or neutral, to negotiate a settlement. If settlement is not reached, the case then proceeds to trial.

6. *"Neutral expert evaluation"* means bringing all parties and their counsel together to present summaries of their cases to an experienced, neutral expert for the purpose of receiving a nonbinding assessment or otherwise resolving a "swearing contest" among competing experts.

7. *"Summary bench trial"* means, in any case not triable by a jury, a pretrial procedure intended to facilitate settlement consisting of a summarized presentation of a case to a judicial officer whose decision and subsequent factual and legal analysis serves as an aid to settlement negotiations.

8. *"Summary jury trial"* means a flexible nonbinding procedure, usually reserved for trial-ready cases in which protracted jury trials are anticipated, and involves a short hearing in which evidence is presented by counsel in summary form to a jury. Following the evidentiary presentation, the jury returns an advisory verdict that forms the basis for settlement negotiations.

B. *"Client"* means the particular client represented by the USA in the case at issue and, depending on the circumstances, may include the United States of America or one or more of its agencies, officers or employees, or other individuals or entities for whom representation has been authorized.

C. *"Government"* means the United States of America and its agencies and officers.

D. *"Nonbinding"* means that the parties are not bound by any resolution unless they agree in advance to be bound. All of the ADR techniques described in this Guide produce nonbinding outcomes. (In contrast, the terms "mandatory" and "voluntary" describe how cases enter ADR. "Mandatory" means that the referral to ADR is court-ordered; "voluntary" means that the referral to ADR is by consent of the parties.)

E. *"United States Attorney"* includes any duly authorized designate of the USA.

V. General Case Analysis Criteria

In order to operate successfully, the chosen ADR technique must be specifically tailored to the particular dispute. Alternative Dispute Resolution is often appropriate in cases where litigation will produce an unsatisfactory result regardless of outcome or where litigation is too slow or cumbersome. Alternative Dispute Resolution also permits the parties to exercise more direct control over the dispute resolution remedy. ADR techniques have proven successful in many categories of cases where the cases are routine (not precedent setting), such as routine auto torts, slip and fall, and employment rights cases, or where confidential communication with a neutral third party will help to clarify issues. Alternative Dispute Resolution techniques also allow the parties to craft individualized, nontraditional remedies. The following are some general suggestions to consider when determining whether to undertake ADR in a give case.

Use of ADR should be seriously considered in matters involving contract performance or interpretation disputes, permit or licensing disputes, discrimination cases or any case in which the parties will have a continuing relationship regardless of outcome. ADR is also appropriate in many tort cases.

The use of an ADR technique should be considered, but is often inappropriate, in cases involving the need to set precedent or to clarify constitutional issues. In addition, ADR is rarely appropriate in cases where there are prescribed outcomes or statutory remedies are inflexible. For example, in Social Security cases, the agency has no real discretion to depart from the statutory mandates of the Social Security Act. Finally, in those cases in which it is clear that the parties are not ready to negotiate or are opposed to the use of any ADR process, ADR is inappropriate.

Alternative Dispute Resolution is not meant to replace traditional negotiation in every case. Rather, it may serve to provide attorneys with additional tools to facilitate negotiation where traditional two-party negotiation has not produced an acceptable resolution or where the presence of a neutral may cause negotiations to proceed more efficiently.

The following, by way of example but not limitation, are factors to consider when determining whether to use ADR and when determining which ADR technique will be most suitable in a given case:

A. General Considerations. The following is a list of factors to consider and analyze when determining whether and when to use ADR in a given matter. These factors are neutral in the sense that whether they militate in favor of or against the use of ADR depends entirely upon the specific facts and circumstances of the case at issue.

1. The parties' purpose in filing the lawsuit demonstrates an agenda separate from the specific issues in the case.

2. Case procedural history, *i.e.*, what administrative proceedings have preceded filing in court.

3. Assessment of likely outcome including likelihood of appeal.

4. Where is the case in the discovery process? Has all of the information necessary to settle the case been discovered?

5. Where is the United States in terms of procuring settlement authority? Is more information necessary before authority can be obtained?

6. Who is in charge of the litigation, parties or counsel?

7. Are factual disputes significant?

8. Are legal disputes significant?

9. Are parties individuals, corporations or other governmental entities, and how does that affect their ability to participate in ADR process?

