

REPORT FOR THE PRESIDENT

ON

THE USE AND RESULTS OF ALTERNATIVE  
DISPUTE RESOLUTION IN THE EXECUTIVE  
BRANCH OF THE FEDERAL GOVERNMENT

*Giving the American People  
Better Results and More Value*

April 2007

A Collaborative Project of Representatives From:  
-Federal Interagency Alternative Dispute Resolution Working Group Sections  
-Federal Interagency Alternative Dispute Resolution Working Group Steering Committee  
-Agencies in the Executive Branch of the Federal Government

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- Report written by: Linda A. Cinciotta, Senior Counsel for Alternative Dispute Resolution and Director, Office of Dispute Resolution, U.S. Department of Justice; Joanna Jacobs, Deputy Director, Office of Dispute Resolution, U.S. Department of Justice; and Deirdre McCarthy Gallagher, Attorney Advisor, Dispute Resolution Service, Federal Energy Regulatory Commission
- Overall leadership and guidance: Linda A. Cinciotta, Office of Dispute Resolution, U.S. Department of Justice; Cindy Mazur, Alternative Dispute Resolution Director, Federal Emergency Management Agency, Department of Homeland Security, and Chair of the Interagency Alternative Dispute Resolution Working Group's Workplace Section; Richard L. Miles, Director, Dispute Resolution Service and the Office of Administrative Litigation, Federal Energy Regulatory Commission, and Chair of the Interagency Alternative Dispute Resolution Working Group's Civil Enforcement and Regulatory Section; Anthony N. Palladino, Associate Chief Counsel and Director, Office of Dispute Resolution for Acquisition, Federal Aviation Administration, Department of Transportation, and outgoing Chair of the Interagency Alternative Dispute Resolution Working Group's Contracts and Procurement Section; and Hon. Richard C. Walters, Administrative Judge, United States Civilian Board of Contract Appeals, and incoming Chair of the Interagency Alternative Dispute Resolution Working Group's Contracts and Procurement Section
- Portions of the report dealing with civil enforcement and regulatory matters: Richard L. Miles, Federal Energy Regulatory Commission; Kirk Emerson, Director, U.S. Institute for Environmental Conflict Resolution of the Morris K. Udall Foundation; David Emmerson, Senior Program Coordinator, Office of Collaborative Action and Dispute Resolution, Department of the Interior; Jennifer Gatlan, Attorney Advisor, Federal Maritime Commission; Thomas Louthan (currently on detail as a Legislative Fellow, Senate Finance Committee), Internal Revenue Service, Department of the Treasury; Robert C. Manley, Associate Counsel (ADR), Office of the General Counsel, Department of the Navy, Department of Defense; and Ronald Murphy, Director of the Office of Consumer Affairs and Dispute Resolution Services, Federal Maritime Commission
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- Editorial assistance: Pamela Pontillo, Manager, Headquarters Mediation Program, Office of Dispute Resolution, Department of Energy
- Administrative assistance: Sylvia Covington, ADR Office Manager, Federal Emergency Management Agency, Department of Homeland Security; Currie Gunn, Confidential Assistant to the Associate Attorney General; Aloma Shaw, Staff Assistant, Office of the Associate Attorney General, Department of Justice; Krista van der Horst, Dispute Resolution Support Specialist, Office of Dispute Resolution, Department of Justice

# EXECUTIVE SUMMARY

## I. Introduction

Alternative dispute resolution (“ADR”) is an umbrella term for processes that provide an alternative to traditional litigation. ADR processes give the parties an opportunity to play a more active role in crafting a resolution to their dispute. Appendix A describes the various types of ADR processes, the best known of which is mediation. The types of ADR processes used by the agencies in the Executive Branch of the federal government are charted in Appendix B.

In 1998, a Presidential Memorandum directed the Attorney General to coordinate interagency efforts to promote and facilitate the use of ADR in the Executive Branch and to report periodically on that work. The Attorney General submitted an initial report in 2000 when federal ADR was in its infancy. The Report which we now submit:

- describes the growth in the breadth, scope and depth of federal ADR since the 2000 Report was submitted;
- documents the results and benefits of federal ADR, including substantial cost savings, increased workforce productivity and accountability, timely achievement of agency goals, and delivery of reliable and efficient service; and
- discusses the future of federal ADR, including the challenges it faces and opportunities to develop its full potential.

### A. A Brief History of Federal Alternative Dispute Resolution

The first uses of ADR processes began experimentally in the 1970s as a potential remedy for disabling court backlogs, and as resolution techniques for environmental and natural resource disputes. In 1985, the Attorney General issued an order recognizing the need for ADR to reduce the time and expense of civil litigation. A few years later the Department of Justice again recognized the benefits of ADR in the Congressional testimony of its Assistant Attorney General, Office of Legal Counsel, who supported the first ADR legislation enacted by Congress in 1990.

In the 1990s, Congress passed three statutes (the Administrative Dispute Resolution Acts of 1990 and 1996, and the Alternative Dispute Resolution Act of 1998) which, collectively, required each agency to adopt a policy encouraging use of ADR in a broad range of decision making, and required the federal trial courts to make ADR programs available to litigants.

In 1996, the President issued Executive Order 12988 on Civil Justice Reform, directing federal litigation counsel to consult with the referring agency and suggest ADR where benefits might be derived from its use. On May 1, 1998, the President issued a Memorandum directing the Attorney General to lead an Interagency Alternative Dispute Resolution Working Group (“Working Group”) to promote and facilitate federal ADR.

The Working Group established four Sections to represent the major substantive areas of ADR application in civil enforcement, claims against the government, contracts and procurement, and workplace conflict. A Working Group Steering Committee was established to represent nearly 60 federal agencies. The past and current leadership of the Working Group Sections and Steering Committee is given in Appendix C, and the current membership of the Steering Committee is given in Appendix D.

The Attorney General's first report to the President, submitted in May 2000, described the first full year of interagency efforts. (The 2000 Report is reprinted in the Addendum to this Report.) Since that time, the use of ADR has become well-accepted and part of standard practice throughout the Executive Branch. This Report describes hundreds of ADR programs representing the gamut of federal executive responsibilities, from defense to education, from energy regulation to veterans' affairs. It shows how ADR has expanded to cover use in a broad range of contexts, including policy development, adjudications, rulemaking, administrative and civil judicial enforcement actions, permit issuance, and public involvement.

#### B. Overview of the Interagency Working Group Sections and Working Group Steering Committee

Since 1998, the work of the four Interagency Working Group Sections and Working Group Steering Committee has reflected the expansion of ADR programs and applications throughout the Executive Branch, and has promoted that growth.

The Working Group's Civil Enforcement and Regulatory Section was formed initially to educate and assist member agencies in using ADR as an alternative to traditional litigation and settlement methods in civil enforcement cases. The Section's coverage subsequently was expanded to include regulatory conflicts -- in such areas as environmental, business, and transactional disputes -- in recognition of the potential of ADR to make business and resource planning more cost-efficient and productive. The Section publishes a periodic Newsletter for agencies and the public to provide information on the application of ADR to enforcement and regulatory missions.

The Working Group's Claims Against the Government Section focuses on the achievement of proper balance between litigating a case where necessary and appropriate, and otherwise resolving cases through some form of ADR where practicable and in the best interests of the client. ADR is being used to resolve a wide range of civil actions brought against the United States, such as aviation and admiralty cases, medical malpractice cases, and class action workplace discrimination cases.

The Working Group's Contracts and Procurement Section addresses the need for a viable alternative to traditional litigation processes for resolving the contractual and procurement disputes of agencies and private sector companies. The Section sponsors an ongoing series of free educational programs, open to all government and private sector public contracts professionals, on a variety of ADR topics such as the legal and ethical

issues of confidentiality in public procurement ADR, and the development of guidance for federal agencies' use of binding arbitration.

The Working Group's Workplace Section assists federal agencies with workplace ADR programs covering all types of employment-related disputes. The Section sponsors a monthly Lecture Series to provide current, useful, and thought-provoking information about workplace ADR which can be implemented and utilized by ADR specialists at their respective agencies.

The Working Group Steering Committee has recently published four new guides which serve as advisory best practices in federal ADR. The guides cover: application of statutory provisions governing confidentiality in mediation of federal workplace disputes; practical ethical guidance for federal employee mediators; factors for ensuring the independence and impartiality of a federal ombuds office; and finding appropriate neutrals for agency workplace disputes. The Steering Committee meets monthly to share knowledge and experience on the facilitation of ADR in the Executive Branch.

### C. Survey of Federal Alternative Dispute Resolution Programs

The Working Group Steering Committee in mid-2005 began surveying every agency in the Executive Branch about their ADR operations. Responsive data was submitted by over 100 agencies and agency components, which are listed in Appendix E. The data have been used to prepare this Report, and the information is also helpful in identifying areas where the Working Group Sections and Steering Committee may be able to provide assistance in maximizing the success of agencies in using ADR.

## II. Alternative Dispute Resolution Programs: Enhancing Agency Missions

The ADR programs and policies of the 15 Cabinet agencies and 31 independent agencies are summarized, and the nexus between programs and the agency missions is shown, in this section of the Report. The Report demonstrates that, increasingly, agencies such as the Federal Energy Regulatory Commission are expanding their ADR options to provide a menu of resolution choices that are better able to enhance the missions of government and agencies, and serve the needs of citizens.

At both Cabinet and independent agencies, ADR processes are being used to meet agency – and government – goals of security, safety, and responsiveness, to name just a few. The agencies are using a spectrum of dispute resolution tools which are flexibly applied to meet the wide range of their needs. Here are a few examples of the types of success stories that are seen in Cabinet agencies:

- The Department of Commerce/National Oceanic and Atmospheric Administration used consensus building and public participation throughout the development of the natural resource damage assessment regulations promulgated pursuant to the Oil Pollution Act of 1990.

