

## **RESOLVING CONFLICT**

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

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### **IADRWG Technology Committee Survey**

#### **Results**

by Michael Wolf, Director, FLRA  
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In 2016, the IADRWG Technology Committee administered a survey of IADRWG practitioners to get a sense of possible avenues for future work of the Technology Committee. We were surprised at the results! After reading the rest of this article, please contact a member of the IADRWG Technology Committee to join us in exploring next steps.

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#### **SURVEY METHODOLOGY**

Technology Committee members developed 20 survey questions. Committee Chair Michael Wolf did his best to resuscitate his degree in sociology and long-dormant professional training in survey design and methodology. Original draft questions were carefully reconstructed to increase the chances of obtaining meaningful results.

We hosted the survey instrument in SurveyMonkey and invited potential respondents from the IADRWG email list. Alas, we only received 27 survey responses. As a result, readers should consider the data

informative and instructive, but not statistically reliable.

For information about the respondents' collective characteristics, see the last section of this article.

#### **BIG PICTURE**

Survey respondents already use a wide variety of ADR Technology; they are interested in learning more about this subject; and Members of our Technology Committee are interested in helping their peers achieve that goal.

#### **WHAT WE FOUND**

We did not expect 85% of respondents to report that they are either comfortable or very comfortable with the use of technology! And 75% reported that they have sufficient tech support to use available technology, including installation, maintenance, troubleshooting, and training. In fact, virtually all respondents know of someone who could assist them if they had questions about the use of technology.

Many survey respondents told us that they have access to and regularly use a wide variety of collaborative technology tools. Aside from telephone and video-teleconferencing, these include (with percentage of respondent users in parentheses):

- **Conference Call Tools (94%):** Skype, Skype for Business, Conference bridge, Lync, Blue Jeans, Adobe Connect
- **Document Sharing Tools (38%):** SharePoint, Google Docs, Office 365, iShare, eRoom
- **Scheduling Tools (44%):** Outlook, Google, Doodle, ESW
- **Survey Tools (38%):** Survey Monkey, Qualtrics
- **Online Meeting Tools (38%):** GoToMeeting, WebEx, Adobe Connect, Lync, Skype, Skype for Business
- **Social Networking (19%):** Twitter, LinkedIn

Collectively, most respondents identified an impressive array of obstacles/challenges they face in their ADR practice that might be resolved by utilizing new technologies. Examples include the positive effect appropriate technology can have on budget, remote participation from multiple locations, and ability to create greater efficiencies in the ADR process.

Slightly more than half of respondents also identified concerns that, left unaddressed, could militate against using technology in their ADR practice. They listed information security, building trust, confidentiality, document management, making connections, non-verbal communication, piercing firewalls, dealing with emotions, lack of participant preparation, and a simple preference for working in-person. ADR practitioners might overcome these concerns by learning how to manage the ADR technology acquisition and implementation process, and becoming skilled at knowing when and how to most appropriately and effectively use – and not use – various ADR technology tools. These survey results can inform IADRWG decisions about how to

develop training and support for federal sector ADR practitioners.

About three-quarters of respondents reported no barriers to acquiring and implementing ADR technology. That is very encouraging. The other quarter identified barriers such as lack of resources (including funding and tech support), buy-in, time, and firewalls. In a separate question, about three-quarters of respondents said they are not aware of technologies they wish they had but were unavailable because they are cost-prohibitive. These responses seem consistent. But in yet another question, only half of respondents said that their office has the resources to acquire and implement mediation technology. The question of resources warrants further inquiry.

When asked to rate their interest in learning more about available technologies, almost 75% expressed high or “really high!” interest, with 80% wanting to learn more through meetings and presentations. That’s fantastic! About 40% liked the idea of learning through videos and online information. More than a quarter favored mentoring. Fortunately, 44% of respondents expressed willingness to serve as technology mentors. We should consider developing a mentor registry and match mentors with mentees. If there is enough volunteer support, we also should consider regularly offering ADR technology training, brown-bag lunch sessions, webinars, etc. Other ideas might include creating an online repository of training material, legal guidance, and best practice information, together with helpful links to various ADR technology tools.

## **RESPONDENT DEMOGRAPHICS**

Do you wonder whether survey respondents are representative of the larger federal sector ADR provider community? More than a third reported that they possess more than 15

years of experience as ADR practitioners. The rest were pretty equally split between those with 8 to 15 years of experience and those with 7 or fewer years of experience. Respondents' agencies provide a wide variety of ADR services. About 75% offer workplace ADR and about a third offer ADR services in connection with litigation and environmental matters. About a quarter of respondents said their agencies offer reg-neg, procurement and regulatory-related ADR services. Seventy percent or more offer mediation, facilitation, coaching. About a third of the respondent agencies offer ombuds, while about a quarter offer conciliation, early neutral evaluation, fact finding, and arbitration.

About two-thirds of respondents reported that they conduct 30% or more of their meetings by phone. Some of us were surprised that 40% of respondents conduct no more than 60% of their ADR sessions in person. Like other elements of these survey results, we should validate these findings. If accurate, many of our colleagues and peers are already beginning to utilize technology in a significant portion of their ADR work.

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## **Real Time Resolution of Ocean Transportation Disputes**

By Jennifer M. Gartlan  
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The Federal Maritime Commission (FMC or the Commission), established in 1961, is an independent federal agency that regulates the ocean transport of cargo and persons between U.S. and foreign ports. The Commission's efforts to resolve commercial and regulatory shipping disputes span various consumer, corporate, and logistics interests internationally. The agency essentially establishes the "rules of the road" for containerized shipping, meaning that it oversees the commercial operations of vessel operators, intermediaries that arrange for shipments (e.g. freight forwarders), and marine terminal operators, that handle the loading and offloading of cargo onto vessels. The agency also exercises limited oversight of cruise lines. In addition to the requirements set forth in the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act, 46 U.S.C. § 41301 (the "Shipping Act"), and the agency's regulations, much of the agency's oversight is clarified through agency adjudication.<sup>1</sup> While the FMC has a robust civil enforcement program, equally important is the agency's ability to resolve disputes between private parties via administrative litigation.<sup>2</sup> While the agency originally implemented alternative dispute resolution to help manage its formal complaints docket, this article will focus on the

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<sup>1</sup> For example, in *Gruenberg-Reisner v. Overseas Moving Specialist Inc. d/b/a Int'l Sea and Air Shipping*, FMC Docket No. 1947(1)(Served October 7, 2016)(unpublished), the agency expounded on requirements for regulated entities when providing certain types of rate arrangements to their customers.

<sup>2</sup> The Shipping Act enables private parties to sue one another for violations of the Shipping Act. While not the focus of this article, parties engaged in administrative litigation before the Commission are required to attend mandatory mediation conferences conducted by the Office of Consumer Affairs & Dispute Resolution Services' staff to determine whether mediation is feasible to resolve the dispute. 46 C.F.R. § 502.64.

agency's innovative efforts to prevent and resolve commercial and regulatory disputes in real time.

The ocean shipping industry relies upon long-term commercial relationships that exist between individuals or companies that offer their goods for transportation and various actors in the logistics chain that effectuate delivery of such cargo. The interpersonal nature of international shipping, coupled with the transient nature of cargo, make it difficult for parties to engage in long-term litigation. By the time traditional or administrative litigation has ceased, the parties' relationship is often irreparably damaged and the subject cargo of the dispute may be lost or destroyed. The FMC established the Office of Consumer Affairs and Dispute Resolution Services (CADRS) in 2004. CADRS staff regularly provide ombuds, rapid response, and mediation services to help resolve emerging and ongoing challenges. CADRS's external ombuds services differ somewhat from the traditional concept of the organizational ombudsman. Unlike a traditional organizational ombuds service, parties usually do not contact the office to report a concern or problem regarding a systemic agency problem or trend. Instead, most requests for assistance implicate disputes or problem trends involving regulated entities, concerns involving agency regulations, or industry conditions generally. For example, during a period of port congestion that impacted ports nationwide, CADRS received numerous reports and requests for assistance from importers and exporters. CADRS staff assisted disputing parties locate and obtain delivery of cargo, achieve settlement of disputes regarding port storage charges, participated in four agency - sponsored forums in major port cities to explore the causes and challenges experienced by the ocean shipping public, reported to the

Commission on the various complaint trends tracked by the office, and posed various options for prospective agency action. Another recent example of a large - scale ombuds matter involved the bankruptcy of a major steamship line. CADRS served as the agency's primary point of contact with the shipping public. It fielded parties' inquiries and concerns, ensured that parties had up-to-date information, and worked to alleviate disputes as they arose. CADRS also reported to the Commission regarding the various trends and concerns it observed. With respect to the use of ombuds to resolve disputes generally, the office assists parties with addressing more discrete issues and disputes. For example, individuals often hire local neighborhood companies to arrange for ocean shipments of holiday packages to relatives living abroad. CADRS often receives requests for assistance during the post-holiday period when the packages fail to arrive at destination. CADRS will work with both parties to resolve the dispute and arrange for delivery of the cargo. Another example involves importers that are trying to obtain their cargo for a particular season or event (e.g. holidays, Superbowl, etc.). A company's entire inventory and profit potential may be jeopardized due to the fact that the steamship line exercised a lien on the cargo due to a past unrelated dispute with the company's freight forwarder on another shipment. CADRS will work with the parties involved to resolve the immediate dispute to facilitate release of the cargo as well as address the underlying financial dispute between the various parties.

The FMC also has instituted a rapid response CADRS service whereby a disputing party requests assistance on an emergency basis. To support this initiative, the agency negotiated with the major steamship lines and obtained an agreement

that a designated official would respond to requests for assistance from CADRS within 24 hours. A recent example of a rapid response matter involved a request from a small business whose replacement shipment of stock was delayed at port. Given the fact that the importer resided in a rural community, lack of the commodity would have created significant problems for the importer's community. The importer was unable to obtain updates from the freight forwarder and was concerned about obtaining its cargo as well as the accrual of storage costs at port. CADRS reached out to the steamship line and the cargo was released to the importer shortly thereafter. Another example of rapid response services involve requests for assistance from perishable agricultural exporters when their shipment bookings are cancelled or otherwise delayed. CADRS will work with the parties to explore potential options to ensure that the cargo moves promptly to destination.

Both ombuds and rapid response services are provided via telephone and via email to ensure that parties in various global locations and time zones are able to connect to explore timely resolution. The use of technology also helps limit program expenditures.

Parties may also elect for more traditional mediation services from CADRS both pre- and post-litigation. For example, a dispute may involve FMC regulations, other domestic or foreign regulatory considerations, and contractual considerations. Normally, a party would have to file an administrative complaint with the FMC while reserving other concerns for the courts. By choosing to mediate the matter voluntarily, parties may simplify the process or narrow the issues involved and save time and money resolving the various

issues in dispute. Such services do not require the filing of a formal complaint before the FMC and may incorporate various commercial, regulatory, and other legal concerns. Parties have the option of obtaining mediation services either in person or via telephone.

For more information regarding services provided by CADRS, please visit the Commission's website at:

[http://www.fmc.gov/bureaus\\_offices/consumer\\_affairs\\_and\\_dispute\\_resolution\\_service.s.aspx](http://www.fmc.gov/bureaus_offices/consumer_affairs_and_dispute_resolution_service.s.aspx) or contact CADRS staff at 866-448-9586.

*\*Jennifer M. Gartlan is the Deputy Director of the FMC's Office of Consumer Affairs & Dispute Resolution Services. The opinions and views expressed in this article are her own and are not binding on the FMC. This article is intended to provide general guidance and does not constitute legal advice or guidance.*

### **U.S. Institute for Environmental Conflict Resolution Helps Parties Streamline ESA Consultation Process**

Submitted by Dana K Goodson, Senior Program Manager on behalf of the US Institute for ECR

Weighing in at one-quarter of an ounce—the equivalent of three pennies—the tiny Indiana bat is a big deal in Ohio. The rare, insect-eating bats' population has dropped 50 percent in the last 30 years, in part due to disturbances to their habitat from road expansion and other development. Motivated by the need to protect the endangered bat's habitat and advance the state's transportation projects, federal and state agencies working in Ohio decided to join forces.