10. Witness credibility and its impact on the litigation.

11. Are there individuals or entities with interests in the outcome who are not parties to the case?

12. There has been prior extensive administrative process.

13. Position on the court docket.

14. Expenses of litigation versus expenses of ADR.

B. Factors That Generally Favor ADR. 1. If suit is one facet of a deeper dispute necessitating remedies unavailable to the court, for example, where the remedy available through the litigation may be different from the true agenda of the opposing party, ADR may be helpful to resolve the larger, underlying dispute by permitting the parties to fashion remedies not available to the court.

2. The relationship between the parties will continue beyond the resolution of the litigation. For example, in employment dispute cases where the plaintiff will continue to be employed by the agency, ADR may help to resolve the issues while minimizing damage to an employment relationship that will continue beyond the litigation.

3. There will be detrimental impact on parties, witnesses, and evidence because of crowded court dockets and projected trial dates.

4. Any of the parties has limited resources.

5. The relative resources of the parties are unequal.

6. Relative positions of multiple parties (while the entire case may not be resolved, with multiple parties, disputes may be narrowed for trial).

7. There is a need for confidentiality.

8. There is a large administrative record in cases involving APA review.

9. The client or other participants in the litigation may benefit from the input of an impartial third party.

C. Factors That Generally Disfavor ADR. 1. There is a need for precedential decision.

2. There is a need for resolution of public policy issues or constitutional issues.

3. There is a parallel criminal investigation or proceeding involving the parties or circumstances of the case.

4. There is a strong likelihood of swift resolution on jurisdictional or other legal issues.

5. The United States has reason to believe that the opponent is engaging in fraudulent or criminal behavior. For example, in an auto tort case there is reason to believe that the accident has been staged.

6. It is believed that settling the case would encourage future meritless litigation.

VI. Designation of Cases

A. The ADR techniques which may be appropriate for a case depend upon many specific factors peculiar to that case. The following categories of cases are generally "appropriate for ADR."

The ADR techniques to consider within the context of the given case include, but are not limited to, arbitration, early neutral evaluation, judicial settlement conference, mediation, mini-trial, neutral expert evaluation, summary bench trial, and summary jury trial.

1. Drivers, Motor Vehicle Accidents (TODR), Property Damage (TOPD), Personal Injury (TOPI), Medical Malpractice (TOMM) and Wrongful Death (TOWD).

2. Employment Discrimination (ED) and Civil Rights Fair Housing (CRTH), Veteran's Reemployment Rights Act (LBVR).

3. Employment Rights of Government Employees (ER), Back Pay (ERBP), Adverse Action (ERAA) and Grievance (ERGR).

4. Land/Real Property Condemnation (LDCN) (only where United States is plaintiff).

5. Commercial Litigation Adversarial Proceeding (COAD), other claims related to federal assistance programs (COOC) and Recovery of overpayments made by the government (CORO).

6. Recovery of Health Education Assistance Loans (COHE), Recovery of National Health Services Corps Scholarships (COHS) and Civil Penalty (CV).

7. Fraud (FR), Anti-Kickback (FRAK), Government Commercial Programs (FRCM), False Claims (FRFC), Health Care Fraud (FRHC), Education (FRED), Environmental (FREV), Medicaid/Medicare (FRME), Medicare Only (FRMO) and Qui Tam suits (FRQT). In Qui Tam suits, there must be careful analysis of the relator's position on ADR.

B. The following categories of cases are generally "inappropriate for ADR":

1. Notwithstanding that a particular category may be enumerated in Part VI-A above, any case in which there is a dispositive motion by the United States Attorney, to which opposition would be frivolous or insubstantial in the considered opinion of the USA.

2. Government agents sued in their individual capacity, e.g., *Bivens* (TOBI) and other non-government individuals (e.g., witnesses and jurors) sued in their individual capacities (TOOI). (In Bivens cases, careful consideration should be given to the fact that the individual defendant is the client rather than the government.)

3. Any case in which the adverse party appears *pro se*.

4. Preliminary injunctions/TRO's (IJ) (where United States or its agency is a defendant).

5. Foreclosure/Liens (COMC).

6. Constitutionality of Statute (CN).

7. Social Security cases (SS) and all related causes of action as presently structured.

8. Any case in which the United States Attorney has determined that a precedent setting decision is required on a significant issue in the case.