- The Department of Education/Office of Federal Student Aid Ombudsman works with federal student aid recipient loan holders, guarantee agencies, and schools to prevent loan foreclosures.
- The Department of Health and Human Services/Departmental Appeals Board uses ADR to provide less contentious and quicker resolution of disputes involving Medicare and Medicaid program exclusions, imposition of civil sanctions against health care providers and nursing homes, and disputes with grantees (including States and universities) concerning disallowances of funds.
- The Department of Homeland Security/Federal Emergency Management Agency provided arbitration for more than 130 Los Alamos fire claim victims who wanted an alternative to court proceedings.
- The Department of Justice/Civil Rights Division's Americans With Disabilities Act Mediation Program uses ADR to resolve, quickly and voluntarily, discrimination complaints about architectural, communication, and attitudinal barriers for people with disabilities throughout the country.
- The Department of Transportation/Federal Aviation Administration has integrated a Neutral Evaluation program into the negotiated grievance process for all labor disputes between the Air Traffic Controllers Association and the Federal Aviation Administration. The program promotes collaboration and resolution early in the process by presenting disputes to an independent neutral, with expertise in the particular subject matter at issue, to provide a non-binding advisory decision.
- The Department of the Treasury/Office of the Comptroller of the Currency's Office of the Ombudsman, through the Customer Assistance Group, addresses disputes between consumers and national banks or their subsidiaries, and provides a user-friendly Web site of resources, answers, and formal complaint forms for consumers.

The independent agencies shared a similarly impressive track record of success stories, some of which are these illustrative examples:

- The Consumer Product Safety Commission utilized mediation to resolve a major dispute involving a risk to the public of carbon monoxide poisoning.
- The Environmental Protection Agency/Office of Administrative Law Judges uses a mediation program to facilitate settlement of administrative civil penalty enforcement cases under a set of federal environmental laws. The agency's Office of the Small Business Ombudsman resolves disputes with the small business community in the development and enforcement of environmental regulations.
- The Federal Energy Regulatory Commission provides a menu of ADR options such as facilitation of collaborative pre-license processes, mediation, settlement judges, and the use of early neutral evaluation.
- The Federal Maritime Commission facilitates the flow of U.S. ocean commerce by using ADR to quickly resolve disputes involving ocean shipping transactions, violations of shipping statutes, and freight charges.

- The Nuclear Regulatory Commission employed collaborative, facilitated ADR processes to involve the public in decision making about revision of agency rules and guidance on emergency planning in the wake of 9/11.

The Report also shows that ADR is being routinely employed – with great success – to resolve workplace conflict and result in higher morale and greater productivity in the federal workforce.

### III. Advantages of Alternative Dispute Resolution

ADR has been instrumental in promoting a citizen-centered government, managing the costs of government, and supporting the strategic management of government resources.

#### A. Promoting a Citizen-Centered Government

A citizen-centered government is one that is:

- accessible to the citizens it serves;
- responsive to the needs of the citizens it serves; and
- inclusive of the interests impacted by government initiatives.

The inherent design of ADR promotes a citizen-centered government because ADR processes facilitate early and direct communication and interaction among disputants.

Federal agencies are capitalizing on technology to enhance the contributions of ADR to citizen-centered government. The National Mediation Board is a forerunner in the use of on-line dispute resolution tools, such as document-sharing software, to bring parties together electronically in their efforts to forge agreement. The Federal Energy Regulatory Commission operates an Enforcement Hotline which gives citizens access to an early neutral evaluation for a range of disputes before complaints are formally filed with the agency. The Department of Justice Civil Rights Division has a comprehensive, interactive, and user-friendly Web site for persons with disabilities and business owners who have questions about their rights and obligations under the Americans with Disabilities Act. The Department of Defense/Department of the Air Force utilizes the Internet as a primary means of dispensing ADR information.

Numerous agencies, such as the United States Agency for International Development, are employing ombuds to provide employees and citizens an opportunity to speak directly with an agency representative about issues of concerns. The ombuds provides timely feedback to the potential disputant and, as importantly, ongoing feedback to the respective agency regarding the impact and effectiveness of its programs.

Countless agencies also are encouraging the use of consensus-building processes to let citizens participate in agency decision making. The Nuclear Regulatory Commission, for example, has convened collaborative processes for developing guidelines regarding the recycling of radioactive materials. The Department of Energy Office of Legacy

Management has developed a Public Participation process to target populations – small towns, rural areas, minority and low-income communities – that are limited in their ability to participate in environmental decisions because they lack access to information, technology, expertise, and decision-makers. Such processes serve to identify and dismantle roadblocks to agency initiatives and foster collaborative relationships between agencies and their respective stakeholders, something that can have a long-lasting impact on agency decision making and approval processes.

## B. Managing Costs

ADR contributes to the effective conservation of limited federal resources in several interrelated ways:

- controlling the costs of conflict;
- producing quicker and more durable results; and
- preserving resources for the mission of the agency.

*Controlling the costs of conflict.* Use of ADR controls the financial impact of conflicts by saving on the skyrocketing costs associated with litigation. Many agencies have documented significant costs savings in legal expenses, expert witnesses and travel costs. ADR also saves the cost of productive labor that otherwise would be dedicated to, or lost as a result of, the conflict.

*Producing quicker and more durable results.* Litigation is extremely time-consuming and results in a winner and a loser. In contrast, because ADR is inherently flexible, it gives the parties a unique opportunity to craft the process and solution which are tailored to their own needs. They can decide when to meet and they can decide on the terms of a mutually-beneficial outcome that best serves their respective interests. The resolution they reach is likely to last much longer than a hierarchical decision imposed by an outside forum.

*Preserving resources for the mission of the agency.* The use of ADR preserves resources for agencies. Rather than funneling resources to manage ongoing disputes, agencies employing ADR are able to apply resources to achieving the mission of the agency.

## C. Managing Strategically

ADR contributes to the strategic management of government resources, both monetary and human, by:

- maximizing resources;
- promoting innovation; and
- fostering continuous improvement and expansion.

*Maximizing resources.* Use of ADR maximizes resources. The issues at stake in some cases demand litigation or a more formal administrative process. Maximizing agency

resources requires the assessment and identification of those cases which are appropriate for ADR and those which require a more formal disposition. As the Federal Election Commission reported, early disposition of cases to ADR liberates resources for those cases that necessitate a more formal process.

*Promoting innovation.* Use of ADR promotes innovation by giving the parties a chance to craft a resolution that captures their needs and interests in a way that may not be possible through a more formal process. As the Federal Maritime Commission explains, ADR processes provide flexibility to the parties involved in shipping transaction disputes so they can draft innovative solutions that reflect their own needs as well as the state of the market.

*Fostering continuous improvement and expansion.* Use of ADR promotes continuous improvement and expansion by encouraging agencies to identify opportunities for more and better ADR successes. The growth of ADR programs throughout the federal government, in a wide range of areas, reflects the need for this improvement and expansion as agencies strive to develop programs that better serve party needs.

#### IV. Areas of Alternative Dispute Resolution Programs and Use

This section of the Report discusses the specific contributions of ADR to good government, as viewed through the lens of the four major substantive areas of federal ADR applications: civil enforcement and regulatory; claims against the government; contracts and procurement; and workplace.

##### A. Civil Enforcement and Regulatory

*Promoting a Citizen-Centered Government.* In civil enforcement and regulatory disputes, unassisted negotiations and litigation have focused traditionally on which party has the stronger position. Today, many agencies fulfill their statutory mandates with the use of ADR, which is used as a supplemental tool to avoid protracted litigation when unassisted negotiations fail. The public interest is often better served when citizens, non-governmental organizations, corporations, state and federal agencies, tribal nations, and other entities participate directly in an ADR process that includes them in the development of a result that meets the interests of all concerned. Stakeholders who work toward a shared, positive outcome often achieve better results than they would have received in court and can create long-term productive working relationships.

A few examples show how ADR is supportive of citizen-centered government by promoting accessibility, responsiveness, and inclusiveness:

- The Environmental Protection Agency Brownfields Mine-Scarred Lands Initiative is a multi-level effort to engage a broad range of federal partners and local community members in addressing mine-scarred lands across the country.

- The Department of Energy Office of Environmental Management is using ADR to involve stakeholders early and often in decision making regarding the nuclear weapons complex cleanup program.
- The Small Business Administration National Ombudsman acts as a “trouble shooter” between small businesses and federal agencies on problems perceived as unfair and excessive regulatory enforcement.
- The Department of the Interior Office of Environmental Policy and Compliance is advancing greater use of consensus-based decision making in the implementation of the National Environmental Policy Act to engage local communities throughout the analysis process including developing the preferred alternative.

*Managing Costs.* ADR programs enable better control over resources expended, as well as better outcomes, as these examples reflect:

- The Department of Homeland Security/Federal Emergency Management Agency notes that for every lawsuit avoided, the agency can save thousands of dollars, thus leaving it better able to manage its resources.
- The Federal Energy Regulatory Commission reports faster processing and savings in hydroelectric proceedings where settlement agreements are reached during the pre-filing period.
- The Securities and Exchange Commission, while unable to agree to settlements during the mediation session (because of the need for review and authorization by the Commissioners), emphasizes the benefits that can flow from the process of mediation. For example, the Commission reports that mediation routinely helps to streamline discovery and focus the parties on key issues so that they are able to reach settlement shortly after the mediation concludes.

*Managing Strategically.* Agencies are building internal capacity to maximize the benefits of ADR, as shown by these practices:

- The Department of the Treasury/Internal Revenue Service Appeals office has an incentive-based training program which enhances the competitiveness of Appeals Officers trained for collateral duty mediation, and 400 of them have been trained as mediators.
- The U.S. Institute for Environmental Conflict Resolution has a national roster of pre-qualified neutrals, searchable on-line, that is used by federal agencies to locate environmental conflict resolution practitioners.

## B. Claims Against the Government

Cases involving claims against the government are cases in which the United States is a defendant in a civil action. Since the federal district courts are required to offer some form of ADR, its use is fairly common in many of the cases. Additionally, many agencies make an initial determination as to whether to settle a civilian claim before a

lawsuit is actually filed. Agencies use mediation to some degree at these initial stages; however, without the rights to discovery which accrue with the formal filing of the lawsuit, the parties may not yet have enough factual information to support a knowledgeable settlement at this stage.

The goal of ADR in these cases is consistent: offering expedient alternatives to citizens while at the same time pursuing the best interests of the government. As a Department of Justice attorney said in describing the obligations of representing the United States: “Our mission is to zealously represent the United States in suits brought against it or in suits brought on its behalf...However, we also owe a responsibility to our citizens to act fairly to those litigating with the United States.” ADR can further both the mission and the responsibility of the government, while yielding these benefits:

- savings in costs associated with trials, such as fees and travel expenses for experts and other witnesses;
- savings in time of attorneys, staff and parties who are federal employees;
- quicker resolutions than a trial would offer and therefore fewer days that the parties have spent under the cloud of a pending lawsuit;
- creative resolutions acceptable to the parties, but which a court could not impose;
- lower monetary judgments than a jury or judge might impose; and
- a durable and voluntary agreement without any appeals.

