

Administrative Enforcement and Regulatory Process

This document was prepared by participating section federal agencies in February 2014 to highlight their program activities.

The Administrative Enforcement and Regulatory Process section reports that Alternative Dispute Resolution (ADR) is gaining wide usage across a large cross section of industries in federal civil and regulatory enforcement negotiations and disputes. Parties and interests such as corporate entities, private and government institutions, Native Nations, landowners, and persons with disabilities are increasingly seeking ADR to accommodate concerns as far reaching as domestic and international transportation and trade, intellectual property rights, pipelines and energy infrastructure, and workplace violence, education, and special needs.

The institutionalization of government provided ADR in these diverse fields underlies ADR's demonstrated success. In particular, ADR is attractive to participants because it allows for quick, efficient, cost effective, creative and durable solutions that reflect parties' mutual interests. One major success is the evolution on the part of some agency programs to provide "real time" ADR services to private party disputants. "Real time" ADR protects and promotes US commercial interests through preventing the costs and opportunity losses associated with conflict escalation. The use of ADR as discussed below also demonstrates good governance by allowing agencies and parties to limit unnecessary bureaucratic procedures and challenges in furtherance of regulatory, commercial, economic, environmental and personal needs and interests.

The following section provides specific examples of new agency innovations and new ADR programs and services in the transportation and trade, energy, environment, education, and special needs fields. Such examples are for demonstrative purposes and are not exhaustive of the various developments in the civil and regulatory ADR field.

Transportation and Trade

ADR in the transportation and trade sectors has evolved significantly to include new innovations and programs. With respect to the transportation field, both the Surface Transportation Board (STB) and the Federal Maritime Commission (FMC), which regulate commercial domestic rail, truck, and water transportation and commercial containerized international ocean shipping respectively, have enhanced their ADR service offerings to provide "real time" ADR. While both agencies offer traditional ADR services such as mediation and arbitration, these agencies have established programs that provide telephonic dispute resolution to parties in real time. For example, entities that encounter a rail related transportation dispute can now contact the STB's Rail Customer & Public Assistance Program to obtain telephonic facilitation of their disputes. Similarly, the FMC offers telephonic *ombuds* services to assist disputing participants within the international ocean shipping supply chain. As part of this effort, the FMC recently enhanced its *ombuds* services to include the use of Rapid Response Teams (RRTs). Under RRTs, ocean common carriers designate a senior level contact that is responsible for working with FMC staff to facilitate resolution to disputes that arise between ocean common carriers and their customers. The RRT program also has evolved to include

concerns reported by ocean carriers. As the STB and FMC's programs continue to flourish, another transportation agency, the Federal Motor Carrier Safety Administration, reports that it is currently exploring the feasibility of implementing a new ADR program that would address disputes involving the interstate transportation of household goods.

In addition to recent initiatives in the transportation field, there are exciting new developments involving the use of ADR in international trade. For example, the International Trade Commission (ITC), which conducts investigations into certain unfair practices in import trade involving allegations of patent and other intellectual property infringement that private parties may bring under Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), has implemented a new mediation program. The ITC initially launched the initiative as a pilot program in 2009, but made the program permanent in 2010 due to its potential to reduce the number of issues, claims, and/or parties. Mediation provided by the ITC provides Section 337 litigants a confidential and risk-free quick mechanism for case evaluation and opportunity for early settlement. In addition, mediation may result in a global settlement covering not only the investigation before the ITC but also related litigation in other courts and countries. The ITC's Mediation Program plays an important part in ensuring the agency's continued success in accomplishing its mission of administering U.S. trade remedy laws within its mandate in a fair and objective manner.

Energy and Environment

The use of ADR has also continued to grow and evolve in energy and environmental matters. For example, in 2010, the Federal Energy Regulatory Commission (FERC) issued Order No. 734, which expanded the role of FERC's Dispute Resolution Division (DRD) to include handling of "real time" landowner disputes pertaining to the construction and operation of jurisdictional infrastructure projects primarily associated with non-federally sponsored natural gas pipeline facilities and hydroelectric projects. Through the Commission's DRD Toll-Free Helpline, neutral DRD staff has timely and successfully addressed 634 inquiries to date and of those, guided landowners, energy companies and other interested persons to informally resolve 93 percent or 195 of 210 infrastructure disputes using ADR: conciliation (86 percent), mediation (12 percent), and facilitative mediation/early-neutral evaluation (2 percent). Eighty-two percent of these energy infrastructure and related environmental matters were concluded, primarily successfully, further demonstrating the efficiency of voluntary ADR in achieving positive outcomes.

Just as FERC has broadened the scope of ADR services to include new types of disputes, the U.S. Institute for Environmental Conflict Resolution (ECR), which provides neutral facilitators and mediators in multi-party negotiations and collaborations involving federal agencies, has experienced a growing use of its ADR services to include regulatory negotiation involving tribal interests. In one example, ECR recently provided neutral support for regulatory negotiations in the development of rules for Indian oil valuation. One motivating factor for this trend is that tribes are requesting that Congress require the

regulatory negotiation in legislation that affects tribes as a way of guaranteeing tribal self-governance in these matters.

As the scope and breadth of environmental disputes continues to grow along with the need for rapid and efficient resolution, agencies are introducing technological improvements to meet these demands. While FERC has implemented the use of both a dedicated Helpline toll-free number and email address to handle new subject matter disputes, the U.S. Environmental Protection Agency (EPA), a long-time ADR pioneer, recently introduced new technological innovations that will allow EPA to provide a full suite of online collaborative ADR services significantly reducing the need for delays associated with the expenses of travel. Online collaboration is supported by the installation of video conferencing equipment throughout the agency, staff access to online meeting and collaboration tools, and guidance for staff conducting online meetings. The collaborative technology infrastructure has been utilized to conduct effective mediations and facilitations of problem solving and public engagement sessions, and is supporting a valuable evolution in Agency ADR, collaborative practice, and inclusiveness.

Workplace Violence, Education, and Special Needs

In addition to addressing commercial and environmental matters, agencies in this section have also made significant strides in furthering ADR programmatic development in the areas of workplace violence, education, and special needs. For example, EPA has utilized its new technological advances in its establishment of a national program which uses ADR to address allegations of violence in the workplace. This unique program provides conflict management expertise and services to de-escalate and defuse workplace violence situations after an allegation has been received, coordinates investigations, and convenes and coordinates efforts of a Threat Assessment Team. This effort includes collaboration with Labor and Employee Relations, Office of General Counsel, Office of Inspector General, Employee Assistance Programs and Security. The program has proven extremely effective in preventing the escalation of workplace violence.

ECR, like the EPA has demonstrated expansive subject matter capabilities in its provision of ADR services. Through its efforts, ECR has provided support in two issues that required tribal implementation of the No Child Left Behind law.

The Department of Justice's innovative Americans with Disabilities Act (ADA) Mediation Program resolves ADA complaints through application of mediation to rights-based disputes in a significant shift away from the traditional adversarial, government-directed model. The ADA Mediation Program, carried out through a federal-private partnership, has achieved remarkable results, eliminating architectural, communication, and attitudinal barriers for thousands of people with all types of disabilities throughout the country. This allows the Department to achieve meaningful compliance with the law without having to allocate scarce resources to investigate or litigate these mediated disputes. Because the program quickly achieves measurable results, people with disabilities as well as legal and disability advocacy organizations continue to request mediation to resolve ADA complaints, indicating their ongoing trust and confidence in

the program. The program has successfully resolved 78% of the more than 4,000 complaints mediated.