9. Freedom of Information Act (FO).

10. Privacy Act (PV).

11. Immigration (IM).

12. Prisoner Cases (PC), Post Conviction § 2255 (PCST), Habeas Proceedings (PCHC).

13. Asset Forfeiture (COFF).

C. With the client's consent and input, the United States Attorney should consider voluntary participation in ADR in cases specifically designated as generally "inappropriate for ADR," including those designated in Part VI-B above, under the following circumstances:

1. The United States Attorney believes that the enhanced communication available through ADR will increase the likelihood of settlement or the scope of settlement options under construction.

2. The United States Attorney foresees a substantial probability that, even in the absence of complete settlement, ADR will result either in a stipulation narrowing the scope of disputed issues or a more focused, mutual effort of the parties to tailor further discovery to material issues that are genuinely disputed.

D. This Guide reflects recommendations formulated within the context of practice in United States Attorneys' Offices and may vary from guidance provided by other DOJ litigating components because of different underlying policy considerations.

VII. Specific Guidance for Cases Designated As Generally "Appropriate for ADR"

With respect to those categories of cases designated as "appropriate for ADR" in Part VI-A above and not otherwise excluded by Part VI-B, it is recommended that USAs pursue the following course:

A. With the client's consent and input, engage in genuine settlement discussions with opposing counsel at an early practicable opportunity and at reasonable times thereafter for the purpose of settling the case even without the necessity of ADR, if possible and appropriate under the circumstances.

B. Notify the court in writing, either in such case management reports or pretrial statements as may be filed under Fed. R. Civ. P. 16 or under applicable local rules or otherwise, of:

1. The client's willingness, if any, to participate in ADR;

2. The client's preferred ADR technique, and

3. The preferred timing of ADR under the circumstances of the case (*e.g.*, before, during or after discovery, before or after ruling on dispositive motion(s)).

C. Participate in ADR if ordered by the court or, with the client's consent, voluntarily, with such notice to the court of the employment of ADR as the circumstances may suggest.

VIII. Specific Guidance for Cases Designated As Generally "Inappropriate for ADR"

With respect to those categories of cases designated as "inappropriate for ADR" in Part VI-B above, it is recommended that USA's:

A. With the client's consent and input, engage in genuine settlement discussions with opposing counsel at an early practicable opportunity and at reasonable times thereafter for the purpose of settling the case, if possible and appropriate under the circumstances;

B. Participate in ADR if ordered by the court;

C. Participate in ADR voluntarily with the consent of the client at the discretion of the USA, if circumstances, including but not limited to those set forth at Part VI-C above, suggest that ADR may enhance the opportunity for a cost-efficient resolution of the case.

IX. Training Program

A. Current Training: The Office of Legal Education (OLE), EOUSA, has played a leading role in ADR and negotiations training. An ADR Seminar, where ADR is the exclusive subject, is offered twice a year by the Legal Education Institute (LEI) (whose primary target is agency counsel) and twice a year in the Attorney General's Advocacy Institute (AGAI) (whose primary target is AUSAs and Department of Justice Trial Attorneys). In addition, ADR is taught as part of several LEI and AGAI courses including: the Negotiations Skills Course, offered three times a year; the Federal Administrative Process Course, offered two to three times a year; the Civil Chiefs Seminar, offered for Supervisory Assistant U.S. Attorneys each year; the Affirmative Civil Enforcement Course, offered twice each year; the Advanced Civil Trial Course, offered at least once each year; and the Civil Practice Seminar, offered three times a year.

The Office of Legal Education also has an extensive video and audiotape lending library which includes several selections on ADR issues. The Office of Legal Education continually updates this library and makes it available to all USAOs offices and DOJ litigating divisions.

B. Future Training: The Office of Legal Education will develop future training within existing budgetary constraints in consultation with the USAOs, the AGAC Working Group on ADR and the Senior Counsel for ADR.

X. Internal Procedures for Authorization and Funding

A. ADR Officer: The USA shall designate one AUSA as the ADR Officer who shall oversee, implement and monitor the ADR activity within the district's civil litigation. It is suggested that the Civil Chief of the district be designated the ADR Officer.