The use of ADR in appropriate claims against the government also allows the agencies more control over agency resources. Savings in money, time, and labor resources are significant when discovery and litigation costs are reduced or eliminated through the use of ADR to settle claims, but the impact can be realized even when the claim is not resolved through ADR. As the Department of Justice/Civil Division reports, even when a case does not settle, the use of ADR often results in a narrowing of contested issues and the scope of discovery.

Finally, the use of ADR in appropriate claims against the government enables agencies to maximize the limited government resources that are available to defend a case. As the Department of Justice pointed out: “By resolving cases that can be resolved through ADR, attorneys are able to focus their resources and work efforts on the cases that need to be fully litigated...and on the core missions of their agency rather than on time-consuming litigation.”

### C. Contracts and Procurement

The application of ADR to contracts and procurement disputes has increased in recent years, as more agencies – and more contracting companies – realize the value of ADR in achieving prompt and fair resolution of contract and procurement-related disputes.

*Promoting a Citizen-Centered Government.* Agencies across the board are utilizing technology to promote ADR, and as these examples show, that approach is allowing

individuals and private sector entities to do business with a government that is accessible, responsive, and inclusive:

- The Department of Defense (the Department of the Air Force, the Department of the Navy, and the Defense Logistics Agency) has developed user-friendly Web sites that provide information on ADR processes, sample forms, and training in how to engage in interest-based collaborative problem solving.
- The Department of Transportation/Federal Aviation Administration has developed a similar citizen-centered Web site.

*Managing Costs.* The use of ADR in contracts and procurement disputes has resulted in savings of both time and money:

- The Department of Defense/Department of the Air Force reports that its “ADR First” policy in contract disputes has enabled it to avoid an average of \$57.6 million in liability in each of the most recent five years (FY 2002 through FY 2006).
- The Department of Transportation/Federal Aviation Administration reports that the use of ADR has resulted in shorter resolution timeframes for the agency: bid protests are resolved through ADR in an average of 24 calendar days, while contract disputes have been resolved by ADR in an average of 67 calendar days.

Perhaps most importantly, agencies report that resolutions reached through ADR are more durable because they reflect the needs and concerns of the parties at the table, including the government. The Department of Veterans Affairs says that as the result of its ADR program, decisions are made with “greater certainty in achieving the Department’s mission.”

*Managing Strategically.* Use of ADR is enhancing the effective allocation of resources while promoting innovation in both process and outcome:

- The Department of Defense/National Guard is maximizing its resources by providing contracting officers and other Guard personnel with Claims Avoidance workshops which have contributed to a reduction in problems and disputes arising from the implementation of contracts.
- The Department of Agriculture maximizes resources through ADR process efficiencies such as using internal neutrals, consolidating travel assignments, and using telephonic and video-conferencing in place of travel where possible.
- The Department of Transportation/Federal Aviation Administration provides ADR to parties *before* they file formal bid protests which enables them to resolve concerns before the dispute escalates, and reports that of 79 “pre-dispute” cases where ADR was employed only three proceeded to formal litigation.

In 2002, upon the recommendation and with the support of the Interagency ADR Working Group Contracts and Procurement Section, the Office of Management and Budget's Office of Federal Procurement Policy established an annual Federal Procurement ADR Awards Program for agencies and their private sector business partners who effectively employ ADR to avoid and resolve procurement-related disputes. The public sector award winners to date have included the Department of Defense (Department of the Air Force, the Armed Services Board of Contract Appeals, the Army Corps of Engineers, the Defense Logistics Agency, and the Department of the Navy), the Department of Transportation/Federal Aviation Administration, and the General Services Administration Board of Contract Appeals.

#### D. Workplace

Across the federal government, agencies have found that the availability of workplace ADR increases the ability of employees and managers to resolve internal disputes quickly and effectively, at the earliest possible time, and at the lowest possible level. This is especially important in the workplace, where festering disputes may distract an employee or manager from fulfilling essential work responsibilities. Use of ADR is cost-effective, saving money and time because resources are not spent on long investigations and protracted litigation, but rather on resolving disputes more quickly outside of the courtroom. In addition, agencies have found that involvement in the ADR process often forces supervisors to deal directly with the outcome of their, or their subordinate's, actions. This results in important lessons being learned that have long-term positive effects on the organization's efficiency. Additionally, direct supervisor interaction with employees often opens avenues of communication that had been closed, resulting in better working relationships and improved productivity.

*Background History of Workplace ADR.* Early and pioneering workplace ADR programs at the Equal Employment Opportunity Commission and the U.S. Postal Service launched a number of lessons learned that still serve as linchpins for managing workplace conflict:

- On the whole, many managers felt less threatened when they participated in a "problem solving" mediation to resolve a work-related dispute, rather than being put on the defensive in response to allegations of illegal discriminatory conduct.
- The earlier the mediation occurs, the better the chances are that the parties will reach a voluntary settlement, and that the collateral negative impact of the dispute on co-workers and the organization as a whole will be minimized.
- Mediation should be made available at many different stages of a dispute so that it is at all times a viable alternative to continuing with the formal dispute process.
- Voluntary agreements reached through mediation provide a more enduring solution to the issues underlying the dispute than any outside adjudication could do.

*ADR Programs Are Successful in Resolving Workplace Disputes.* Agencies report ADR settlement rates all above 50% and some reaching 75% and above, with significant cost savings. By comparison, the Equal Employment Opportunity Commission reported the national settlement rate of EEO cases through ADR was 49%.

*ADR Programs are Cost-Effective.* ADR programs conserve human capital by creating loyalty and longevity in the agency's work environment, and increase productivity.

*ADR Saves Agency Funds.* Federal agencies report considerable savings of monetary resources through workplace ADR programs:

- The Social Security Administration calculated that the average costs of processing an EEO complaint through a traditional process was approximately \$40,000, while the costs of mediating an EEO complaint ran from \$50 (if a shared neutral is used) to \$1500 (if an outside vendor is used).
- The General Services Administration noted that for every EEO case resolved through mediation, the agency saved \$3500 - \$4500 in investigation fees alone.
- The Department of Justice/Federal Bureau of Investigation calculated that it cost the agency over \$2,600 for each EEO investigation and over \$250,000 for a Final Agency Decision, but only \$1,800 on average for each case resolved through mediation.

*ADR Saves Agency Time.* Agencies report a substantial time savings through the application of ADR to workplace disputes:

- The Department of Defense/Department of the Air Force reports, for example, that workplace disputes resolved through mediation take an average of 27–40 days, as opposed to an average of 390 days for EEO cases which proceed to the administrative phase.
- The Department of Defense/Washington Headquarters Service reported that ADR processes took an average of 39 days, as opposed to EEO formal complaints (federal-wide) which took an average of 469 days in Fiscal Year 2004.
- The Department of Housing and Urban Development reports that processing time is reduced from 802 days in formal EEO cases to 53 days in ADR.

*ADR Programs Are Essential to Strategic Management of the Workplace.* The availability of ADR options gives both internal and external benefits to the agencies by:

- demonstrating an agency's concrete commitment to fostering a positive long-term working environment for all employees;
- improving relationships between federal managers and employees;

- increasing employee productivity;
- reducing costs with interagency sharing of in-house neutrals; and
- increasing efficiency with interagency sharing of expertise.

*Workplace ADR Programs Create Collateral Benefits for the Agency.* The benefits to ADR extend beyond the immediate dispute:

- Effective communication, a key ingredient of ADR, enables management to get key input from the employees working with issues that can potentially pose problems for the agency as a whole.
- Addressing causes of employee dissatisfaction can increase productivity.
- ADR processes identify and address recurring issues that lead to systemic problems, making it more likely that similar disputes can be avoided in the future.

*E-Government Makes Workplace ADR Accessible to All.* Workplace dispute resolution programs are utilizing electronic tools to multiply the use and application of ADR through:

- information dissemination to educate agency employees and increase the use of ADR services;
- use of electronic tools for training in ADR techniques and use of the ADR process itself; and
- use of ADR processes to elicit staff input in converting to e-government.

## V. The Future of Alternative Dispute Resolution

### A. Capitalizing on the Potential of ADR

Alternative dispute resolution has become well-accepted in federal agencies as an effective and efficient method for resolving disputes and has been readily adopted as part of a sound business model. All of the agencies responding to the survey convey the fundamental belief that conflict is reduced wherever and whenever communication is improved and acknowledge the positive impact of ADR on both reducing conflict and enhancing communication.

However, the agencies in the Executive Branch are still a long way from employing ADR to its full potential. Alternative dispute resolution is still being used to “fix problems” as they occur, and needs to grow into a system of pro-active conflict management. The key to reducing conflict is early intervention and anticipatory dispute resolution which prevent the escalation of disagreement. A number of agencies have developed programs to focus on early intervention, including: the Federal Aviation Administration Early Dispute Resolution Center; the Federal Energy Regulatory Commission Dispute Resolution Service and Enforcement Hotline; the Department of the Interior CORE PLUS Program for managing any workplace conflict; the Department of Justice Mediation Program for disability rights; the Department of Transportation Center for

Alternative Dispute Resolution; and the U.S. Institute for Environmental Conflict Resolution work with the other federal agencies on engaging stakeholders early in the process of resource planning or environmental review.

All agencies can learn from these trailblazers to recognize the positive power of conflict. Successful conflict resolution programs value the diversity of viewpoints, and are based on a belief that more creative and responsive resolutions can emerge when more minds tackle a problem. Conflict is thus transformed from a negative interaction into a cooperative activity which can infuse value, flexibility, and adaptability into business decisions.

## B. Challenges and Opportunities

The Report offers a roadmap of challenges and opportunities that could assist in fulfilling the promise of ADR in the coming years:

*Leadership.* Expressions of leadership commitment would be valuable in maximizing the beneficial impact and results of ADR through the Executive Branch. Possibilities include:

- proclamation by the President of a National Conflict Resolution Day recognizing the societal value of conflict management (Appendix G);
- letter of greetings and commendation from the President to federal employees responsible for alternative dispute resolution (Appendix H);
- establishment of a Federal Council and annual conference for agency Dispute Resolution Specialists; and
- government-wide biennial ADR achievement awards program.

*Performance Management.* The uses and successful outcomes of ADR are more likely to be maximized if the agency performance management structure includes conflict management elements, for example:

- conflict management as a selection and performance appraisal criterion for executive and management positions;
- conflict management as a key element in recruitment, training, and planning; and
- programmatic reviews and evaluations to show measures of improvement and progress in implementing ADR programs.