In 2010, the Ohio Department of Transportation (ODOT), the U.S. Fish and Wildlife Service (USFWS), and the U.S.

Federal Highway Administration (FHWA) came together to develop a new statewide agreement that would protect the Indiana bat as well as improve the efficiency of new transportation projects in the state. Although all three agencies recognized the importance of protecting the Indiana bat and the need for the state's transportation projects to progress; still, after two years of negotiations, the interagency team hit a wall.

"We had nowhere else to go, we spent so much time getting nowhere and we were out of options," said Matt Perlik, assistant environmental administrator at ODOT, who worked on the negotiations. Perlik pointed out that none of the agencies wanted to push an agreement through litigation. "We needed something to be mutually beneficial, the only way was a collaborative approach. So we hired a third-party to take us by the hand and guide us through the process."

In 2014, ODOT hired the Udall Foundation's U.S. Institute for Environmental Conflict Resolution (U.S. Institute) to help facilitate the process for finding a mutually beneficial agreement between ODOT and USFWS, the two agencies working on the ground. The FHWA was crucial in originally bringing all the agencies together; however, they encouraged ODOT and USFWS to work through the details of linking Ohio-specific transportation projects and Indiana bat protection under the Endangered Species Act (ESA). The long-term facilitation helped the agencies understand each other's interests, smooth rough relationships between team members, improve communications, and organize deliverables without taking sides or forcing an agreement. To further complicate the negotiations, the Northern long-eared bat, which is also located in Ohio, was listed under the ESA in 2015. The team agreed to address both species of bat in the agreement.

"Prior to the Institute getting involved, the meetings between the agencies had become contentious, with individuals on all sides feeling unheard and disrespected. In that type of environment, folks tend to get stuck in a loop, arguing the same points over and over," said Karen Hallberg, biologist with the USFWS. "The greatest benefit was having the Institute staff who understood the agency-specific policies and positions, who established ground rules, and enforced them in a non-threatening manner... and smoothed ruffled feathers when needed."

With about 400 transportation projects requiring tree removal in Ohio annually, evaluating projects for their potential impact on bats on a case-by-case basis is not only time consuming, but it can cost up to \$20,000 per project. The collaborative state-wide programmatic agreement allowed ODOT to understand which types of transportation projects would raise red flags for the USFWS and which would require measures to protect bat habitat.

None of the participants in this project had previous experience with facilitated processes, and prior to the U.S. Institute's involvement, were under the impression that the facilitator would be the "decider." Both agencies agreed they enjoyed learning how to communicate better, how to organize their collaborative process, and learning how to break through their "endless argument loop."

"This had to be approached collaboratively. Neither agency was forced to do this, so it is important that everyone was getting what they needed. Without a standardized agreement, the cost and work required for each project would be tiring," said Megan Michael, with ODOT. She said prior to the U.S. Institute stepping in to facilitate the process she didn't feel heard and that contrasting office cultures made progress challenging. Having a neutral third-party

involved helped to restate everyone's needs, highlight shared goals, and get past sticking points. "Now, I am excited to be able to focus on conservation, and that is rewarding. As a biologist, I am very interested in that. Through this process, our agreement ended up being better than we had hoped."

The Ohio agreement, now in the final stages, is so well-tailored to bats and transportation projects, certain aspects of it may become a model for a range-wide agreement that will help guide how transportation agencies and the USFWS address impacts to bats in 20 states, from Maryland to Oklahoma.

*The U.S. Institute for Environmental Conflict Resolution (U.S. Institute) is a program of the Udall Foundation, which is an independent federal agency of the Executive Branch established by Congress in 1992. The U.S. Institute provides independent collaboration, consensus-building, and conflict resolution services on a wide range of federal environmental, natural and cultural resources, and public lands issues. As a neutral convener, the Institute serves all parties.*

#### **ADDITIONAL LINKS**

Learn more information about the [U.S. Institute for Environmental Conflict Resolution](#).

For the Indiana bat story with accompanying slideshow, visit our [website](#). For more information on the Indiana bat, visit the U.S. Fish and Wildlife Service Endangered Species Indiana bat information [page](#).

#### **Disclaimer:**

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