The ADR Officer will be responsible for coordinating ADR activity within the district. Specific responsibilities of ADR Officers include:

1. Ensuring that each AUSA with civil litigation responsibility receives comprehensive basic training in negotiation and ADR with periodic supplemental training.
2. Coordinating the district's collection and reporting of statistics consistent with the provisions of section XIII of this Guide.

B. ADR Reporting Responsibilities: Each district will be responsible for making an annual report to EOUSA showing the frequency and type of ADR techniques utilized within the year and whether ADR was instrumental in resolving the litigation prior to trial.

C. Withdrawal From ADR Activity: The United States retains the right to object and withdraw from any ADR activity where the USA or his designate has made a determination that the selected neutral should be disqualified under conditions analogous to those found within 28 U.S.C. § 455. It is recommended that the USA or his designate should promptly communicate this objection and withdrawal to the Clerk of Court and should strive to identify an alternative neutral acceptable to the court and all parties prior to objection and withdrawal.

XI. Selection Criteria for Appointment of Neutrals

A. Selection Criteria for Neutrals: Factors to be considered when selecting a neutral include, but are not limited to:

1. Whether the neutral is an attorney;
2. What other training or expertise the neutral possesses;
3. Experience in the technical area of the dispute;
4. Experience in ADR processes;
5. Experience in government litigation;
6. Experience in multiparty litigation;
7. Whether the neutral knows counsel and the nature and context of that knowledge; and,
8. Cost associated with hiring neutral.

B. Selection and Certification: Any person qualified as a neutral by a federal judicial officer or pursuant to the rules promulgated by the highest court of a state, its legislative bodies or other government sanctioned ADR unit and who is not disqualified or disqualifiable under conditions analogous to those found within 28 U.S.C. § 455 may act as a neutral in a case or matter involving the United States.

XII. Payment of Fees and Expenses Associated With ADR

A. Neutrals: Neutrals shall be paid for through the neutrals fund established through JMD and in the manner prescribed by EOUSA.

B. Expert witnesses: Shall be paid in the same manner as expert witnesses in any civil litigation within the USAO.

C. Fact witnesses: Shall be paid in the same manner as fact witnesses in any civil litigation in the USAO.

Other fees and expenses: Fees and expenses associated with ADR proceedings, other than fees for neutrals, shall be paid from the litigation expense budget of the USAO.

XIII. Designation of ADR Coordinators

The following are designated as ADR coordinators for the USAOs and EOUSA:

1. William D. Wilmoth, United States Attorney for the Northern District of West Virginia, 304–234–0100
2. Jeanette Plante, Special Assistant United States Attorney, Executive Office for U.S. Attorneys, 202–616–6444

XIV. Statistics

The Executive Office will collect statistics on the use of ADR in the Districts. The statistical collection plan will be developed in consultation with the USAOs and the Senior Counsel for ADR and will be as minimally burdensome as possible.

XV. Miscellaneous

USA O Employees Serving As Neutrals: USAO employees, with the written approval of the United States Attorney, may render services as a "neutral" on a case by case basis when it has been determined that the United States has no known or future interest in the litigation and the USAO employee "neutral" is not disqualified under conditions analogous to those found within 28 U.S.C. § 455. The USAO employees who render services as a "neutral" may not receive reimbursement for said services, except for travel and *per diem*.

Tax Division—Policy for Tax Litigation

Introduction

On April 6, 1996, the Attorney General signed an order promoting broader use of Alternative Dispute Resolution as a toll for resolving disputes between the government and its citizens in as prompt, efficient, and inexpensive a manner as possible. Alternative Dispute Resolution ("ADR") is any non-binding dispute resolution process facilitated by a third-party neutral. ADR methods include, but are not limited to, arbitration, mediation, early neutral evaluation, neutral expert evaluation, mini-trials, and summary jury trials. ADR may be conducted pursuant to the agreement of the litigants, or it may be court-mandated.

Policy

the Tax Division always has had, and continues to have, a policy of settling cases, where appropriate, as early in the litigation as reasonably possible. I believe that the use of ADR will further this Division policy. Therefore, Tax Division attorneys are expected to use ADR in appropriate cases and to cooperate with and support court-annexed or court-sponsored ADR programs.