*External Promotion and Facilitation.* Agencies should educate the entities subject to their jurisdiction about how ADR works and the benefits it can produce, and promote and facilitate their use of ADR in appropriate cases.

*Training.* At a minimum, agencies should provide communication skills training for all new employees, and communications skills and conflict management training for all new

managers and supervisors. Agencies should explore means of saving training expenses by using and sharing federal trainers and training resources.

*Interagency Sharing of Federal Resources.* With leadership and coordination, agencies should consider sharing in many interagency projects, including ADR tracking and evaluation tools.

*Management Support.* Agencies should institutionalize their ADR programs by providing leadership commitment and continuity of staff and funding. Regardless of whether their ADR programs and operations are centralized or decentralized, agencies should ensure that ADR is integrated into the way people do business in all areas of the agency's responsibilities where use of ADR is appropriate.

## VI. Conclusion

Alternative dispute resolution is a tool for appropriate cases, not a panacea for all cases. The interests of the United States often are unique. Federal officials can resolve cases only in ways that will not undermine important legal issues, jurisdictional defenses, or policy interests. In appropriate cases, ADR has become a common sense option for the federal agencies. It is cost-effective, time-efficient, it gives the parties control over the outcome, and it involves stakeholders in decisions that affect them.

# **I. Introduction**

Although it is human nature to avoid conflict where possible, conflict is not all bad. Conflict can be constructive and a catalyst for growth. It also is inevitable, so the real question is how best to manage conflict. In our world, litigation too often has been the primary game plan for dealing with conflict. But the need for an alternative to litigation was evident at least 150 years ago, when Abraham Lincoln said: “Discourage litigation because the nominal winner often is a loser, in both time and money.” It took a long time after President Lincoln’s admonition before a new framework was constructed that recognizes litigation is not, and should not be, inevitable. That framework is alternative dispute resolution (“ADR”).

Less than ten years ago, in May 1998, a Presidential Memorandum directed the Attorney General to coordinate interagency efforts to promote and facilitate the use of ADR in the Executive Branch of the federal government and requested a periodic report on that work. The Attorney General submitted an initial report in 2000 when federal ADR was in its infancy. The Report which we now submit:

- describes the growth in the breadth, scope and depth of federal ADR since the 2000 Report was submitted;
- documents the results and benefits of federal ADR, including substantial cost savings, increased workforce productivity and accountability, timely achievement of agency goals, and delivery of reliable and efficient service; and
- discusses the future of federal ADR, including the challenges it faces and opportunities to develop its full potential.

Successful managers in every federal agency are embracing and institutionalizing alternative dispute resolution – and the results are dramatic. Throughout the federal government, the use of ADR is delivering concrete and measurable results to the American people who rely on the resources of the federal government, including:

- ✓ substantial cost savings;
- ✓ increased workforce productivity;
- ✓ increased workforce accountability;
- ✓ timely achievement of specific agency goals; and
- ✓ delivery of reliable, efficient, and high quality service.

ADR is an umbrella term encompassing a range of processes that provide alternatives to traditional litigation. ADR processes, in general, give parties the opportunity to play a more active role in collaborating to create mutually agreeable decisions or crafting a

resolution to their disputes. Mediation, a commonly used ADR process, highlights the benefits of this opportunity. Through mediation, those individuals who best know the facts, the issues, and the vested interests involved in an issue or dispute are the very people balancing priorities and crafting a resolution that reflects their interests. The result is a durable resolution, created and endorsed by those who will implement it. Oftentimes, the result also includes improved relations between the parties to a dispute, particularly important for parties who have ongoing business relationships.

The range of ADR processes employed throughout the federal government is varied, reflecting the needs of the respective agencies and their constituencies. However, all of the ADR processes give parties a greater opportunity to engage with their government in decisions that directly impact them. Attached in Appendix A is a list of some of the various processes that fall within the ADR umbrella, along with descriptions of the elements of each one. Attached in Appendix B is a description of the types of alternative dispute resolution processes employed by each federal agency.

## A. Brief History of Federal ADR

The use of ADR processes in the federal government is not a new phenomenon. Its genesis was in the 1970s. In the 30-plus years since it took root, ADR has experienced exponential growth. Let us look back at those tentative early efforts, and the catalysts that have led ADR to its current status as part of the business of the federal government.

In the mid-1970's, ADR use was championed as a potential remedy for overwhelming and disabling court backlogs. Countless cases were delayed – many for two years or more for lower court adjudication – leaving litigants languishing, their access to effective justice essentially denied. The initial federal implementation of ADR aimed to address this problem by offering litigants a quicker route to resolution in appropriate cases. The experiment offered great promise and delivered tangible results. The effective use of ADR also demonstrated over time that there are other distinct advantages to using these processes beyond merely shrinking court backlogs. Disputes addressed through ADR often are resolved more quickly, more effectively, and at less cost, both in terms of money and human resources, than disputes addressed through traditional processes, primarily litigation or formal administrative proceedings. Additionally, the voluntary agreements reached with ADR often are better received and, correspondingly, more durable than adjudicated outcomes.

Also in the 1970s, use of ADR began to take hold for resolution of environmental and natural resource disputes. Then, in 1985, the Attorney General issued an order recognizing the need for ADR to reduce the time and expense of civil litigation. A few years later the Department of Justice again recognized the benefits of ADR in the Congressional testimony of its Assistant Attorney General, Office of Legal Counsel, who supported the first ADR legislation subsequently enacted by Congress.

It was the initial positive experience with ADR that led to its further development and expanded use in the courts and throughout the federal government. In 1990, Congress

moved toward institutionalizing federal agency ADR with the passage of the Administrative Dispute Resolution Act, which required each agency to adopt a policy to encourage use of ADR in a broad range of decision making. Initially, the Act included a sunset provision as well as other provisions protective to the government in ADR processes. In 1996, however, the statute was reenacted permanently without the earlier restrictions. Also in 1996, the President issued Executive Order 12988 on Civil Justice Reform, directing federal litigation counsel to consult with the referring agency and suggest ADR where benefits might be derived from its use. Two years later, in 1998, Congress mandated that the federal trial courts develop and implement ADR programs in every district throughout the country. It was slowly becoming clear that dispute resolution no longer was just a narrow response to a particular legal problem, but a widely applicable tool for effective conflict resolution.

In response to the burgeoning use of ADR throughout the federal government, the Interagency Alternative Dispute Resolution Working Group (“Working Group”) was established by Presidential Memorandum on May 1, 1998. The President directed the Attorney General to lead the Working Group’s mission of assisting Executive Branch agencies in exploring ADR as a more effective and efficient way to handle disputes involving the federal government. The Working Group also was tapped to monitor and coordinate ADR use and report periodically to the President on the current state of federal use of ADR. The initial organizing meeting of the Working Group established four Sections, described in detail below, to represent the major substantive areas of ADR application. A Working Group Steering Committee was established to represent nearly 60 federal agencies. The past and current leadership of the Working Group Sections and Steering Committee is given in Appendix C. The current membership of the Working Group Steering Committee is in Appendix D.

The Attorney General submitted a brief initial federal ADR Report to the President on May 8, 2000 (“the 2000 Report,” attached as the Addendum) when federal ADR was still in its infancy. The 2000 Report concluded the important first full year of interagency efforts to promote and facilitate federal ADR. At that time, the largest and most successful use of federal ADR was the U.S. Postal Service’s REDRESS<sup>®</sup> Program, which focused on Equal Employment Opportunity (“EEO”) complaints. The statistics presented in the 2000 Report detailed the obvious advantages of ADR and the agency’s extraordinary accomplishments in that area. The early use of ADR in contracting also had begun to show promise. Today, the use of ADR is well accepted and part of standard practice in those areas. Since the submission of the 2000 Report, there has been a major expansion in the use of ADR in other areas, including enforcement and regulatory, and claims against the government.

The growth in breadth, scope, and depth of the ADR programs developed since 2000 is described at length in this Report. The use of ADR has grown to encompass a broad range of contests, including policy development, adjudications, rulemaking, administrative and civil judicial enforcement actions, permit issuance, and public involvement. This Report seeks to measure and evaluate that exponential growth and provide a harbinger of the potential for ADR to realize the goal of good government --

government that is both results-oriented and responsive to the needs of the American people.

## B. Overview of the Interagency Working Group Sections and Working Group Steering Committee

The 2000 Report focused on the initial challenge of promoting and assisting in the establishment of an ADR program in every federal agency. Since that time, the use of ADR has expanded across and within many federal organizations. For example, agencies which once concentrated their ADR efforts solely on workplace disputes have effectively leveraged their positive experiences to expand ADR to procurement and regulatory disputes. Correspondingly, the goals of the Working Group Sections and Steering Committee have expanded in broadening support for the continued development of ADR programs and application of ADR in a multitude of areas. This Report captures the unprecedented advances of the years following submission of the 2000 Report and reflects an extraordinary overall decade of federal leadership in the field of ADR. The compilation of innovative ADR programs thoughtfully designed in over a hundred federal agencies and sub-agencies in recent years - many of which are built on the foundations described in the 2000 Report – demonstrates ADR’s potential to deliver government accessibility, services, and justice to the American people.

In mid-2005, the Working Group Steering Committee began the process of surveying hundreds of ADR programs throughout the federal government in order to evaluate and measure progress achieved in the use of ADR. Surveys were distributed to every agency within the Executive Branch. The data provided by those agencies (listed in Appendix E) offer concrete information to illustrate the past successes and future potential of ADR, and confirm that ADR has both delivered on its promises and offered realistic hope for further successes.

Before delving into the survey results, addressed in length in the subsequent sections, we have described below some of the other specific areas of accomplishment of each of the substantive areas covered by the four Working Group Sections and Steering Committee.

### CIVIL ENFORCEMENT AND REGULATORY SECTION

When initially formed, the goal of the Civil Enforcement Section was to educate and assist member agencies in the use of dispute resolution techniques in civil enforcement and compliance cases as an alternative to traditional litigation and settlement methods. This goal remains the same today but with an expanded focus, to reflect the realization that there are other, related areas where ADR has great potential to make business and resource planning more cost-efficient and productive in appropriate instances. Accordingly, in the autumn of 2002, the scope of the Section’s coverage was expanded to include regulatory conflicts, and its name was changed to the Civil Enforcement and Regulatory Section. Active agency representatives in this Section come from the: Federal Energy Regulatory Commission, Securities and Exchange Commission, Federal

Maritime Commission, Federal Election Commission, Coast Guard, Department of the Navy, Department of the Interior, Environmental Protection Agency, Air Force, Internal Revenue Service, U.S. Institute for Environmental Conflict Resolution, and the Department of Commerce. These members are dedicated to assisting other agencies and stand ready to provide consultation or training in ADR program development. Agencies for which this Section has provided consultation and training include the Social Security Administration, the Department of Transportation's Surface Transportation Board, and the Department of Labor.

