

RESOLVING CONFLICT

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

Inaugural Issue September 15, 2014

Welcome Letter to all Readers

from Victor Voloshin, IADRWG
Steering Committee Chair (EEOC)

Dear Colleagues - Welcome to the inaugural issue of a newsletter published by the Steering Committee of the Federal Government's Interagency Alternative Dispute Resolution Group (IADRWG). To be more accurate, welcome to the first issue of a *revived* newsletter, as there have been newsletters put out by our group in the past. Thanks to Ramona Buck of FMCS for spearheading the Outreach Committee and the effort to reinstate this publication. For now, we will call it "RESOLVING CONFLICT" and see if it resonates with the readers. A previous iteration of the newsletter was titled "ADR Network." If you have a suggestion for a pithy and interesting permanent name, please let Ramona know at rbuck@fmcs.gov. Fittingly, this first issue gives some background about the IADRWG and provides a historic perspective on the development of the Federal ADR. It also features some of the current ADR programs within Federal agencies.

It has been almost 6 months since the change in the leadership of the Steering Committee. Tremendous thanks go to Matilda Brodnax of FEMA for leading this group for a year! She chaired her last meeting in March of 2014. Under her able leadership, the group has written a new report to the President and submitted it to the Justice Department for review and

approval. Also during Matilda's tenure, the format of the monthly meetings was changed to provide a specified time slot for a featured speaker or discussion. We also have added a new time slot called "Open Mic," during which anyone can bring up a potential topic for a future discussion to see if it generates a broader interest among members. If it does, then the topic or the speaker gets added to the future agenda as a featured presentation. This format seems to be popular with members, so we will continue using it.

In April of 2014, I assumed the role of the Chair, and Katie Manderson of the State Department was selected as the Vice Chair of the Steering Committee.

During the past four meetings, we have heard reports from all four permanent sections of the IADRWG: Administrative Enforcement and Regulatory Process, Contracts and Procurement, Litigation, and Workplace Conflict Management. During the next few meetings, we will hear from the newly emerged ADR fields, or the subject areas that came into being since sections were created 20 years ago. These reports have already precipitated a start of an important conversation among members about the role of the sections in promulgating ADR throughout the Federal government. Let us continue this discussion throughout the upcoming months, paying particular attention to the following questions, raised in one form or another by our members:

- 1) Is the current section structure responsive to the needs of the group membership?
- 2) If not, how can we create a more responsive structure? Suggestions so far range from changing the names of the sections to better reflect their current missions and memberships, to adding more sections, to keeping the existing sections but adding new permanent committees, to abandoning the section structure altogether.
- 3) How can we reach out to many Federal ADR professionals who don't know about our group?
- 4) How can we keep the existing members interested and involved?
- 5) How can we better promulgate ADR throughout the Federal government?

Let's keep the conversation going. And let's direct our energies to the ultimate goal of our group – making sure that ADR is the default method of resolving issues faced by the Federal agencies, Federal employees, and the American public, in whose service we always remain. Katie and I look forward to working with you in the months ahead!

History and Mission of the Interagency Alternative Dispute Resolution Group

By Melissa Leibman, Staff Attorney
Office of Dispute Resolution,
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In 1996, Congress enacted the Administrative Dispute Resolution Act of 1996 (ADRA), which is the seminal legislation enabling the federal government to use ADR. *See* 5 U.S.C. § 571 *et seq.* That statute authorized the federal agencies' use of ADR to resolve disputes within the federal government and directed the convening of an interagency task force to

facilitate and encourage the development and expansion of ADR programs.

In response, on May 1, 1998, President William Jefferson Clinton established the Interagency Alternative Dispute Resolution Working Group to facilitate and encourage agency use of alternative means of dispute resolution and appointed the Attorney General as its leader. In that memo, President Clinton also urged federal agencies to take steps to “(1) promote greater use of mediation, arbitration, early neutral evaluation, agency ombuds, and other alternative dispute resolution techniques, and (2) promote greater use of negotiated rulemaking.”

The Working Group's members are comprised of representatives from the Cabinet Departments and other federal agencies with a significant interest in dispute resolution. Additionally, four discrete Sections were created within the Working Group to assist federal agencies in creating and operating ADR programs in specific subject matter areas. Those Sections are: Workplace Conflict Management, Contracts and Procurement, Administrative Enforcement and Regulatory Process, and Litigation. During the first year of operation, the Working Group operated primarily through these Sections to provide technical assistance and guidance on best practices in ADR program development. These sections have conducted more than fifty training sessions, meetings, and colloquia on all aspects of ADR. The Sections continue to serve the needs of federal agencies interested in developing strong and effective dispute resolution programs.

Other activities of the Working Group include:

- Developing procedures to permit agencies to obtain the services of neutrals on an expedited basis;

- Maintaining records to ascertain the benefits of alternative dispute resolution;
- Periodically advising the President of its activities. Since its inception, the Working Group has submitted two Reports to the President regarding ADR programs through the federal government. These reports are detailed account of the current programs in every federal agency;
- Creating and maintaining subcommittees for Arbitration, Ethics, Collaborative Governance, Environmental ADR and other areas.

Additionally, the Working Group has a Steering Committee that supports the work of the Sections and the Working Group. The Steering Committee consists of ADR professionals and experts in the federal government who have given their time and expertise to the cause of the Working Group and its Sections. Many members of the Steering Committee serve as their agency's Dispute Resolution Specialist and are responsible for the operation of ADR programs within their agencies.

The website for the Working Group is www.ADR.gov. The website contains ADR guidance, information about upcoming trainings, information about the Sections, and more. The website is updated on a regular basis, so check back for updates. Although Working Group meetings are limited to government officials, many training opportunities are open to the public.

Anyone can receive regular updates about training opportunities by clicking on the "Receive Notices of Training Events" link at the bottom of the ADR.gov home page.

The Administrative Conference and the Development of Federal ADR

By David M. Pritzker

ACUS Deputy General Counsel

The Administrative Conference of the United States (ACUS) was established by statute in 1964 as a means of bringing together the best thinking from the public and private sectors to find ways to improve the functioning of federal agency programs. A full-time staff, currently only 15 people, works with a membership of approximately 100 senior government officials, academics, attorneys, and other experts, to research issues of administrative procedure and develop recommendations that will increase the efficiency, fairness, or effectiveness of those procedures. Conference recommendations are most often addressed to agencies or Congress. They result from an entirely open process, which encourages public input. Information about the entire body of ACUS work, including more than 200 sets of recommendations, and access to current projects are available at www.acus.gov.

Early in the 1980s, the Conference started to research ways to incorporate into federal programs the growing body of private sector experience with consensual approaches to preventing or resolving disputes as alternatives to court litigation. Our initial foray in this area looked at ways to incorporate experience with voluntary consensus standards development, resolution of environmental disputes, and other public policy negotiations, into the federal rule-making process. This led to recommendations in 1982, which described our concept of negotiated rulemaking, set forth a number of criteria for identifying when this process might be appropriate, and suggested some basic procedural steps. The innovative application of this new technique for drafting consensus-based regulations by the Environmental Protection Agency and the

Federal Aviation Administration led ACUS to refine its recommendations in 1985, and encouraged other agencies to adapt “reg neg” to their own programs. Guidance and assistance from ACUS to agencies and congressional staff eventually led to enactment of the Negotiated Rulemaking Act in 1990.

Soon after adopting the first negotiated rulemaking recommendations, ACUS began a much broader program of seeking to apply “alternative means of dispute resolution,” and the term “ADR” quickly became part of the vocabulary of federal officials. Over the next several years, the Conference adopted numerous recommendations that initially addressed ADR generally, but soon produced guidance on a variety of specific procedures such as mediation, arbitration, and use of settlement judges and ombudsmen, and specific contexts such as contract disputes, farmer-lender disputes, and the Americans with Disabilities Act. Conference recommendations also addressed technical matters such as ADR confidentiality and how to acquire services of neutrals.

A key event in this history was a daylong gathering in 1987 of hundreds of federal officials with private sector ADR experts representing a variety of perspectives, including corporations, public interest groups, academics, and practicing attorneys. The objective was to demonstrate to the government officials, based on private sector experience, the enormous potential value of appropriate use of ADR by agencies. Among the speakers were Senator Orrin Hatch, American Bar Association President Eugene Thomas, EPA Administrator Lee Thomas, and D.C. Circuit Chief Judge Patricia Wald. Within a few days, Senator Charles Grassley’s office contacted ACUS to discuss whether ADR legislation might be helpful. In the next few weeks, a small team including ACUS

attorneys Charles Pou and David Pritzker and Conference consultant Philip Harter produced the first draft of what became the Administrative Dispute Resolution Act, enacted in 1990, contemporaneously with the Negotiated Rulemaking Act.

