RESOLVING CONFLICT

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

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*There are a variety of topics included in this edition of **Resolving Conflict**. We start with an article about coaching in the Federal Government. This illustrates one of the variety of ADR options there are, in addition to mediation. Following that, there is a description of one of the IADRWG Sections that hadn't been covered in the past issues – the Section that is now called the Administrative Enforcement and Regulatory Process Section. There is also an article on confidentiality in Federal ADR programs and an article on the NIH ADR Program. We hope you find all of these interesting and illuminating.*

Coaching in the Federal Government: Innovation, Transformation, and Exhilaration

by Cindy Mazur, Chair of the Workplace Conflict Management Section and Director of FEMA's ADR Division.

Most ADR professionals are adept at conflict coaching. We do one-on-one work with our clients as they vent and explore strategies. We are naturally good at coaching because we are skilled at listening, posing powerful questions, being non-judgmental, problem solving, and helping to generate options. It is a short leap from conflict coaching to leadership and executive coaching.

Every HR office has leadership development programs for its employees of which coaching is a major component. Some HR offices are reaching out to their ADR offices to ask them to serve as internal coaches in these competitive programs. With appropriate coach training, an ADR professional can help employees transform their careers and their lives. Georgetown University and George Mason University have rigorous coaching certificate programs; and a certain number of federal ADR professionals have been able to secure agency funding to attend them. Traditionally, coaching has been reserved as an expensive perk for SES employees or utilized as a remedial tool for poor performers. Now, it is being implemented in many ways, for many diverse levels of employees. Agencies are using coaching to accelerate learning, increase motivation, build on strengths, do succession planning, enhance transitions, and support change.

Coaching is an integral part of maximizing the benefit of the 360 instrument. An employee might seek coaching when taking on more complex responsibilities, transitioning to another location, or seeking a promotion. A team may ask for a coach when it is designing new SOPs, experiencing a dramatic re-organization, or moving to office hoteling.

OPM has decided that it wants to create a coaching culture in the federal workplace. It partnered with the federal Chief Learning Officers to establish the Federal Coach Network. The Network has an oversight Board that researches and collects data on

the return on investment for using federal coaches. It is drafting coaching policies and procedures. It has constituted a government-wide data base of internal, OPM-trained coaches available to federal agencies at no cost. And, it has designed an outstanding federal training program that is accredited through the International Coach Federation. This is an exacting, eleven-day, seven-month program. In its second year, the 2015 cohort has 65 students and 30 collateral duty coaches/instructors who support the training. In 2014, this training won the Best Federal Development Program Human Capital Award.

OPM strongly believes that an internal coaching culture will accelerate employee development and satisfaction; save hundreds of thousands of dollars; and increase retention, innovation, and excitement. The coaching model that OPM teaches is entitled GROW: Goal, Reality, Obstacles and Options, and the Way Forward. The core coaching principles involve setting a goal, gaining clarity and awareness, making choices, committing to action, and establishing accountability.

More and more ADR conferences are offering sessions on coaching. These include the Dispute Resolution Conference of the American Bar Association, the Coalition of Ombuds DC Conference, EXCEL, the Association for Conflict Resolution, and the Federal Dispute Resolution Conference.

By the same token, more and more managers are asking to be trained in coaching skills. One of the largest performance evaluation systems in the federal government includes evaluating the manager's ability to coach. The new maxim is: Leaders coach and coaches lead.

Several people have started federal coaching groups. Riley Barrar and Katie Manderson of the State Department run the Federal Conflict Coaching Group, FCCG, which meets regularly to discuss important topics and ideas for conflict coaching. The ICF Metro DC Chapter and Larry Westberg, an executive and leadership coach at ODASD, have created a Government Community of Practice for coaching at that meets every month.

ADR practitioners have seen the exhilaration that results from transformation and innovation. They are uniquely positioned to excel at coaching. They understand the power of hope, how to listen for core values, and the illusive nature of truth. They know how to brainstorm and role play. The ADR professional uses unconditional positive regard and has confidence in the client. These skills have incalculable value in the coaching field. Thus, I invite all members of the IADRWG community to join this wonderful opportunity.