Since its inception and expansion, the Civil Enforcement and Regulatory Section consistently has reached out to agencies and other organizations to expand the use of ADR. Agencies were contacted directly to explore interest in participating in Working Group activities. The Section also developed a Newsletter for agencies and the public, detailing Section activities and providing information on the applicability of ADR to enforcement and regulatory missions. Topics which have been covered in the Newsletter include: ADR success stories in the civil enforcement and regulatory arena; resources available to support ADR efforts, such as ADR consultation teams; related initiatives by other organizations; guidance on frequently asked questions, and considerations on the appropriateness of ADR for a particular case. Each Newsletter is posted on the Federal Interagency ADR Web page at [www.adr.gov](http://www.adr.gov).

In sum, the Civil Enforcement and Regulatory Section and its dedicated members support the widespread application of ADR. Lengthy, costly, and time-consuming traditional adjudication processes have forced business decision-makers to devote an inordinate amount of their time to defending their positions. Their time could be better spent running their businesses more efficiently. This Section recognizes that ADR provides an attractive alternative for dealing with environmental disputes, business disputes, and transactional disputes. An environment that allows for disputes to be resolved quickly, and at low cost, benefits everyone directly affected, as well as the general citizenry. The goal of the Section is to continue to foster the development and implementation of ADR initiatives within the enforcement and regulatory arenas of the federal government.

The Administration recently demonstrated its commitment to the use of ADR in environmental disputes through the Memorandum on Environmental Conflict Resolution which was issued jointly on November 28, 2005 by the Office of Management and Budget and the Council on Environmental Quality. This policy support has enabled members of the Civil Enforcement and Regulatory Section to be stronger advocates for the effective use of environmental conflict resolution within their own agencies.

### CLAIMS AGAINST THE GOVERNMENT SECTION

Since the 2000 Report, this Section has assisted federal offices across the country in integrating ADR into the preparation and management of appropriate cases involving a claim against the government. This has included trainings for federal attorneys throughout the country, to educate them on how to effectively represent their client in an ADR process, as well as to strategize about the most effective and appropriate use of

ADR. The focus is on reaching the proper balance between litigating a case where it is necessary and appropriate and otherwise resolving cases through some form of ADR where it is practicable and in the best interests of the client. The federal government has used ADR successfully in aviation and admiralty cases, medical malpractice cases, class action and individual workplace discrimination cases, water rights and Native American land disputes, and a vast array of other civil actions brought against the United States.

## CONTRACTS AND PROCUREMENT SECTION

The goal of the Contracts and Procurement Section is to address the need of agencies and private sector companies to find a viable alternative to traditional litigative processes for resolving contract and procurement disputes.

This Section has actively promoted the use of ADR through an ongoing regular series of free educational programs on a variety of ADR topics. The Section has co-sponsored, along with the American Bar Association, twenty educational programs from 1999 to the present. The programs are open to all government and private sector public contracts professionals, giving them an opportunity to pro-actively identify potential problems of future contract interpretations and develop programs to explore areas subject to future disagreements. The programs have been exceptionally well-received with attendance often exceeding one hundred participants, with an equal or greater number participating by teleconference. A few of the topics include: “Unique Aspects of Mediating Government Construction Contract Disputes”; “Developing Guidance for Federal Agency Binding Arbitration”; and “Confidentiality in Public Procurement ADR – Legal and Ethical Issues.” The series is continuing and will include program topics suggested by the membership as topical and pertinent to contracting issues.

In 2002, the Section worked with the Office of Federal Procurement Policy and the Procurement Executives Council to develop and implement an award program recognizing federal agencies and private sector companies that have used ADR effectively to resolve government contracts disputes. The award winners are selected by an independent panel of public and private sector ADR experts. Government award winners to date have included: the Air Force; the Army Corps of Engineers; the Federal Aviation Administration; the Defense Logistics Agency; the Armed Services Board of Contract Appeals; the General Services Administration Board of Contract Appeals; and the Department of the Navy. A special award was presented in 2003 to the American Bar Association Public Contract Law Section. The award program recognizes agencies and contractors who have distinguished themselves in their effective use of ADR in federal procurement disputes and serves to encourage other agencies and companies to utilize ADR in resolving public contracting disputes.

The Section also has facilitated mentoring among federal agencies on the appropriate use of ADR to resolve procurement disputes. In this area, the Section has been actively working with individual agencies to develop or improve their ADR processes and procedures. Section members have worked directly with and conducted ADR seminars

and training sessions for twenty different agencies and have worked with many more on an informal basis to optimize their ADR programs and usage.

## WORKPLACE SECTION

The purpose of the Workplace Section is to assist federal agencies in the development and implementation of workplace ADR programs which provide faster, more cost-effective and more satisfying opportunities for employers and employees to address and to resolve all types of employment-related disputes. In addition, many agency workplace programs cover more than simply current employees; some programs cover contractors, former employees and even applicants for positions with the agency.

The Workplace Section has focused its efforts on educating all federal agencies about ADR and advancing the use of ADR in the federal workplace. The Workplace Section facilitates, encourages, and coordinates the use of ADR to resolve workplace conflict and disputes. To support this effort, the Workplace Section has convened a panel of dispute resolution mentors to assist and motivate agencies with creating and improving workplace ADR programs.

A critical component of the Section's education process is information dissemination. The Workplace Section has organized a Lecture Series (generally held on a monthly basis) on federal workplace ADR to provide the most current, useful, and thought-provoking information affecting the workplace. The popularity of these presentations has steadily expanded since the first session in 1999, with growing participation and interest in the series. Each month, the ADR speakers at these sessions share their knowledge, experience, theories, and techniques. This medium for educating the federal ADR community has proven to be quite successful. It is expected that much of the information presented can be implemented and utilized by ADR specialists at their respective agencies.

## STEERING COMMITTEE

In July 2006, the Steering Committee posted on the interagency Web site an updated governance document which outlines the mission of the Interagency Working Group Sections and Steering Committee, and describes their authority, structure, interrelationship, and decision making process. The governance document is available on the interagency ADR Web site at [www.adr.gov](http://www.adr.gov) (click on left "Working Group" navigation button, click on "Governance").

In 2006, the Steering Committee published three new guides to serve as advisory best practices in federal ADR. Two of the guides cover confidentiality and federal employee mediation ethics. The third guide, on ombuds programs, is a joint publication by the Steering Committee and the Coalition of Federal Ombudsman. The three guides are intended to bridge the gap between the Administrative Dispute Resolution Act's legislative intent to promote ADR and the difficult, practical questions facing federal government administrators in developing workable dispute resolution programs. Prior to

finalization, public comment on each of the three draft guides was solicited in the Federal Register.

In 2005, the Steering Committee published a new Handbook on finding appropriate neutrals for agency workplace disputes.

The three guides and the Handbook, described briefly here, are posted in their entirety on the interagency ADR web site at [www.adr.gov](http://www.adr.gov).

“Protecting the Confidentiality of Dispute Resolution Proceedings:  
A Guide for Federal Workplace ADR Program Administrators”  
(April 2006)

This comprehensive guide offers practical guidance for federal ADR program managers on the application of statutory provisions governing confidentiality in mediation of federal workplace disputes. The guide covers all requirements applicable before, during, and after dispute resolution sessions. It includes discussion on specific areas of confidentiality, including confidentiality agreements, record-keeping, program evaluation, access to reports, and non-party participants. The guide focuses ADR program managers on the appropriate balance between governmental reporting requirements and the importance of protecting parties’ confidentiality. It describes how to maintain appropriate agency goals pertaining to confidentiality and, at the same time, leave an agency sufficient flexibility to tailor a particular program to meet specific agency circumstances and needs. The guide is available on the interagency ADR Web site at [www.adr.gov](http://www.adr.gov) (click on left “Guidance” navigation button.)

“A Guide for Federal Employee Mediators:  
A Supplement to and Annotation of the Model Standards of Conduct for Mediators  
Issued by the American Arbitration Association, the American Bar Association, and the  
Association for Conflict Resolution”  
(May 2006)

This guide offers practical ethical guidance for federal employee mediators, tailored to a mediation practice within the federal government. Federal employees who are serving as mediators for a federal agency must balance their obligations and responsibilities as mediators and as federal employees. The guide sets forth the ethical responsibilities for mediators in the 2005 Model Standards of Conduct for Mediators with further explication under Federal Guidance Notes following each ethical provision. The Notes are intended to make federal employees aware of their additional employee responsibilities under a variety of statutory and regulatory requirements. The guide is available on the interagency ADR Web site at [www.adr.gov](http://www.adr.gov) (click on left “Guidance” navigation button.)

“A Guide for Federal Employee Ombuds:  
A Supplement to and Annotation of the Standards for the  
Establishment and Operations of Ombuds Offices  
Issued by the American Bar Association”  
(May 2006)

The Steering Committee’s Guide for Federal Employee Ombuds is intended to be read in conjunction with the American Bar Association’s “Standards for the Establishment and Operation of Ombuds Offices,” and describes more fully the underlying factors intended to ensure the independence and impartiality of a federal ombuds office. The guide focuses on the importance of determining whether a conflict of interest may exist between the ombuds’ responsibility of independence on the one hand and the employee’s duties to the agency/employer on the other hand. The guide is available on the interagency ADR Web site at [www.adr.gov](http://www.adr.gov) (click on left “Guidance” navigation button.)

“Finding Neutrals Handbook”  
(May 2005)

The Steering Committee’s Finding Neutrals Handbook assists agencies in obtaining the services of neutrals and assessing the type of neutral needed for a particular workplace dispute. This guide provides basic and comprehensive information about: the various types of neutrals available for use by federal agencies, including both government employees and privately employed neutrals; the various settings in which government neutrals operate; the advantages and disadvantages of each type of neutral for particular cases; the primary vehicles for procuring private neutrals; and an overview of some of the related issues of concern under federal procurement law. The Handbook also serves as a guide for balancing a government neutral’s professional obligations against the Executive Branch’s responsibilities to operate in the public interest and with fairness. The Handbook is available on the interagency ADR Web site at [www.adr.gov](http://www.adr.gov) (click on left “Guidance” navigation button.)

