

RESOLVING CONFLICT

**Newsletter of the Interagency Alternative Dispute Resolution Working Group
of the U.S. Government**

Issue 7 – June, 2018

**From the Chair and Vice-Chair of the
IADRWG Steering Committee**

David Moora, Chair (EPA) and
Andrea Geiger, Vice-Chair (DON)

Dear Colleagues,

Andrea and I are excited to serve as your Chair and Vice-Chair this year. Thank you to Melissa Leibman for her leadership, innovative ideas and thought-provoking discussion topics. I have greatly enjoyed working with Melissa. Andrea and I are looking forward to continuing her good work.

Our goals this year are to provide opportunities for us to get to know each other better, collaborate to build our knowledge and share resources, and work together to address challenges. Below are some ideas and projects to get started. We look forward to hearing your ideas and working with you to implement them.

One idea to encourage sharing of resources is to add time to the meeting agenda for members to share and exchange resources. Before each meeting we will designate a type of resource to share and ask members to bring examples to the following meeting. Resources could include items such as promotional materials, videos or ADR guides. We will create a repository on the max.gov site to house the resources for IADRWG members to access, similar to the repository of training materials created by the Training Committee.

We encourage everyone to join a Section or Committee and get involved in a project. Getting involved in a Section and/or Committee is great way to get to know your colleagues and work on important projects in your area of expertise. One of our goals is to provide each Section and Committee the opportunity to lead a discussion focused on innovations, new resources or a challenge in their subject matter area during a IADRWG meeting.

Another of our goals is to help build our knowledge through trainings and thought-provoking discussions. Similar to the meetings chaired by Melissa, we will have a focused discussion each meeting. We would also like to create training opportunities for IADRWG members. The Workplace Conflict Management Section is doing a great job with the ADR Luncheon Series. Building on this success, the Training Committee is hoping to organize a training day for IADRWG members. The training sessions could be organized and produced by IADRWG members and could range from individual speakers, skills workshops and informal discussions to train the trainer sessions.

Finally, we plan to assist the IADRWG members to provide support to each other to address challenges that are facing our programs. One challenge many federal dispute resolution programs are facing is diminishing resources and staff. The Benefits of ADR Ad Hoc Committee is

currently working on an important project to assist us in our efforts to demonstrate the value of our services. The committee is developing survey questions that we can use to evaluate our program, and research documents on the benefits of ADR that we can draw on to create materials about the value of our services. These documents will be located on max.gov. We also plan to form an advisory group to be a resource for agency programs to call on for guidance on how to promote and demonstrate the value of their services to leadership.

To accomplish these goals, we need your help. Please reach out to me and Andrea if you would like to contribute to these projects, or if you have ideas about new projects or initiatives that you would like to organize. Please also let us know if you have ideas for topics to discuss during the IADRWG meetings. Andrea and I are looking forward to working with all of you this year. Our e-mail addresses are: moora.david@epa.gov and andrea.geiger@navy.mil.

The ADRA at 22: We've Made The Case, So Let's Make Sure It's Told!

By Marc Van Nuys¹

(A 3-part series)

Part 1: *If ADR Processes Have Become Mainstream Knowledge, Why Aren't They the Default Option – At Least for Workplace Disputes?*

Twenty-two years ago, Congress passed the Administrative Dispute Act of 1996². The ADRA, the acronym by which it came to be

known, made permanent an earlier law that had sunset after 5 years. The ADRA was the first concerted effort in the Federal Government to reduce the time and expense of using litigation to resolve administrative claims against the Government. To this day, the ADRA is the principal authority for the use of all sorts of informal processes designed to resolve federal administrative disputes quickly, inexpensively, and fairly, without litigation. Two years after ADRA, Congress passed the Alternative Resolution Act of 1998³, extending the ADR mandate to civil suits in all federal district courts.

So here we are, two decades later. What has been achieved? Well, to invoke the classic lawyer's response, "it depends." From an institutional standpoint, ADR processes, especially mediation, are legion. Every federal district court, every administrative tribunal that decides disputes involving the Federal Government, and every federal agency has a policy addressing the use of ADR in lieu of litigation to resolve disputes. And this is not limited to the federal sector. States and local jurisdictions have adopted ADR as a preferred alternative to litigation in appropriate cases. Pick a tribunal that adjudicates claims and disputes against the government and somewhere behind that forum is a policy and practice encouraging (even compelling) the parties to engage in mediation or some other collaborative process, and the procedures for making that happen. ADR has slipped the bonds of being "alternative," and has emerged as an integral part of the dispute resolution landscape in the United States of America.

¹ JD, Wake Forest University; LL.M., Georgetown Law Center. Mr. Van Nuys is the Army ADR Program Director. These remarks are adapted from the keynote speech to the Department of Defense Conflict Resolution Symposium, October 14, 2015. His remarks are his own. The author gratefully acknowledges the invaluable assistance of Kathryn

MacKinnon, Department of Defense ADR Liaison, in the preparation of this series.