To learn more about the Federal Conflict Coaching Group, FCCG, contact BarrarRE@state.gov; and MandersonMK@state.gov. For more information on the Government Community of Practice for coaching, contact larry.a.westberg2.civ@mail.mil. To learn more about OPM's trainings and resources, go to http://www.coachfederation.org/. For more information on the International Coach Federation, which is the organization that sets the standards for the coaching field, go to http://www.coachfederation.org/. For more general information, contact Cindy Mazur at cindy.mazur@dhs.gov.

The Administrative Enforcement and Regulatory Process Section
By Deborah M. Osborne, Chair of the Section, and Director of FERC's Dispute Resolution Division *with contributions by Jennifer Gartlan, FMC, Sally Bromley, U.S.I.T.C, and Shawn Grindstaff, U.S.E.P.A.*

The work of the sections of the Interagency ADR Working Group (IADRWG) committee are intended to keep abreast of current government needs to accommodate an ever changing landscape of law, regulations, missions and mandates to serve the public interest. To accommodate such changes, at the meeting of the IADRWG on July 16, 2014, the section which had been called the Civil Enforcement and Regulatory Section, known as CERS, was renamed Administrative Enforcement and Regulatory Process (AERP). The reason for this change was to take into account the evolution of ADR success in enforcement and regulatory process disputes.

The mandate of the original section, Civil Enforcement, then CERS, and now AERP remains in effect - that is to educate and assist management and staff of federal agencies on effective application of alternative dispute resolution (ADR). But the scope is expanded from civil to administrative enforcement disputes and from regulatory to regulatory process disputes. Disputes include but are not limited to environmental disputes.

Over time, agency dispute resolution specialists under the Administrative Dispute Resolution Act of 1996 (ADRA) and AERP section participants realized that ADR techniques were adaptive enough in administrative enforcement and regulatory processes to be used more flexibly at different and earlier timing junctures in agency processes. And, there was a desire to include a varying range of stakeholders inclusive of agencies with overlapping jurisdictions and disputants who may not have had rights or easy access to other legal processes for decision-making. At a 2012 Symposium co-sponsored by the Department of Justice and the Administrative Conference of the United States, former Attorney General Eric Holder made the point as well that, *"ADR was uniquely different than other dispute resolution paths and favorable because it afforded citizens at all levels of society access to participatory decision-making."* AERP covers more accurately the range and scope of ADR techniques and tools that are currently being applied to resolve agency challenges and disputes on a number of fronts in this arena.

AERP consistently reaches out to similar federal agencies to encourage and expand the use of ADR in civil enforcement and regulatory cases. For almost two decades of program implementation at some participating agencies, performance results demonstrate that ADR provides for quick, low cost and durable resolution of disputes, with long lasting social capital benefits of improved relationships and enhanced trust in the federal government. Current participants in AERP apply ADR techniques and tools to a variety of disputes in their own programs:

- interstate commerce
- energy licenses and certificate applications and their implementation
- freight, railroads, congestion, monopolies
- shippers, common carriers, customers
- environmental and cultural resources conflict prevention and resolution
- external labor management disputes
- international trade and international work

- negotiated rulemaking
- public disputes
- regulatory dispute design

AERP provides a variety of services for management and staff of federal agencies involved in enforcement, compliance, and regulatory activities.

- Training in the effective use of ADR
- Providing guidance for ADR program development
- Disseminating information about government experiences with ADR
- Providing tools to evaluate when – and whether – to use ADR
- Demonstrating proven approaches for addressing barriers to ADR
- Offering a "Consultation Team" to provide personalized assistance to agencies interested in developing and implementing an ADR program

Regulatory disputes, for example, could arise over non-federally sponsored project proposals that require federal regulatory approval to meet public convenience and necessity, such as large, non-federally sponsored energy transport pipelines. Administrative enforcement disputes similarly could result from commercial activities and operations that have an adverse effect on clean air, water and the environment and may not be in compliance with set environmental standards. Various stakeholders in these disputes range from commercial enterprises and business operators, international trade, private property owners, environmental groups and the public.

For other federal employees interested in joining the AERP Section or for other info on this topic, contact Deborah Osborne at Deborah.Osborne@ferc.gov.