### C. Survey of Federal Alternative Dispute Resolution Programs

As noted above, the Steering Committee in mid-2005 initiated a detailed survey of ADR programs in the Executive Branch of the federal government. The goal of the Steering Committee’s survey was to gather information about programs and plans. The survey elicited valuable feedback and statistics, submitted by over 100 agencies and sub-agencies, which quantify and evaluate existing federal ADR programs and which form the basis of this Report.

This Report details the current state of ADR within the federal agencies and their efforts to measure results and determine the effectiveness of ADR. However, because each

agency has a unique mission, the use of ADR is extremely variable. Additionally, standardization is difficult because each agency is in a continuous process of implementing new programs and adjusting old programs to better fit its changing needs. If there is a single guiding principle in ADR, it is that the process requires flexibility. It is clear that in ADR “one size does not fit all.” The agencies not only have been expanding the substantive areas in which they use ADR, but they also have been developing creative new applications of the various ADR processes, as well as new hybrid combinations. In fact, it is this essence of tailoring the process to meet the individual parties’ particular needs and goals which inspires and guarantees the parties’ personal accountability in the resolution itself. Thus, development of uniform standards for measuring success of each of varying programs, within a particular agency and among the many agencies, is an enormous challenge.

This Report applies the agencies’ own measurements of success where they have developed agency goals and guidelines for results. As we note, agency targets and measures still are under development in some of the newer ADR programs, as well as in some existing ADR processes where specialists face challenges in maximizing their potential. Part of the focus of this Report is to identify areas where the Steering Committee may be able to provide assistance to agencies in their efforts to develop goals and measurements of success for their programs, and to maximize that success.

## **II. ADR Programs: Enhancing Agency Missions**

Managers across the board have described how the effective and appropriate use of ADR permits an agency to focus more time and resources on its mission. In this section of the Report, we describe agency ADR policies as well as specific areas in which agencies use ADR and measure resultant benefits. Many of the agency ADR programs merit more space than we have available in this Report, but further information can be obtained from the Web sites where agencies describe their ADR programs in greater detail.

### **Cabinet Level Agencies**

#### **DEPARTMENT OF AGRICULTURE**

The Department of Agriculture is responsible for developing farm income and foreign markets for agricultural products, as well as for protecting and conserving the environment through agricultural research and conservation projects. Most Agriculture sub-agencies have established independent ADR programs, primarily for workplace disputes, with a few addressing disputes involving external clients and customers. Approximately half of all of the programs in place have set up separate ADR programs for early intervention in workplace disputes and EEO disputes. In 2006, the Department issued a revised and strengthened ADR regulation that made an offer of ADR mandatory at the informal complaint stage, unless a very narrow exception is made because of the existence of workplace violence, sexual assault/battery, or other criminal activity that is related to the complaint. Significant provisions provide that: management is expected to participate in ADR if requested, barring a compelling reason; agencies within the Department must establish permanent ADR awareness programs; mediators for the Department programs must maintain training and experience credentials; and decisions not to offer ADR at the formal complaint stage must be documented.

#### **DEPARTMENT OF COMMERCE**

The mission of the Department of Commerce is to create the conditions for economic growth and opportunity by promoting innovation, entrepreneurship, competitiveness, and stewardship. The Department uses ADR in three general areas: workplace/employment disputes (including EEO matters); environmental compliance issues regulated by the National Oceanic and Atmospheric Administration; and government contract disputes.

The Department of Commerce uses mediation as a technique to resolve all types of employment disputes. The Department's Headquarters Office of Civil Rights, through the ADR Program Manager, develops program policy and operational guidance overseeing each bureau's EEO ADR initiative. Each bureau makes mediation available at the EEO informal or pre-complaint stage for cases where mediation is appropriate; the Headquarters office makes mediation available at the formal complaint stage. Currently, the focus of EEO ADR efforts is on the election of ADR by employees and agency officials. Each fiscal year, performance targets are established to measure the increase in

election rates above the previous year's levels. A target measure is 20% above the previous year's rate. In addition, the resolution rates are tracked. If the matter is resolved through ADR, or the parties withdraw the initial complaint, the case is considered an ADR success.

The National Oceanic and Atmospheric Administration does not have a formal ADR program in the environmental conflict resolution arena, but uses several ADR techniques to resolve particular cases as the situation warrants.

The National Oceanic and Atmospheric Administration utilizes a broad variety of ADR processes in other contexts, however, including use of consensus building and public participation in all of their cases. Consensus building is important to move cases toward settlement among the various trustee agencies and frequently with the responsible parties. Public participation, to some degree, is required by law in most natural resources cases and is used to keep the public informed and engaged in the agencies' assessment of damages and to get the public's input into choosing the appropriate restoration of natural resources. Consensus building and public participation were used extensively throughout the development of the natural resource damage assessment regulations promulgated pursuant to the Oil Pollution Act of 1990. Furthermore, all settlement negotiations for hydro re-licensing are based on the basic premise of reaching consensus, and typically include federal, state, local, and tribal governments, as well as industry, environmental groups, recreational interests, and local business interests as well as ratepayers.

The National Oceanic and Atmospheric Administration also uses facilitation in public stakeholder meetings, in rulemaking public meetings, in a Superfund site to coordinate government issues, and in internal meetings among its staff and across its programmatic line offices to help air and address differences, problems, or issues of concern. On occasion, the sub-agency has used settlement judges in a few of its public claims for environmental damage to resolve liability.

Lastly, the Department uses ADR in certain government contract disputes, generally using an Administrative Judge from the Board of Contract Appeals as a neutral.

## DEPARTMENT OF DEFENSE

Throughout the Department of Defense, agencies are employing ADR tools in workplace disputes and contract and procurement disputes, as well as areas of land use and accessibility. The Department reports tangible, timely benefits from ADR use, including time and monetary savings and, perhaps most importantly, a profound impact on the workforce, permitting parties to focus on accomplishing agency mission rather than on disagreements.

### *Department of the Air Force*

The Air Force mission is to deliver sovereign options for the defense of the United States and its global interests—to fly and fight in the Air, Space and Cyberspace. ADR

supports this mission by giving commanders, managers, and employees options for effectively and efficiently resolving disputes that otherwise could jeopardize morale and unit cohesion.

#### Air Force Workplace ADR Program.

The Air Force's emphasis on voluntary, collaborative problem solving promotes a sense of teamwork, camaraderie, and a shared commitment to make outcomes work. The collaborative aspects of ADR have actively promoted stronger working relationships between management and employees. By exhorting parties to fashion their own solutions to their disputes, ADR produces outcomes better suited to promoting positive working relationships, maintaining worker morale, and promoting a sense of responsibility and accountability throughout the workforce. More than one-half of the Air Force's civilian workplace disputes are referred to an ADR or other collaborative early resolution process utilizing interest-based problem solving techniques, with an average resolution rate of 75% or better. As a result, the Air Force consistently diverts about 40% of its civilian personnel dispute workload from time- and resource-intensive formal dispute resolution processes. Use of ADR and other non-traditional early resolution techniques for those workplace disputes resolves most complaints in one-eighth the time and at one-eighth the cost of traditional processes. By reducing cycle times to process disputes from inception to resolution, ADR and other early interest-based techniques free personnel from dispute-related tasks faster and get them back to their primary mission tasks.

Empowering people to take control of resolving their own disputes places a premium on the ability of supervisors and managers, and their employees, to engage in interest-based interactions to solve workplace problems, and the Air Force is currently engaged in a large-scale, intensive effort to deliver those skills to its management workforce, military and civilian, through its Integrated Conflict Management System, discussed below.

#### Air Force Contract Disputes ADR Program.

The collaborative aspects of ADR also have had a positive effect on and promoted stronger working relationships between the Air Force and its contractors. In contract disputes, ADR is the Air Force default position, and is offered in over 80 percent of cases, with acceptances at twice the rate of rejections. ADR has reduced cycle times dramatically in these disputes, from 38 months (for a trial) to seven months after the parties agree to use ADR. Cost savings from the use of ADR flow primarily from reduced cycle time, and include years of lawyer and staff effort, direct expenses of litigation such as witness fees, travel, and document production, and Contract Disputes Act interest on contractor claims.

In recent years, the Air Force has emphasized early resolution of contract disputes, prior to the issuance of a contracting officer's final decision, and preferably prior to the submission of a formal claim under the Contract Disputes Act. The Air Force Federal Acquisition Regulation Supplement instructs contracting officers to submit proposed final decisions to the Directorate of Contract Dispute Resolution at Wright Patterson Air

Force Base for review prior to issuance. Final decisions in excess of \$500,000 also are to be submitted to the Deputy General Counsel for Dispute Resolution for review. A primary purpose of the review in both instances is to ascertain whether ADR should be used to resolve the dispute before it enters the formal disputes process. Air Force policy is to use ADR techniques once unassisted negotiations have reached an impasse. Early resolution is desirable for both parties. It means that creative solutions can be reached at minimal cost and with minimum program disruption, and – perhaps most important – the contracting parties retain maximum control of the outcome.

#### Integrated Conflict Management System and the Air Force Negotiation Center of Excellence.

The Air Force Integrated Conflict Management System has two primary elements. The first is a robust ADR system to resolve disputes as efficiently as possible. The second is a conflict management system that works to prevent disputes from arising in the first place. Key to making such a conflict management system work is training in negotiation and communication skills. The Air Force ADR program office for the last two years has conducted large scale negotiation training for supervisors of civilian personnel. The supervisory skills training has received very high marks from participants, who realize that interest-based, collaborative problem solving skills will help them perform all aspects of their jobs more effectively.

This large scale training led to establishment in 2005 of the Air Force Negotiation Center of Excellence, a partnership of the Air Force General Counsel's office and Air University, the leading provider of Air Force professional military and civilian education. The purpose of the Center is to incorporate negotiation education and skills training into professional development across all functional areas, from personnel management to acquisition to war fighting. Education and training in negotiating, fostering teamwork, and collaboration have been integrated into the curriculum at the Air War College because senior Air Force leaders recognize that mission success these days may rest more on the ability to collaborate with others in contingency and reconstruction operations than on the ability to give and follow orders. To reflect today's realities, the Center's course offerings include cultural awareness and cross-cultural negotiations.

#### *Department of the Army*

The Army's mission is: training and maintaining active duty and reserve forces in defense of the national security; preserving and improving the natural environment; and providing military assistance to federal, state, and local governments. Within the Army, the ADR program development and implementation resides at the major command level, which permits them to serve as a development laboratory, promoting and sharing best practices throughout the organization. While the avoidance of litigation costs aids commanders with already limited resources, the greatest benefit is the improved employee productivity. The Army's ADR policy is to resolve disputes at the earliest stage feasible, by the fastest and least expensive method, and at the lowest possible

organizational level. ADR is used in workplace disputes, contracts and procurements, civil enforcement, and claims against the government.

The greatest support to the Army's mission results from resolving employee disputes early and quickly. The Army mission heavily relies on its employees and the reduced productivity of an employee engaged in protracted litigation is a mission detractor. The employee often is distracted and disgruntled, and that hurts overall workplace morale. Direct supervisor interaction with the employee often opens avenues of communication that had been closed, resulting in improved working relationships and improved productivity. Therefore, the early mutual resolution of disputes is critical to the Army mission.

At the headquarters level, attorneys within the Office of The Judge Advocate General administer ADR programs to resolve the acquisition and environmental disputes not within the purview of the major command. Although the Army does not have a citizen-centric mission, it does provide limited services to military dependents and the public-at-large. For example, the Army uses ADR techniques to resolve disputes regarding the accessibility of Army activities and facilities to military dependents and the public at-large who have disabilities.

#### *Army Corps of Engineers*

The Army Corps of Engineers is the Army's real property manager, overseeing engineering, construction, and realty for Army and Air Force civil works. They have found that protracted litigation distracts the agency from its mission, and costs incurred as part of litigation detract from the advancement of that mission. The agency uses ADR as part of its duty to the public to contain costs. The savings, in transactional costs and the costs of delay, translate into additional funding that can be available for mission execution and services on other projects in support of the Army. The agency works with each contractor to fashion a dispute resolution process which is specifically tailored to the matter in dispute. Over the past ten years, the Corps has processed 131 cases involving contract disputes through ADR and successfully resolved 90% of them.

Additionally, the expedited resolution achieved through ADR has a significant positive effect on the workplace environment because it inhibits the development of negative attitudes attendant to protracted litigation.

#### *Department of the Navy*

The Department of the Navy is responsible for maintaining freedom of the seas to protect our national interests. It uses ADR to resolve issues in controversy at the earliest possible stage, by the fastest and least expensive method possible, and at the lowest possible organizational level prior to litigation. Recognizing that every dollar used for litigation is a dollar that cannot support the fleet or Marine forces, the Department of the Navy has established, within the Office of the General Counsel, an ADR Program Office which is led by the Assistant General Counsel.

The Department of the Navy has found that ADR processes contribute to civilian workplace productivity by improving working relationships and reducing the time devoted to dispute resolution so that the workforce can focus on the agency mission. Similarly, the Department of the Navy uses ADR techniques (particularly facilitated partnering) for procurement and environmental issues.

While not a regulatory agency, the Department of the Navy interacts with the public, either as employees or as contractors, at all of its facilities. All of the ADR processes are used where appropriate. The ADR Program Office effectively markets these services through public outreach, including an active Web site and by offering on-line ADR training.

#### *Defense Commissary Agency*

The Defense Commissary Agency operates hundreds of retail grocery stores throughout the world, providing an economical food supply for thousands of military families. The agency's policy is to utilize ADR unless some specific and identifiable reason precludes it. ADR is used primarily in workplace disputes, as well as in some procurement matters. The Office of the General Counsel sets forth the agency's policy and each program head develops a specific "ADR Plan" which is tailored to meet the needs of an individual program. Every employee is required to cooperate in the ADR process.

ADR processes have served to reduce greatly the administrative litigation involving all types of workplace disputes. Moreover, supervisors and managers who have used ADR find that they are better able to resolve subsequent disputes, thereby decreasing the total number of complaints across the board.

#### *Defense Contract Audit Agency*

The Defense Contract Audit Agency performs audit functions and provides accounting and financial advisory services to all Department of Defense components. ADR is utilized primarily in EEO and workplace disputes. The agency reports that ADR has saved the agency time and resources in processing, investigating, and litigating those cases and thus promotes greater efficiency in accomplishing the agency's primary mission.

#### *Defense Contract Management Agency*

The Defense Contract Management Agency is the Defense Department's contract manager, responsible for ensuring that federal acquisition programs (systems, supplies, and services) are delivered on time, within projected cost or price, and meet performance requirements. The agency's dispute resolution policy covers all disputes which may arise within the agency, and is applied primarily in workplace, contract, and procurement disputes. As the agency transforms from performance-based management to earned-

value management, the agency has been monitoring the number of new workplace disputes, in order to assess the value of early ADR intervention in the workplace arena.

The agency's Contract Law Group, which includes many attorneys who are trained mediators and dispute resolution specialists, is structured to engage in early dispute resolution and committed to partnering with the military services as well as the private sector to effectively resolve controversial contract issues at the earliest opportunity. The appropriateness of using ADR is evaluated for every contract dispute which arises. The agency is committed to working with its defense contractors to assure its war fighters get the best equipment in the most expeditious manner. The more effectively the agency can manage and resolve disputes with those contractors, the faster it can return to its mission of supporting the needs of the military.

The Ombuds Program provides another avenue for employees or contractors to raise issues of integrity, fraud, or other conflict while remaining focused on the mission of supporting the war fighter.

#### *Defense Finance and Accounting Service*

The Defense Finance and Accounting Service provides financial and accounting services to the Department of Defense. The agency's dispute resolution policy authorizes the use of ADR in any workplace dispute (subject to a limited number of narrow exceptions) and has been used successfully in EEO, labor, and personnel disputes.

#### *Defense Information Systems Agency*

The Defense Information Systems Agency provides and services the vast network of information systems which permit communications among the Department of Defense components. Their workplace dispute resolution policy extends to all military and civilian personnel and is administered by a specialist who monitors and tracks ADR usage. Component ADR specialists provide the dispute resolution services wherever needed and report statistics to a program manager and ADR steering committee. Through the use of ADR, the agency has realized greater efficiency and economy, as well as creative solutions, in a broad spectrum of workplace disputes.

#### *Defense Logistics Agency*

The Defense Logistics Agency serves as the logistical support for all of the Department of Defense components as well as other federal agencies, and provides materials, assistance, and supplies worldwide. The agency reports that it has a broad-based dispute resolution program encouraging earliest possible use of ADR in any and all matters of dispute. The agency has a central ADR Program Manager, Headquarters Advocates, and ADR Specialists throughout the field. ADR is used in workplace disputes and contracts disputes.

In the workplace, the policy is that ADR is always considered at the earliest possible stage and any management decision not to use ADR must be documented in writing at least one level above the deciding official. In the contracts area, ADR provides quick avenues for contractors to have their disputes heard and resolved, typically through facilitation, mediation, or early advisory opinions. The various dispute resolution processes have: reduced the amount of time spent on disputes, allowing the agency to accomplish its designated functions; reduced the negative feelings generated by disputes, allowing parties to work better together in furtherance of the agency mission; and reduced the money spent on disputes, preserving necessary resources for agency work.

#### *Department of Defense Education Activity*

This agency provides education, from kindergarten through twelfth grade, to the minor dependents of overseas military and civilian personnel. The agency uses ADR in workplace disputes. Through the use of mediation, managers in this program save money, make more efficient use of limited resources, preserve the integrity of ongoing work relations, and develop more creative resolutions than would be possible through the usual litigation channels.

#### *National Geospatial-Intelligence Agency*

The National Geospatial-Intelligence Agency provides geospatial intelligence for national security purposes. The agency has an expansive approach to ADR and uses it in resolving all types of workplace disputes, as well as some procurement disputes. The agency uses a broad array of ADR processes, including mediation, facilitation, and partnering, reporting that successful ADR in the workplace promotes teamwork, trust, and partnership.

#### *National Guard Bureau*

The National Guard Bureau develops and provides direction and guidance for the National Guards of the 54 states and territories. The agency policy requires that the National Guards of the various states and territories attempt to resolve conflicts at the earliest possible time and lowest possible level through the effective use of ADR. The National Guard Bureau has established the position of an ADR Advocate who is responsible for promoting and effectuating a broad use of ADR. The ADR framework of the National Guard Bureau is applied across the board in all categories. A yearly report is compiled in order to review and evaluate each state or territory's program.

Various types of facilitation have been used by the National Guard in considering changes in land use. For example, the proposal to "withdraw" certain parts of Limestone Hills, MT, for increased military training caused grave concern among special interest groups which currently use Limestone Hills (cattle ranchers, mining interests, private property holders). Facilitative dispute resolution processes were used early in the Environmental Impact Statement process to successfully address many of the concerns of these groups. The National Guard arranged for meetings and open discussions among the

various stakeholders over several months in order to identify, discuss and share alternatives. These meetings impacted the perspectives of the public participants and of the National Guard and resulted in a recommendation to Congress which meets most of the concerns of the varied stakeholders as well as the needs of the government. These consensus building public meetings proved to be crucial in: increasing participants' knowledge and understanding of the proposed action; convincing the participants of the National Guard's desire to be open and straightforward in the discussions; and reaching consensus on the best plan to go forward.

The National Guard Bureau also has used an ADR process of partnering, primarily with labor unions when new regulations are generated. This sort of open discussion and exchange promotes far greater acceptance by the union, as evidenced by fewer complaints of unfair labor practices under the newly-enacted regulations.

The National Guard Bureau also reports that various ADR processes have been successful in resolving tensions between military officers and subordinates in the workplace without sacrificing the military authority of superior officers.

#### *National Security Agency*

The National Security Agency protects communications in the United States and produces foreign intelligence overseas. The agency has created a Center for Conflict Resolution with twenty agency-trained mediators for use in workplace disputes. The Center also provides management training to recognize conflict early and respond more efficiently. By increasing the ability of employees and managers to respond to each other directly through ADR processes, managers and employees are able to maximize their productivity.

#### *Uniformed Services University of the Health Sciences*

The Uniformed Services University of the Health Sciences is the nation's federal health sciences university. ADR applies to: disputes involving contracts or grievances to which the University is a party; appeals from withholding of documents requested under the Freedom of Information Act; complaints of discrimination; and administrative grievances or other disputes or controversies deemed appropriate for ADR by the University's General Counsel and President. Because the organization is a small one with few controversies, the ADR process used most often has been mediation in the context of EEO proceedings.