Tax Division lawyers should consider the use of ADR in all civil cases within the Division in a manner consistent with our enforcement objectives and the need for consistent treatment of similarly situated taxpayers. In cases where the attorney assigned to the case, in consultation with his or her reviewer, believes that ADR may be appropriate, he or she should consider using an independent third-party neutral through a court-sponsored program, from another government agency, or from outside of the government. Where court-sponsored and/or court-annexed ADR programs are available, Division attorneys are expected to utilize and participate fully in such programs in all appropriate cases.

The Tax Division has a strong record of resolving disputes through settlements achieved through traditional negotiation between counsel. I expect that all attorneys in the Division will continue to use their negotiation skills to settle cases where settlement is appropriate. ADR is not a substitute for traditional negotiation, but rather provides attorneys with additional tools to facilitate settlement of cases on an appropriate basis at the earliest state at which such a settlement reasonably can be reached. Knowing how and when to settle a case is as important as knowing how to try a case. ADR processes can be important tools in the prompt and fair resolution of tax disputes and the skilled use of negotiation and ADR processes is part of the responsibility of every attorney in the Division. To facilitate the greater use of ADR, as well as to improve attorneys' negotiating skills in general, all Division attorneys will be required to participate in comprehensive and continuing training in both negotiation and ADR.

It is the policy of the Tax Division, in making promotions and giving awards and other professional recognition, to recognize the outstanding contributions of trial attorneys in skillfully negotiating settlements as well as in trying cases. Thus, skillful use of ADR will likewise be considered in evaluating attorneys and recognizing their contributions to the Division.

Attached is a set of case selection criteria to be used by the Civil Trial Sections, Court of Federal Claims Section, Appellate Section, and Office of Review in evaluating whether and when ADR is appropriate in a particular case.

Tax Division—Alternative Dispute Resolution

Case Selection Criteria

Alternate Dispute Resolution ("ADR"), as used here, is any non-binding dispute resolution process facilitated by a third-party neutral, whether or not appointed by a court. The Tax Division presently resolves a large number of its cases through settlements negotiated through traditional two-party negotiation and believes that it will continue to do so. ADR is not meant to replace traditional negotiation, but rather to provide attorneys with additional tools that may facilitate negotiation of settlement where traditional two-party negotiation has not produced an acceptable resolution or where the presence of a third party may cause negotiations to proceed more quickly or efficiently.

One of the advantages of ADR is that it gives the parties to a dispute the flexibility

to fashion their own procedures for resolving the dispute. There are almost as many kinds of ADR as there are parties and disputes. Thus, in evaluating whether ADR processes may be useful, there are no hard and fast rules. Attorneys should begin considering whether ADR might be helpful in a particular case at the beginning of the litigation and should continue to revisit the question throughout the progress of the case. Such analysis must take account of the ADR processes that may be available through or imposed by the court in a particular district or circuit.[1] Attorneys also should keep in mind that many different kinds of ADR are available both through the courts and independent of the courts. Some forms of ADR may be more useful than others at particular points in the litigation. For example, early neutral evaluation, a process whereby a third-party neutral evaluates each side's case and helps the parties agree on the most efficient method of exchanging factual material, is most appropriate at the beginning of litigation and can be a useful tool in quickly obtaining a better understanding of the strengths and weaknesses of your case. By contrast, mediation, a process where a third party facilitates negotiation between the parties, may be most useful after the case has been more fully developed.

This statement on ADR relates to the government's voluntary participation in ADR. Nothing herein shall be construed to limit the government's duty to participate in ADR pursuant to court order or applicable local rules, except that Tax Division attorneys shall resist participation in ADR, by appropriate motion, whenever said participation would violate the U.S. Constitution or other governing law or would not be in the best interest of the United States.

This statement shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity, by a party against the United States, its agencies, its officers, or any other person. This statement shall not be construed to create any right to judicial review involving the compliance or noncompliance of Tax Division attorneys with its terms.

The following is a list of factors to assist attorneys in the Tax Division in determining whether to use ADR in a particular case.[2] Not all listed factors will have relevance in any given case and factors not listed below may also be present that weigh in favor of or against the use of an ADR process.