CONFIDENTIALITY IN FEDERAL ADR

By D. Leah Meltzer, Esq., Deputy Dispute Resolution Specialist, U.S. Securities and Exchange Commission

Confidentiality is a critical component of a successful ADR process. This article addresses general confidentiality parameters in federal ADR programs at the agency level. This article does not apply to ADR programs within federal courts.

In a study conducted by the Ombuds at MIT, the promise of confidentiality was one of the key factors in the client's decision to seek assistance in resolving their dispute. Guarantees of confidentiality allow parties to freely engage in candid, informal discussions of their interests to reach the best possible settlement of their dispute. A promise of confidentiality allows parties to speak openly without fear that statements made during an ADR process will be disclosed to others. Confidentiality also can reduce posturing and destructive dialogue among parties during the resolution process. For further, more in-depth analyses, please see suggested references at the end of this article.

Sources of Expectations and Obligations of Confidentiality:

The confidentiality requirement in federal ADR stems from multiple sources: primarily, the Administrative Dispute Resolution Act (5 USC § 571 *et seq*.), standards of practice, an employee's position description, agency policy, agreements to mediate, and ADR office brochures and other promotional materials. Each of these is discussed below.

ADR Act of 1996: Congress enacted the ADR Act to promote and support the appropriate use of ADR within the federal

government. The provisions of the ADR Act establish requirements regarding the confidentiality of communications during ADR processes involving federal agencies. These requirements attempt to balance the goals of open government with the need to assure the confidentiality necessary to encourage free communications within the ADR process.

The primary confidentiality provision in the ADR Act is 5 USC § 574. This provision underscores the *neutral's* obligation to maintain confidentiality, with a very few exceptions. The *parties'* confidentiality obligations, however, are not as straight forward. The Act states that any party is free to disclose what any party said when all parties were present [§574 (b)(7)]. For example, suppose all the parties to the ADR process are in the same room and Ms. A says that she is pregnant. Under the Act, any person who was in the room (except the neutral) is free to go to Starbucks and disclose this to all of his or her buddies.

Some agencies have addressed this confidentiality gap by requiring parties to sign a confidentiality agreement that states that all parties will keep confidential all communications shared during the ADR process. While this creates shared expectations for all parties, it has not yet been tested by the courts, and also potentially creates some collateral consequences. For example, by requiring more confidentiality than that specified in the Act, the parties lose the Act's automatic statutory exemption from disclosure under FOIA [§ 574 (d)(2)].

An interesting twist to the Act's confidentiality requirements arises when focusing on the definition of "neutral." The identification of neutrals is vital because neutrals to a specific conflict may share confidential information with each other, but they also assume the neutral's obligation to maintain confidentiality. Under the ADR Act, a "neutral" is someone who functions specifically to aid the parties in resolving the conflict (§ 571) and who is acceptable to the parties (§ 573). The determination whether an individual is serving as a neutral under the Act is case specific. In many conflicts, there will be more than one neutral. For example, assuming they meet the Act's criteria, the intake person, an ADR supervisor or a co-mediator could all be "neutrals."

ADR Standards: Applicable published ADR standards of practice or ethical guidelines may also support and delineate confidentiality parameters. For example, Standard V of *A Guide for Federal Employee Mediators, http://www.adr.gov/guidance.html*, specifically states that a mediator must maintain the confidentiality of all information he or she learns during a mediation, unless the parties agree otherwise. The standard, however, is silent as to the parties' confidentiality obligations.

Employee's Position Description:
The position description of an employee involved in dispute resolution may create an obligation of confidentiality that is more general in its application (as opposed to the ADR Act's designation which is case specific). For example, a position description may state that an employee is an agency-designated neutral when dealing with workplace conflict. Depending on the specific language of the designation, the neutral's confidentiality obligation could be greater in scope than that found in the Act. For example, experts have differed on whether the Act covers conflict coaching. A position description designating an employee conflict coach as a neutral may

clarify that, at least from the agency perspective, the conflict coach must maintain and be supported in maintaining confidentiality.