Each of these statutes specified a role for ACUS to lead a government-wide effort to find the most appropriate ways to apply the full range of ADR techniques to federal programs, to achieve greater efficiency, cost savings, and overall increased satisfaction with the outcomes. ACUS carried out this responsibility through a combination of symposia, written guidance, training sessions, and individualized advice to agencies. A key component of this program was the creation of voluntary interagency working groups that enabled the most experienced and enthusiastic supporters of ADR to share their expertise with one another and with newcomers to ADR. In general, a working group was formed wherever or whenever a specific need arose, addressing, for example, ADR systems design, ADR in EEO and other workplace disputes, training and education, qualifications for neutrals, and creation of an information clearinghouse. ACUS published a newsletter twice each year to inform agencies about new developments and training opportunities. The Conference also created a nationwide database of dispute resolution neutrals.

Another important aspect of these efforts was the widespread support of numerous agencies and their willingness to share their expertise. A few of the many examples: the Federal Mediation and Conciliation Service was a leading source of training; the Department of Health and Human Services took the lead in operating a shared neutrals program; the Army Corps of Engineers shared its extensive experience with ADR in contracting; EPA shared its expertise in resolving environmental

disputes and collaborated with ACUS in producing two editions of the “Negotiated Rulemaking Sourcebook,” a compendium designed to guide agencies through the reg-neg process.

The two 1990 statutes contained sunset clauses, which reflected an expectation that Congress would evaluate the success of these measures before making them permanent, based in part on required reports to Congress from ACUS. The Administrative Dispute Resolution Act of 1996 renewed this legislation permanently. However, in 1995, Congress eliminated all funding for ACUS, so an alternative was needed for the supporting activities described above. A directive from President Clinton in 1998 formalized the coordination process by creating an “Interagency ADR Working Group,” to be convened by the Attorney General.

ACUS returned to the scene in 2010, and since then has been an active participant in the IADRWG. At a 2012 ADR Symposium co-sponsored by the Department of Justice and ACUS, Attorney General Eric Holder recognized our partnership and emphasized the importance of the ongoing interagency collaboration in improving the Government’s “collective ability to resolve disputes effectively, equitably, and efficiently.”

The Use of ADR at the Office of Special Counsel

by Jane Juliano, Chief, ADR Unit

On July 2, 1881, Charles Guiteau assassinated President James Garfield. As Guiteau saw it, he was owed a diplomatic position for supporting Garfield’s campaign. By the 1880s, almost all of the 130,000 Federal government employees were appointed in return for political support and friendship. Efforts at reform had been thwarted—until the assassination. The

Pendleton Act of 1883 for the first time created a merit-based civil service system. Today the US Office of Special Counsel (OSC), an independent Federal agency, protects that merit system by evaluating reports of fraud, waste, and abuse and prosecuting complaints of wrongdoing in Federal workplaces. Appointed in 2011, Special Counsel Carolyn Lerner drew on her experience as a mediator, increasing the use of mediation at OSC in an effort to cut down on investigation time and achieve more satisfying results. Since then, OSC has multiplied its use of mediation more than fourfold, receiving very enthusiastic reviews.

The Alternative Dispute Resolution Unit offers mediation in select Prohibited Personnel Practice cases (e.g., retaliation for whistleblowing) and for the first time in OSC’s history, in Uniformed Services Employment and Reemployment Rights Act cases. USERRA provides rights to Federal employees deployed or in the National Guard or Reserve.

In addition to mediating cases, the recently expanded OSC ADR Unit began designing an improved dispute system process. We met with stakeholders from Federal agencies, advocacy groups, attorneys that represent employees that file complaints with OSC, and veteran’s interest groups. We also consulted with some of you—experienced ADR specialists who participated in the Interagency ADR Working Group.

Drawing on initial case experience and stakeholder input, we created a flexible program that tailors the process to the issues and the parties involved. Cases may involve in-person mediations or a “conciliation” process of phone calls with relevant parties. We offer “subject matter experts” for all USERRA and most PPP cases to answer questions that either party may have. We involve the subject matter experts during the

convening stage – to ensure that the case is appropriate for mediation – and during the pre-mediation, mediation, and post-mediation phases, equipping parties with information about alternatives to agreement.

This is especially important for USERRA cases, where the law and regulations are complex; indeed our stakeholder meetings showed us that USERRA violations commonly result from lack of information. The parties appreciate the opportunity to understand the law and at the same time resolve their dispute and move forward.