² Public Law 104-320, 5 U.S.C. §§ 571-584 (October 19, 1996).

³ Public Law 105-315 (Oct. 30, 1998), 28 U.S. Code, §§ 651-658

And yet, notwithstanding this significant, some would say monumental, shift in the dispute resolution landscape, not everyone has jumped on board. We still spend a lot of time and effort, not to mention loads of money, filing and litigating cases that in all probability are ultimately going to be settled or resolved by means other than litigation. A telling factoid: on average, in any given year, fewer than two percent of the civil lawsuits filed in the federal courts actually go to trial.⁴ The rest are disposed of by procedural motion, summary judgment, or settlement. Those who pursue litigated outcomes are increasingly destined to be disappointed.

In the 17 years I have spent in federal sector ADR, I have come to the conclusion that when it comes to resolving conflicts and disputes, there are two fundamentally different points of view. One seeks to resolve conflict through collaboration and compromise; the other seeks to resolve it through power and total victory. Abraham Lincoln is an example of the first type. Genghis Kahn might be an example of the second. In fairness, Genghis Kahn lived 8 centuries ago, and one would hope that our concepts of conflict resolution have evolved a bit since then. But the point is, we still look at conflict in two distinct ways: as a problem to be solved, or as a battle to be won. ADR and negotiation fall into the Lincoln camp; litigation and other adversarial processes fall into the Kahn camp. Now, I imagine that most people, if asked which camp best describes them, would pick the Lincolnian view of conflict. But often, the favored response to a dispute

is not a problem-solving solution through collaboration, but an adversarial outcome achieved through litigation.

My point is this: informal, collaborative dispute resolution procedures are not new; they've been a part of the federal dispute resolution infrastructure for a long time now, and a lot longer in the private sector, where time and money usually occupy the same space. Moreover, there are still disputes that are worthy of litigation, and should be litigated to conclusion. The ADRA recognizes this by requiring agencies to *consider* not using ADR in certain, fairly rare cases,⁵ where the interest in using ADR gives way to other important governmental interests.

In fact, the vast majority of disputes do not implicate these competing interests. Nevertheless, we are now well into our third decade of ADR, with far too many of our colleagues still opting, if they can, to go through a lengthy adversarial process, even though the proven odds overwhelmingly show that they'll just end up settling anyway. Why is that? It's not as if anyone actually **likes** litigation (except maybe the lawyers), or ever did. Discontent with litigation is not a recent phenomenon. Voltaire observed, "I was never ruined but twice: once when I lost a lawsuit, and once when I won one."⁶ American essayist Ambrose Bierce defined litigation as "a

⁴ Patricia L. Refo, "The Vanishing Trial," *Litigation*, Vol. 30, No. 2, Winter 2004.

⁵ 5. U.S.C. § 572(b). These include situations in which a definitive or authoritative decision to establish precedent, or a public record of the proceedings is desired, or the matter significantly

affects persons or organizations that are not parties to the proceeding.

⁶ From goodreads.com, www.goodreads.com/quotes/88924-i-was-never-ruined-but-twice-once-when-i-lost.

machine which you go into as a pig and come out a sausage.”⁷

No, I think the reason we still litigate so much isn't because we like it, but because we need it! Our culture values winning more than it values problem-solving. We have internalized ideas of adversarial justice as being dispensed in one-hour segments by TV lawyers like *Perry Mason* and *Matlock*. Every week, these guys didn't settle. They *fought*, and *won!* However, mediation is fundamentally different from our concepts of adversarial justice. Its purpose is to settle a dispute, not “win” it.

NEXT: *In Part 2 of this 3-part series, confronting and debunking common myths and misconceptions about ADR, especially the use of mediation to resolve workplace disputes*

Email: marc.vannuys.civ@mail.mil

The Global Pound Conference 2016 -2017 By Ramona Buck, FMCS

As you know, it was at the now-famous Pound Conference 40 years ago in 1976 that Harvard Law School Professor Frank Sander gave his idea that there should be alternative methods for resolving conflicts. Many alternative dispute resolution programs have been developed as a result of his thoughts. A new **Global Pound Conference** (GPC) was held this past year. It was a series of meetings/conferences regarding alternative dispute resolution (ADR) in the commercial arena which were held under the auspices of the International Mediation Institute (IMI) in about 24 countries, spring, 2016 through mid-2017.

It was described by Lyn Lawrence, intern at the CPR Institute, as follows, “*The Global Pound Conference Series: Shaping the Future of Dispute Resolution and Improving Access to Justice* came to its conclusion after the last local event was held in London on July 6, 2017. The purpose of the GPC Series was “to create a conversation about what can be done to improve access to justice and the quality of justice around the world in commercial conflicts and to collect actionable data,” according to the GPC’s *Singapore Report* from its March 2016 kickoff event.