Agency ADR Policy:
An agency ADR policy may also create an expectation of confidentiality, and strengthen any challenge to assertion of confidentiality. On the other hand, agency policies may require disclosure that may not be required by the Act. For example, some agency policies require the neutral to disclose if he or she has reason to believe that either party is in danger of bodily harm, or if a party divulges criminal activity.

Agreements to Engage in an ADR Process:
Agreements signed by all participants and the neutral, can clarify confidentiality expectations for all ADR process participants. These agreements may include confidentiality obligations that differ from those in the Act, providing for more or less confidentiality. It is unclear whether a court would enforce an agreement that provides more confidentiality, but, at the very least, it would be evidence of the parties' intent and creates shared expectations among the parties.

Promotional Materials:
Similarly, ADR program brochures and promotional materials can clarify confidentiality expectations and may be viewed as evidence in the event the matter is challenged in court.

Challenges to Confidentiality:
When a party or third party makes a formal discovery request or initiates other legal process for confidential information, the neutral must follow the procedure set out in the ADR Act [5 USC §574(e)]. Unless a statute other than the ADR Act is controlling, the neutral must attempt to notify the parties of the demand. Any one so notified must offer to defend the neutral's refusal to disclose the requested information or will be deemed to have waived his or her objection. If the parties have waived their objection, the neutral is then free to use his or her discretion whether to disclose the requested information.

So what happens if a neutral or party improperly discloses confidential communications? In reality, the impact under the Act is quite narrow. The ADR Act only speaks to its use in a related proceeding – stating that any improperly disclosed communications will not be admissible [§ 574(c)]. An agency ADR policy, however, could speak to potential disciplinary action against an agency employee for improperly disclosing information. Finally, there may be a cause of action in some circumstances under contract or other applicable law.

Additional Resources
This, by necessity, is a general explanation of federal confidentiality in ADR proceedings. Federal confidentiality in ADR processes is a complicated area. This is, in part, because of the necessity of seeking a balance between confidentiality and open government. If any of the above differs with your current practice, prior to implementing any changes, please refer to the following guidance which discusses confidentiality in federal ADR in greater depth.

The following two documents can be found under "Guidance" on the www.adr.gov website:
Confidentiality: "Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide for Federal Workplace ADR Program Administrators"

(April 2006) (PDF) Prepared by the Interagency ADR Working Group Steering Committee
Confidentiality: Guide to "Confidentiality in Federal Alternative Dispute Resolution Programs" (guidance to assist federal agencies in developing ADR programs) (December 29, 2000) (PDF) Issued by the U.S. Attorney General's Federal ADR Council.

Another useful resource on federal confidentiality in ADR processes is the *Guide to Confidentiality Under the Federal Administrative Dispute Resolution Act*, published by the American Bar Association. cdm16064.contentdm.oclc.org/cdm/ref/collection/p266901coll4/id/725
For more information, contact Leah Meltzer at MeltzerD@sec.gov

An Overview of ADR at the National Institutes of Health
by Tyler Smith, Associate Ombudsman, NIH

As the nation's medical research agency, The National Institutes of Health (NIH) offers multiple Conflict Resolution and Alternative Dispute Resolution resources to its employees; including scientists, administrative staff and trainees. This article highlights the organizational ombudsman program, peer review panels, and EEO mediation.

Organizational Ombudsman Program
As a result of the Administrative Dispute Resolution Act of 1996, like many Federal entities, the National Institutes of Health was faced with the task of developing and providing alternative means of dispute resolution. Along came a very important question: what ADR resource(s) should the NIH provide? To answer that question, a committee, representing various stakeholder offices, was formed. The committee was in charge of researching the best available ADR option for NIH. Following extensive research and discussion, the committee decided the best fit for the NIH was an organizational ombudsman program. There were several reasons as to why an organizational ombudsman program was a good fit for NIH. The most significant was the organizational ombudsman program's ability to focus on not only interpersonal situations and conflict but detection and early warning of new issues and opportunities for systemic change.