Identifying cases that are appropriate for mediation is a key task. The ADR Unit reviews PPP and USERRA complaints, considering criteria such as party relationship, interests, and desired outcomes.

If the case is appropriate, we contact the claimant to explain and offer mediation. If the complainant agrees, the Unit then contacts the appropriate Agency with the same offer. If both sides agree, assigned mediators work with the parties to identify participants, select a mediation date and location, and determine other specifics. The mediation takes place either in person (if the parties are local or the Agency chooses to send representatives to DC) or by phone or videoconference. Employee-complainants may bring an attorney or another support person. Agency-respondents typically have an attorney as well as a management representative in attendance. Care is taken to ensure mediation participants have authority to settle and are able to participate effectively in a mediation setting. The mediation process is confidential and conducted in accordance with the Administrative Dispute Resolution Act of 1996.

The ADR Unit has three core mediators who spend most or all of their time mediating. In addition to the core mediators, OSC also has collateral duty

mediators, all of whom have been trained in both the law OSC enforces and in mediation. In some instances, FMCS mediators, and volunteer mediators have also co-mediated with OSC mediators.

OSC's ADR Unit takes a holistic approach to resolving disputes. It is common to settle both an OSC and related cases in other venues (e.g., EEO, Federal court). We aim to improve parties' overall situation whenever possible. Dialogue, training plans, promotion plans, and transfers to new work positions for employee-complainants are frequent components of settlement agreements. The goal of designing a dispute resolution system is to fit the process to the problem. Judging from what we have heard and experienced thus far, the OSC mediation program is a good fit for many of the PPP and USERRA claims that come to OSC.

The Office of Collaborative Action and Dispute Resolution (CADR) at the Department of Interior

by Matthew Costello, Acting Director,
CADR

The Department of the Interior has over 70,000 employees serving the American public in more than 2,400 locations and spanning 18 time zones. With 9 bureaus and multiple missions, we are required to work in partnership with other Federal agencies, states, tribes, industry, and a rich diversity of stakeholders. In order to effectively engage and partner with our myriad stakeholders and the public, the internal culture of the Department and its bureaus must embody the spirit of engagement, collaboration and communication.

In October of 2001, the Department of the Interior established the Office of Collaborative Action and Dispute Resolution (CADR) to implement and manage the Department's conflict management system, public participation

and formal Alternative Dispute Resolution (ADR) processes. CADR is unique in the Federal Government in having responsibilities for both internal and external collaboration and conflict management. This approach allows for the Department to support its mission activities as efficiently and effectively as possible. And it reinforces the fact that the principles and skills required for good communication, engagement, and collaborative problem solving are the same, whether working with external stakeholders or with internal DOI bureaus, offices, and employees.

To help meet its internal collaboration and conflict management needs, the Department collaboratively developed an Integrated Conflict Management System (ICMS) known as CORE PLUS to provide the skills, policies, resources, and process options to empower the Department's employees to work together more collaboratively and effectively manage conflict as early as possible and at the lowest possible level. CORE PLUS was developed in collaboration by a multi-stakeholder team with representatives from various functions within the Department. This team merged two existing ADR programs to create standardized policies and processes throughout the Department and realized that to truly support the culture the Department embodies with its external stakeholders, a traditional ADR program was not enough. While ADR is part of CORE PLUS, the ICMS is broader and offers a host of services to help support employees and offices in need, including: coaching, training, facilitation, climate assessments, and Organizational Ombuds services. CORE PLUS also provides mediation for general workplace concerns as well as through the EEO and Administrative Grievance procedure processes. The ethos of CORE PLUS is to support employees in their

efforts to manage and resolve conflicts on their own, and to provide additional resources when needed.

CADR plays a large part in managing CORE PLUS and does so in partnership with other DOI Offices including: The Office of Civil Rights, Office of Human Resources, the Solicitor's Office, Training and Employee Development Offices amongst others. This design allows the Department to take a holistic, systems wide approach to managing conflict, as well as provides multiple entry points for employees and offices seeking assistance. To help meet the need for these ADR and collaboration services, CORE PLUS offers employees a wide range of service providers including: DOI employees who are certified to provide neutral assistance, an Indefinite Delivery Indefinite Quantity contract which allows bureaus and offices to access private vendors, and utilization of the FEB Shared Neutrals Program and the Federal Mediation and Consolation Service Roster.

For more information on the Department of the Interior's collaboration and conflict management programs and initiatives please visit www.doi.gov/cadr.

*Send any articles, ideas or items for future issues to Ramona Buck, Chair of Outreach
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