Factors Favoring ADR

1. The case involves largely factual issues and the legal principles are well established (e.g., valuation cases, substantiation cases, trust fund recovery cases).
2. The case is legally and/or factually complex.
3. The case involves multiple independent factual issues (e.g., bankruptcy cases).
4. The case is one where there is a particular need for a prompt resolution of the dispute (e.g., summons, estate tax and bankruptcy cases).
5. The case is one where a consensual resolution may lead to greater future compliance (e.g., employee-independent contractor cases).
6. A settlement in the case would be based solely on collectibility.
7. The other party has a particular need to keep information confidential (e.g., financial information or trade secrets).
8. There are problems perceived either with respect to the decisionmaker or the forum, for example:
   a. The judge is particularly slow in resolving cases;
   b. The docket is backlogged with criminal and/or civil cases;
   c. There is the potential for jury nullification.
9. The case is one where the Government will be required to litigate in a forum other than a federal court.
10. The case is one where the nature or status of a party to the dispute might, in itself, influence the outcome of the litigation (e.g., sympathetic plaintiff).
11. The case is one where there are substantial litigating hazards for both parties.
12. The case is one where trial preparation will be difficult, costly and/or lengthy and the expected out-of-pocket and lost opportunity costs outweigh any benefit the government can realistically expect to obtain through litigation.
13. The case is one where it is desirable to avoid adverse precedent.
14. The case is one where either the party or the attorney may have an unrealistic view of the merits of the case or an unreasonable desire to litigate, with insufficient regard for what may be in the client's best interest.
15. The case is one where the other party has expressed an interest in using ADR.
16. The case is one where the working relationship between the parties or their counsel suggests that the intervention of a neutral third party would be beneficial.
17. The case is one where traditional negotiations will be difficult and protracted.
18. The case is one where the progress of settlement discussions may be improved by a third-party neutral's ability to conduct frank, private discussions with each of the parties.

Factors Disfavoring ADR

1. Taxpayer's case clearly has no merit (e.g., certain *Bivens* cases or protestor suits).
2. The case is one that should be resolved on motion, such as a motion to dismiss or for summary judgment.
3. The case presents an issue where legal precedent is needed, for example:
   a. Issue involved is of national or industry-wide significance;
   b. Issue is presented in a substantial number of cases;
   c. Issue is a continuing one with same taxpayer.
4. The importance of the issue involved in the case makes continued litigation necessary despite some adverse precedent.
5. The information presently available about the case is insufficient to evaluate meaningfully the issues involved or settlement potential.
6. The case involves significant enforcement issues, for example:
   a. Case involves protestors;
   b. Case is high profile and will involve publicity which could encourage taxpayer compliance;
   c. Case involves a uniform settlement position (e.g., shelter cases).
7. The case involves a constitutional challenge.
8. The case is one where government concession is under consideration.
9. The case is one which is very likely to settle through traditional negotiations within a reasonable time after the facts have been ascertained, without a third-party neutral.
10. The case is one where Court imposed scheduling makes use of ADR impractical (e.g., "rocket-dockets").
11. The case is one where the other party has already engaged in ADR at the agency level.[3]
12. The case involves 26 U.S.C. Section 6103 information or privileges which would prevent open discussions with a third-party neutral (e.g., case involving request for third-party tax return information).

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[1] The taxpayer should be required to provide a waiver of 26 U.S.C. 6103 as a condition of the government's agreement to participate in ADR other than ADR imposed by the Court. In the absence of such a waiver, the government might not be able to make a full factual disclosure to the third-party neutral which would substantially undermine the utility of the ADR process.

[2] Many of these factors are equally applicable in determining whether a case should be settled using traditional, unassisted negotiations.

[3] For purposes of this factor, normal agency administrative procedures, such as appellate conferences or administrative claims review, are not considered to be ADR procedures.

Drug Enforcement Administration

Importation of Controlled Substances; Notice of Application

Pursuant to section 1008 of the Controlled Substances Import and Export Act (21 U.S.C. 958(i)), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in Schedule I or II and prior to issuing a regulation under section 1002(a) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with Section 1311.42 of Title 21, Code of Federal Regulations (CFR), notice is hereby given that on May 28, 1996, Applied Science Labs, Division of Altech Associates, Inc., 2701 Carolean Industrial Drive, P.O. Box 440, State College, Pennsylvania 16801, made application to the Drug Enforcement Administration to be registered as an importer of the basic classes of controlled substances listed below: