



Interagency Alternate Dispute Resolution Civil Enforcement and Regulatory Section Newsletter

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NEWS FROM CERS

*(the Civil Enforcement and Regulatory Section
of the Interagency ADR Working Group)*

A Presidential Memorandum requires the Interagency ADR Working Group (IADRWG) and its four substantive sections to submit to the President periodic reports on the current state of federal ADR. The IADRWG Steering Committee and the four sections are currently compiling information for the report.

As the critical first step, the Department of Justice and the Interagency ADR Steering Committee sent a survey to all federal agencies to obtain data about their ADR programs, performance, and results. Federal agencies have been asked to complete the survey and submit their responses to the Department of Justice by August 5, 2005. The goal is to transmit the report to the President by September 30, 2005.



CERS will draft its section of the report in August and early September. If you would like to join us in our efforts or desire to learn more about the survey, including the name of the person in your agency to whom the survey was sent, please contact Richard Miles, the CERS Chair. He can be reached at 202 502-8702 or at Richard.miles@ferc.gov.

DOI'S USE OF NEGOTIATED RULEMAKING

The Department of the Interior is increasing its use of negotiated rulemaking processes ("reg-neg") as a means of engaging interested stakeholders to resolve contentious issues. The Office of Collaborative Action and Dispute Resolution at DOI promotes the use of facilitators and situation assessments to increase the likelihood of reaching consensus-based agreements on proposed regulations.

Authorized by the Negotiated Rulemaking Act of 1990, reg-neg encourages agencies to negotiate rules with the public and interested parties. It incorporates several of the best practices of ADR: Process transparency; ensuring that all interested parties are at the table; the use of a third-party neutral; and the importance of consensus.

The National Park Service successfully used reg-neg to address off-road vehicle use at the Cape Cod National Seashore in the mid-1990's in a situation which had become volatile. Subsequently, at the Fire Island National Seashore in New York, the National Park Service convened a committee to develop new driving rules for vehicles on the island. The reg-neg committee included over 20 individuals representing the full spectrum of interests, including seasonal visitors, residents, local governments, as well as environmental, economic, recreational, and other interests. With the help of two facilitators, the committee reached consensus on 95 percent of the disputed issues. The consensus agreements were then incorporated into the new regulations governing driving in the park.



Building upon this experience, the National Park Service is undertaking two more reg-negs in the Golden Gate National Recreation Area in San Francisco, and at the Cape Hatteras National Seashore in South Carolina. At Cape Hatteras, the issue is the regulation of off-road vehicle use. Visitors to the Seashore have long enjoyed the ability to drive off-road. However, recent studies indicate that the current level of usage might endanger wildlife and the resources of the Seashore. To resolve these competing interests, the National Park Service has engaged the U.S. Institute for Environmental Conflict Resolution to conduct a situation assessment to determine if a reg-neg is appropriate for Cape Hatteras. A similar process is underway at Golden Gate pertaining to the regulation of dog walking in the park.

INTEGRATING TECHNOLOGY INTO DISPUTE RESOLUTION

Using On-line Dispute Resolution (ODR)

Washington, DC-based Agency ABC, has oversight responsibility for removal and clean-up of underground storage tanks in Texas. Prior to litigating, the parties involved agree to mediate.



After extensive research and negotiations, the parties agree that Ms. Gupta has the most directly relevant experience and is the most appropriate neutral for this particular mediation. However, she lives in Arizona and Agency ABC does not have funds to pay her travel and per diem expenses. Moreover, the parties need to start the mediation process immediately and not take the time to find another mediator. What, if anything, can the parties do?

One possibility is using online video-conferencing technology that enables parties from different locations to meet without requiring travel. Web-based video conferencing software has no special software to install or new programs to learn. Only an inexpensive camera is needed. Online video-conferencing allows participants to:

- Meet via the internet from their desk, without traveling,
- Enhance meetings with immediate outcomes,
- Develop or edit documents interactively,
- Share applications such as Microsoft Word or Power Point (anything on your PC),
- Include participants who can not be physically present (via video with inexpensive cameras),
- Follow-up face-to-face meetings with Internet meetings, and
- Draft orders, settlement agreements

Another possibility is to use web-based facilitation software that allows parties to brainstorm and rate and rank ideas in the mediation or facilitation process. This can be done anonymously, which often leads to more creative ideas and options for problem-solving.

The Development of ODR Technology

The National Mediation Board has partnered with the University of Massachusetts at Amherst (UMass) to design, develop and pilot new ODR technology. This work is currently being done under a grant to UMass from The National Science Foundation.

The tools they are developing are not meant to necessarily replace face-to-face meetings, but are intended to enhance them. Integrating technology in the ADR process can help parties improve productivity, increase creative optioning, decrease decision-making time, and decrease travel time and expenses. These tools are particularly useful if:

- Your agency has offices in different locations
- You have limited funds for travel
- You need to meet when travel is not possible, and
- The preferred mediator is at a different location.

In 2006, UMass and NMB will make available a complete package of technological tools to federal agencies. On a limited basis, the NMB will assist other federal agencies, free of charge, in the application of these tools to a mediation or facilitation setting.

Application of ODR Tools to Civil Enforcement Mediation

These tools can be very effective in resolving disputes in the civil enforcement community. For example, in the situation above, the parties were able to hire Ms. Gupta by agreeing to use online dispute resolution technology. To prepare for the meeting, the mediator first used video conferencing technology to meet separately with the parties face-to-face.

In the first joint session, the mediator used video conferencing technology to discuss process and ground rules face-to-face, and then used brainstorm software to generate ideas to be discussed, and to rank the ideas in importance. During this and other sessions, when the parties needed to share existing or create new documents, the parties used the document sharing function of the video conferencing software. Once the parties began to reach agreement on some of the issues, the mediator used document sharing again to allow the parties to draft the agreement. The parties accomplished this at their own computers, with no new software.



ODR technology can be used in a variety of ways and can help the civil enforcement community to maximize resources in mediation. ODR tools can also be used to create a process that includes meetings online as well as face-to-face.

If you would like a demo of the current ODR software the NMB uses, please send an email to Rachel Barbour at barbour@nmb.gov.

USEFUL NEW HANDBOOK

“**Finding Neutrals**”, the new handbook issued by the Acquiring Neutrals Subcommittee of the Interagency ADR Steering Committee, can be found at <http://www.adr.gov/pdf/find-neutrals2005.pdf> . The guide provides basic information on

- the types of neutrals available to federal agencies,
- the various settings in which government employee neutrals operate,
- the benefits and disadvantages of retaining each type of neutral,
- the primary vehicles for procuring private neutrals, and
- related issues in federal procurement law.

Enforcement and regulatory agencies interested in retaining neutrals can select from a variety of sources both inside and outside of the federal government. This guide helps agencies weigh the costs and benefits of choosing between federal employee neutrals (from a variety of sources) and private neutrals. It also identifies agencies providing neutrals at a reduced or no-cost rate to other federal agencies.



Overall, the authors hope to encourage agencies to customize their search for a neutral. Given the wide variety of governmental ADR programs and the equally varied sources of neutrals, agencies can now easily consider and weigh all the relevant factors before selecting their neutral. An ADR process is likely to be much more effective when facilitated by a talented neutral who meets the requirements dictated by the agency culture and the specific dispute.

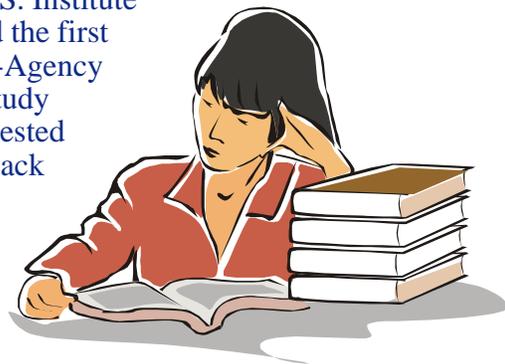
MULTI-AGENCY ENVIRONMENTAL CONFLICT RESOLUTION EVALUATION STUDY

- *How valuable is environmental collaborative problem solving and conflict resolution (ECR)?*
- *How effective is it in creating durable agreements that produce measurable improvements?*
- *How cost-effective is it compared to other approaches to solving environmental problems and making decisions?*
- *Do ECR participants gain trust for each other and improve their working relationships?*

These are fundamental questions for the ECR field as a whole. They are also questions that need to be addressed by federal ECR programs as they begin to evaluate their performance.

The U.S. Institute for Environmental Conflict Resolution has been working for over five years with other federal and state dispute resolution programs to develop a systematic approach for evaluating program performance. Our efforts resulted in substantial agreement on an evaluation model, which specifies expected conditions and outcomes of ECR processes, and on survey questions for process neutrals and participants.

Partnering with six federal and state agencies and with the support of the Hewlett Foundation, the U.S. Institute recently completed the first round of the Multi-Agency ECR Evaluation Study (MAES). We requested and received feedback from program managers, practitioners, trainers and researchers who reviewed the preliminary MAES results. The U.S. Institute used these recommendations to revise the conceptual evaluation model and improve the data collection instruments for an expanded MAES effort.



With continuing Hewlett support, the U.S. Institute has just begun a two-year follow-on study – MAES II. Our goal is to work collaboratively with an expanded network of case contributors to assemble a dataset of at least 75 cases. We will administer questionnaires to neutrals and participants at the end of each process, and to participants several months later. The findings promise to give us solid performance benchmarks for the field of ECR, and to enhance our understanding of these processes so that performance can be improved.

The U.S. Institute is currently recruiting federal and state agency partners. If you are participating in an ECR case, we would appreciate if you could provide information so we can track the case as a candidate for the Study. For more information on the types and timing of cases needed, and to review the preliminary results of round one of MAES, go to the Institute’s website (http://ecr.gov/multiagency/hewlett_summ.htm) or contact the Study Manager, Dale Keyes (520-670-5653; maes2@ecr.gov).

ASK CERS AND ANSWERS

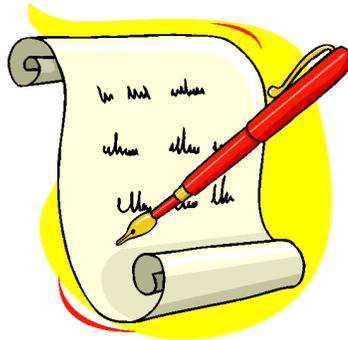
Dear CERS,

I am preparing for an upcoming mediation and the other party has requested that we enter a confidentiality agreement. Should I do it?

Inquiring Advocate

Dear Inquiring Advocate,

Yes! Ensuring the confidentiality of discussions during a mediated settlement negotiation is not only a key component of mediation success, it is a requirement of federal administrative law. The ADR Act of 1996 requires that parties and the mediator protect the confidentiality of both written and oral communications made during mediation. A routinely used method to ensure that everyone is aware of these requirements is for the parties and neutral to enter a written agreement that specifies their expectations of confidentiality. In addition, since the ADR Act provides limited protection for party-to-party communications, a well considered confidentiality agreement may provide additional protection from disclosure by a party of sensitive information discussed during mediation. A confidentiality agreement may also be used to ensure the broad confidentiality required for communications by or to the mediator. As a best practice, it is always a good idea to enter a well reasoned confidentiality agreement including agreements that:



- Parties will adhere to the confidentiality provisions in the ADR Act;
- Communications made by the parties in joint session, or those that are otherwise available to all parties, may not be disclosed by a party (*Note*, this provision has not been tested in the courts, and some ADR practitioners question its enforceability);
- The parties' communications are also protected by other applicable authorities that restrict disclosures, including the Federal Rules of Evidence or the Administrative Procedure Act;
- The parties will not subpoena the neutral(s) regarding matters relating to the dispute resolution proceeding;
- There will be no verbatim recording of the dispute resolution proceedings; and
- Aspects of agency policy – including requirements to disclose certain information learned during a dispute resolution proceeding – are not superseded by the ADR Act confidentiality provisions in the particular ADR process.



For mediations in federal court proceedings, the ADR Act does not specifically apply, so you should check on the local court rules to determine confidentiality requirements.

Sincerely,
CERS

If you have any comments about this newsletter, would like to submit an article, or have any questions for “ASK CERS AND ANSWERS”, please email Leah Meltzer at meltzerd@sec.gov or Robert Manley at robert.manley@navy.mil. The editors would like to thank the following people for their contributions to this issue: Rachel Barbour, David Batson, David Emerson, Dale Keyes, Rick Miles and Sarah Rudgers.