1997 was an exciting and accomplishment-filled year for the NIH. Researchers with the National Human Genome Research Institute (NHGRI) completed a map of chromosome 7, an important milestone within the Human Genome Project. Another team of NHGRI scientists identified a defective gene that causes some inherited cases of Parkinson's disease. And results from the NIH-supported Dietary and Systolic Hypertension trial indicated that blood pressure can be swiftly and significantly lowered through a diet low in fat and high in vegetables, fruits, and low-fat dairy foods (NIH Almanac). Above – well maybe *amongst* is the better word – all of that, an organizational ombudsman pilot program was established. It was a particularly opportune time for this undertaking at the NIH because leaders of the scientific community were becoming increasingly open to new ways of addressing and resolving scientific disputes (Gadlin, 2014). The pilot program served five of the 24 (now 27) Institutes/Centers representing a cross-section of the NIH population. The full title for the office became Office of the Ombudsman, Center for Cooperative Resolution (OO/CCR). The pilot program aimed to:

- Support scientific research through applying efficient, effective, and

innovative conflict management and resolution methods
- Provide an alternative to traditional grievance and Equal Employment Opportunity (EEO) complaint processes.
- Improve the work environment, preserve workplace relationships and enhance the quality of work life by increasing participant satisfaction with dispute resolution outcomes.
- Reduce the costs associated with and time committed to traditional dispute processing.

At the end of the pilot period in 1998, an outside independent evaluation team determined that the office was effective in reducing disputes and offered a valued means to enhance conflict management at NIH. In response to a greater-than-expected demand for services, NIH expanded the staffing of the Office and extended its services to the entire NIH at the beginning of 1999.

Over time, OO/CCR expanded its scope of work by shifting the focus from only conflict resolution to conflict prevention and identification of problem areas. The office also expanded many of its resources. Currently, at full staff, the office employs an Ombudsman/Director, Deputy Ombudsman, five Associate Ombudsman, and a Program Support Assistant. The office also maintains a strong internship program for graduate students in dispute resolution or related fields.

OO/CCR offers informal assistance to members of the NIH community in addressing lab and work-related issues. Ombudsmen are a neutral, independent, and confidential resource. The office works with individuals, teams and larger groups. For individuals, the office provides services such as consultation, policy clarification, conflict coaching, informal mediation/facilitation and shuttle diplomacy. For teams, the office is available to help with developing processes designed to increase resilience and facilitate effective team functioning. For larger groups, the office often facilitates meetings and retreats around policy decisions, structural change, perceived internal dysfunction, or exploring and addressing internal tensions and conflicts (Gadlin, 2014). On a larger systemic level, the office provides early identification of issues and identifies systemic conflicts. The office brings to management and leadership's attention certain practices, norms, policies, and aspects of NIH culture that appear to exacerbate tensions or create problems for scientists, administrative staff and/or trainees. In recent years, the office has developed a very healthy training and workshops program in which a variety of workshops, trainings and topical presentations are available to NIH work-groups, mixed-groups, branches/departments and divisions. Occasionally, the office will offer open enrollment courses on specific topics. The workshops, training and presentations can, in a proactive or preventative way, provide individuals with the helpful skills to manage and address workplace disputes, concerns, issues and conflicts themselves.

A full description of OO/CCR and the evolving role it plays at NIH can be found in Howard Gadlin's article, *Toward the Activist Ombudsman: An Introduction* in Conflict Resolution Quarterly Volume 31, Number 4, Summer 2014.

Peer Review Panels (PRP)

As previously listed, one of the original goals of the NIH ombudsman program was to provide an alternative to the traditional grievance process. In addition to the

informal dispute resolution mechanisms OO/CCR offers, the NIH provides Peer Review Panels (PRP). PRPs are used to settle a variety of disputes.
There are two distinct Panel processes. The first PRP is an alternative to the traditional HHS 771-1 Administrative Grievance Procedure. Modeled after the Transportation Security Administration's program, the PRP was created as a pilot program to serve six of the 27 Institutes and Centers that make up the NIH. Rather than filing a grievance under HHS 771-1, an employee can initiate the PRP process. Like any grievance procedure, the PRP process has limitations on what can and cannot be grieved. What is most beneficial about the PRP is that it offers two stages. Stage One provides an opportunity for the grievant and management official(s) to work with an NIH ombudsmen, who serves as the mediator, to reach a mutually agreeable resolution to the grievance. If the parties are able to come to an agreement, it is committed to a written MOU that settles the grievance. Typically, Stage One is concluded within 14 days of the grievance being filed. More often than not, there are quite a few underlying concerns or issues between the parties that led to the original subject of the grievance. Stage One provides the parties with a confidential and informal space to focus on those underlying concerns and to find mutual, non-coerced agreements, rather than deciding who is right and who is wrong.