The GPC Series was inspired by the original Pound Conference . . . and the positive effect it had on improving access to justice.”

The Core questions were under the following topics:

Session 1: Access to Justice & Dispute Resolution Systems: what do users want, need & expect?

Session 2: How is the market currently addressing parties' wants, needs and expectations?

Session 3: How can dispute resolution be improved? - Overcoming obstacles and challenges;

Session 4: Promoting better access to justice: What action items should be considered and by whom?

Both Deborah Osborne and I attended the conference in Baltimore in June, 2017, and we were impressed with the way that information was collected in real time and projected onto the screen as well as being added to the cumulative information from other conference locations.

⁷ From goodreads.com, www.goodreads.com/quotes/search?commit=Search&page=6&q=ambrose+bierce&utf8=%E2%9C%93

Participants answered 20 multiple choice questions by using an application which each of us had downloaded to our own iPhone or other device. One of the most interesting technological applications was the way they captured one-word answers to questions. When participants responded with a word or two on their iPhones/other devices, their words were captured on a word-cloud screen with the ones used the most being the largest in size. For instance, we were asked what words we would use to describe the *most common impediments that keep parties from resolving their commercial disputes*. For the Baltimore session, the largest sized words for this question were: “ignorance” and “ego” with many other words of different sizes on the word cloud as well.

In an article in the Spring 2018 Dispute Resolution Magazine, published by the ABA ADR Section, Lela Porter Love, Lisa Blomgren Amsler and Mansi Karol report that among many other results of the Global Pound Conference, there are several areas that users and providers agreed would improve commercial dispute resolution:

1. Combining adjudicative and non-adjudicative processes creates effective dispute resolution
2. Developing pre-dispute and pre-escalation processes is a priority
3. It is important to educate future practitioners in business and law schools, and the business community, in general, about commercial dispute resolution.

More information can be found about the Global Pound Conference series and the results at <https://www.globalpound.org/>

While federal government ADR is often somewhat different from commercial ADR, the concept of combining ADR processes is

one of several ideas from the conference that could be reviewed by the IADRWG Steering Committee. In a recent article in the ABA Dispute Resolution newsletter, Peter G. Merrill touts the advantages of “binding mediation,” for example. I welcome more discussion and consideration of this overall topic.*

Email: rbuck@fmcs.gov

*Any views or opinions expressed herein are solely those of the author and do not necessarily, nor are they intended to, represent the views of FMCS.

The Conflict Management Consortium

By Karen Dean, USPTO

Greetings Conflict Resolution/Management Community!

I am honored to serve as the 2018 Chair/Facilitator for the Conflict Management Consortium (CMC). As some of you may or may not know, I like to stir things up, dig deep, think big, and influence change. Concerning the CMC, I am interested in collaborating, learning and exploring different perspectives to influence change in our respective organizations and the Federal government.

My hope is to engage with experts from a variety of disciplines, such as Employee and Labor Relations, employment law attorneys/General Counsel, Security Specialists, EEO, ADR, Ombuds, Behavioral Health/EAP, (and others) to have healthy, honest, and robust conversations to discuss what we are doing now and where we want to go as it pertains to current policies, practices, and processes addressing the full range of workplace conflict in the federal workforce.

Ideally, I'd like to collaborate in terms of what we can do to help each other, our

respective agencies, and other agencies that have oversight such as but not limited to OPM, OMB, EEOC, MSPB, FLRA, and OSC. I believe it would benefit all of us to hear different perspectives/opinions of current laws, regulations, policies, and practices that often contradict preventative measures and contribute to systemic issues, and increase the cost of conflict.

Multiple entities (EEOC, GAO, ACUS, OPM, MSPB, DOJ, US Supreme Court, etc.) have prepared and submitted reports on informal and formal processes to address workplace conflict/issues such as workplace/administrative investigations, alternative discipline, bullying/harassment, discrimination, EEO complaint process, violence in the workplace, civil treatment, ADR, and organizational ombudsman, etc. However, many practitioners may not be familiar with the totality of the reports, research, and discussions. Thus, it would be interesting to explore what has been working, what has not been working, and/or cutting edge practices that have proven successful, and how people have been able to influence change in their respective agencies –and find a way to combine these resources that will be helpful to everyone.

Bottom line: I am interested in expanding our community of practice to influence significant change. Feel free to contact me directly at Karen.Dean@uspto.gov or 571-272-0787.

Disclaimer:

The articles in this newsletter were written by and represent the views of individual members of the Interagency Alternative Dispute Resolution Working Group Steering Committee. The articles do not necessarily represent the views of the Interagency Alternative Dispute Resolution Working Group as a whole. The information in the articles is for general informational purposes only and is not intended to provide legal advice to any individual or entity. Contact information has been provided for the

authors at the end of each article in the event that you would like to communicate with them about the information covered.

Send any articles, ideas or items for future issues to Ramona Buck, rbuck@fmcs.gov 202-606-3678