If an agreement is not reached, the grievant still has the option of moving on to Stage Two. In Stage Two, the grievant brings the complaint to a panel consisting of two managers and three peers who hear the complaint. Employees choose the panelists, randomly, from a pool of volunteers who have been trained in the PRP process. A neutral third-party facilitates the PRP panel process and the panel's decision-making. The panel makes a final and binding decision to grant, modify, or deny the grievant's request for remedy. The panel is the final opportunity for appeal.
The NIH uses the second peer panel to resolve scientific authorship disputes within its Intramural Research Program (IRP). The NIH IRP directly funds approximately 1,200 Principles Investigators who, amongst many things, manage on-site research labs and clinical trials. The idea for the previously described administrative grievance PRP process evolved out of unofficial peer panels designed by OO/CCR staff and NIH scientific leadership to resolve scientific authorship disputes. Eventually, the NIH IRP designed "Processes for Authorship Dispute Resolution," one of which is a peer panel process. However, before going to a peer panel, the Deputy Director for Intramural Research encourages parties to engage in direct dialogue to resolve matters.

Ombudsmen at OO/CCR can be a resource to help each party (if they're interested) think through and prepare for difficult conversations. If direct dialogue does not resolve the matter, the parties are encouraged to use mediation. Mediation is often provided by OO/CCR. The Office has a pool of senior NIH scientists who, if need be, can serve as co-mediators or provide context on complex scientific issues. If direct dialogue and mediation are unsuccessful, parties can choose to have a peer panel make a binding decision. The panel consists of NIH scientists with scientific expertise in the area of research, no conflict of interest, and, when possible, no affiliation with the Institutes/Centers of the involved authors.

Unlike the administrative grievance PRP process, the NIH Intramural Research Program allows parties to decline the use of a peer panel and instead have the Scientific

Director (if all parties are within one Institute/Center) or the Deputy Director for Intramural Research (if parties are from multiple Institutes/Centers) make a binding decision. Over the years, the IRP peer panel process has been modified to help resolve scientific disputes unrelated to authorship.

EEO Mediation

Another ADR option offered by the NIH is within the EEO Complaint Process. When an aggrieved person files an EEO pre-complaint through the Office of Equity Diversity and Inclusion, they can elect "traditional" EEO counseling or ADR. Similar to other agencies, the ADR process offered by NIH is mediation. Mediation is used to attempt to resolve disputes involving employment discrimination (Title VII Civil Rights Act, the Age Discrimination Act, and the Rehabilitation Act), as well as issues of non-employment discrimination. When an aggrieved person elects ADR, an NIH ombudsman serves as the mediator. The mediator then assists parties in their attempt to achieve early, informal resolution of disputes in a mutually satisfactory fashion. The mediation process is confidential and participation is strictly voluntary for the person bringing the complaint. If the parties find a resolution, it is committed to a written agreement that settles the complaint. If the mediation process does not result in an agreement, the aggrieved person has the option of moving forward with the formal EEO complaint process. Similar to Stage One of the PRP process, the EEO Mediation process provides parties with an opportunity to explore and address underlying concerns that may have led to the complaint.

ADR at the NIH is continuously evolving. Nevertheless, the NIH and OO/CCR are committed to providing multiple options for dispute resolution at various stages of disputes. The ombudsman program effectively gives individuals the ability to maintain control of what happens and safely explore their options for informal and formal dispute resolution. Access to PRP processes and EEO Mediation gives individuals an opportunity to resolve matters informally before moving forward with a process in which someone else makes a decision for them. Each ADR process aims to preserve or improve working relationships, boost productivity, encourage collaboration, and save individuals and the agency time and resources.

Reference:

Gadlin, H. (2014). Toward the Activist Ombudsman: An Introduction. *Conflict Resolution Quarterly, 31*(4), 387-402.

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