#### *Washington Headquarters Service*

The mission of the Washington Headquarters Service is to provide administrative and operational services in support of the Office of the Secretary of Defense and the Department of Defense agencies. Their Collaborative Resolution Program offers a broad array of ADR services, including mediation, facilitation, and peer resolution panels, as well as training for employees and managers in communication and dispute resolution

skills. These services are offered to a workforce of almost 6,000 civilian and military personnel.

After tracking the results over some time, Washington Headquarters Service concluded that ADR is an efficient, expedient, and cost-effective means for resolving all types of workplace issues. Sixty percent of all its mediated cases were settled with an average processing time of 39 days, as compared to its nationwide average of 469 days in 2004. There are multiple advantages to a speedy resolution of a dispute which otherwise could grow into a festering conflict: positions have not hardened over time; others in the workplace have not been drawn into the dispute and are thus less impacted by the dispute; and any collateral damages are limited and minimized.

## DEPARTMENT OF EDUCATION

The mission of the Department of Education is to ensure equal access to education and to promote educational excellence throughout the nation. The Department utilizes ADR in a wide range of areas:

- The Informal Dispute Resolution Center, staffed with full-time trained mediators, is in a central location to help employees and managers resolve informally any type of dispute or complaint concerning a work-related matter.
- The Office of Federal Student Aid assists all eligible individuals with federally-funded or federally-guaranteed financial assistance beyond high school. The office's Ombudsman works with federal student aid recipients, loan holders, guarantee agencies, and schools to resolve loan problems informally.
- The Office for Civil Rights is responsible for ensuring that recipients of Department funds do not engage in discriminatory conduct based on race, color, national origin, sex, disability, or age. It is authorized to initiate formal enforcement proceedings against recipients of federal funds who allegedly are engaging in discriminatory practices. However, in the great majority of cases, the agency is able to enter into voluntary corrective action agreements to resolve compliance concerns.
- The Cooperative Audit Resolution and Oversight Initiative aims to improve education programs and student performance at state and local levels through better use of audits, monitoring, and technical assistance. Many audits result in lengthy legal battles that produce insignificant monetary recoveries, develop significant ill will, and fail to provide permanent corrective action. This initiative was designed to avoid costly litigation, lengthy adversarial discussions, and non-productive impasses, and instead to rely on creativity in resolving audit issues. By creating permanent solutions to audit issues, states and local educational agencies can increase the availability of time, money, and resources for teaching, learning, and classroom improvement, and focus on their core mission of the education of students and other learners.

- The Office of Special Education Programs is dedicated to improving results for infants, toddlers, children, and youth with disabilities by providing leadership and financial support to assist states and local districts. The Office of Special Education Programs supports the National Center on Dispute Resolution, which encourages the use of mediation and other collaborative strategies to resolve disagreements about special education and early intervention programs.
- The Department of Education also has engaged in negotiated rulemaking in the development of regulations under the Higher Education Act and Title I of the Elementary and Secondary Education Act.

## DEPARTMENT OF ENERGY

The Department of Energy, like many other cabinet agencies, is employing ADR in a wide range of areas, with a strong focus on public involvement. The Department's overarching mission is to: advance the national, economic, and energy security of the United States; promote scientific and technological innovation in support of that mission; and ensure the environmental cleanup of the national nuclear weapons complex. Because the scope of its mission is broad, the agency is separated into program areas which often operate independently. Additionally, most agency facilities are managed and operated by contractors and have developed their own unique ADR processes.

The Office of Dispute Resolution located within Headquarters oversees the Headquarters Mediation Program as well as the Technology Transfer Ombuds Program located within the agency's national laboratories. The Technology Transfer Commercialization Act of 2000 was enacted to improve the ability of federal agencies to license federally-owned inventions. Each national laboratory and research facility has appointed a technology partnership ombuds. The role of the ombuds is to prevent and resolve – at the earliest possible level – disputes between the laboratories and inventors or private companies, over technology transfer issues such as infringement, intellectual property rights, royalties, and licensing.

The Dispute Resolution Specialist in the Office of Dispute Resolution advises on inclusion of ADR provisions in agency contracts and on locating an appropriate neutral when needed for a specific dispute. In addition, the agency's Board of Contract Appeals (now included with the United States Civilian Board of Contract Appeals) is available to mediate disputes between the agency and its contractors and, in some cases, between a contractor and a subcontractor or between subcontractors.

In the workplace arena, the Headquarters Mediation Program provides mediation for all types of workplace disputes in Headquarters, using professional mediators under agency contract or mediators from other federal agencies through the Sharing Neutrals Program. While most referrals come from the Office of Civil Rights, managers and employees are encouraged to use the program before an EEO complaint or grievance is formally filed.

The Office of Employee Concerns addresses all good faith complaints by an employee that a policy or practice by the agency or one of its site contractors should be improved, modified or terminated because it is unsafe, unlawful, fraudulent, or wasteful. Concerns can address such issues as health, safety, the environment, personnel, or management practices, or whistleblowing reprisals.

The National Nuclear Security Administration Ombuds Program services all of its employees and contractors, providing a confidential, impartial, independent, and informal resource facilitating fair and equitable resolutions to all types of workplace concerns.

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

The Department of Health and Human Services is responsible for the health and welfare policies and programs of the federal government. Like other cabinet agencies, the agency reports that the availability and success of ADR, used in the programs described below, is improving communication, encouraging problem solving, and increasing workplace productivity.

### *Agency for Healthcare Research and Quality*

The mission of the Agency for Healthcare Research and Quality is to translate research findings into clinical practice. The agency has an ADR program which is used primarily in the EEO process, but also can be utilized to resolve other types of employee and management disputes.

### *Centers for Disease Control and Prevention*

The Centers for Disease Control and Prevention is at the forefront of public health efforts to prevent and control infectious and chronic diseases, injuries, workplace hazards, disabilities, and environmental health threats. It monitors and prevents disease outbreaks (including bioterrorism), implements disease prevention strategies, and guards against international disease transmission. The agency provides ADR services and training to employees, managers and supervisors, Commissioned Officers, and visiting fellows.

### *Centers for Medicare & Medicaid Services*

The mission of the Centers for Medicare and Medicaid Services is to ensure effective, up-to-date health care coverage for eligible citizens and to promote quality care for their beneficiaries. The agency provides programmatic oversight of federal medical care quality and develops and implements policies for recipients of such services. The agency uses ADR in several areas of its work.

ADR, primarily mediation, is used in a broad array of workplace conflicts including EEO complaints, formal employee grievances, and general workplace disputes. The agency has determined that mediation has significantly reduced the number of formal complaints lodged and improved communication and the general quality of life in the workplace. In

addition to the specific disputes, the ADR program also is used to improve communication, identify corrective actions, and reduce the incidence of future disputes.

States may provide drug benefits to their Medicaid population by allowing drug manufacturers to sell their drugs to Medicaid beneficiaries. The states then must invoice and collect rebate dollars from the drug manufacturers for the drugs provided. Manufacturers can dispute invoice data they believe is incorrect. The agency uses ADR to facilitate and resolve rebate invoice disputes between the states and drug manufacturers in order to keep the rebate dollars flowing back in the Medicaid program. In addition to settling the specific disputes, the ADR program also is used to improve communication, identify corrective actions, and reduce the incidence of future disputes.

The agency's Office of Hearings hears formal appeals for provider reimbursement for services provided by a component of the Department of Health and Human Services. Its mediation program has a 90% success rate for resolution of appeals. Final settlement of appealed cases generally occurs within 180 days, as opposed to several years for federal court appeals, and costs approximately \$750 as opposed to the \$11,500 cost of a formal one-day administrative hearing.

#### *Departmental Appeals Board*

The Departmental Appeals Board provides prompt and impartial dispute resolution for all of the components in the Department of Health and Human Services which involve medical care. The agency's jurisdiction includes: resolving disputes arising under the large public assistance grants (such as Medicaid and Aid to Families with Dependent Children) and discretionary grant programs; imposing civil monetary penalties and exclusions under fraud and abuse authorities; hearing appeals in enforcement cases brought by the Centers for Medicare & Medicaid Services; and hearing appeals in Medicare coverage as well as payment and entitlement cases. The agency issues the final decisions for the Department of Health and Human Services in all disputes with outside parties such as state agencies, Head Start grantees, universities, nursing homes, doctors, and Medicare beneficiaries.

The agency uses ADR to provide less contentious and quicker options than formal processes such as administrative adjudication in a wide range of its mission-related responsibilities, including:

- disputes with grantees, including states and universities, concerning disallowances of funds, indirect cost rates, and cost allocation plans;
- Medicare and Medicaid program exclusions; and
- imposition of civil sanctions against health care providers and nursing homes.

The agency uses ADR in a number of non-program areas, including:

- mediation of employment cases, including EEO, grievances, and interpersonal disputes;

- administration of the Federal Sharing Neutrals Program, a collaboration of over 40 federal agencies, which provides mediators on a collateral duty basis for EEO complaints throughout the federal sector;
- training in conciliation and facilitation services, and basic and advanced mediation skills for the Department; and
- the conduct, in collaboration with the Department of Transportation, of conflict management and mediation training.

### *Food and Drug Administration*

The Food and Drug Administration protects the health of the nation against impure and unsafe food, drugs, and cosmetic products. The agency uses ADR for all workplace and interpersonal disputes within the work environment. The agency reports finding that the use of ADR enhances communication, facilitates effective problem solving, and increases productivity and employee morale throughout the workforce.

### *Health Resources & Services Administration*

Health Resources & Services Administration, with approximately 1,500 employees, is the primary agency charged with improving access to healthcare for those who are uninsured, isolated or medically vulnerable. Additionally, the agency oversees all organ and tissue donation programs. The agency actively promotes the use of ADR to resolve claims of discrimination and other workplace disputes involving bargaining unit employees. The agency reports that use of mediation encourages cooperation and communication between management and employees and leads to improved performance by the organization.

### *National Institutes of Health*

The mission of the National Institutes of Health, which is the steward of medical and behavioral research throughout the nation, is the pursuit of fundamental knowledge about the nature and behavior of living systems and the application of that knowledge to extend healthy life and reduce the burdens of illness and disability. The Office of the Ombudsman has developed a special expertise in addressing and settling scientific disputes relating to peer reviews of grant-funded scientific research. The office additionally uses ADR processes to resolve disputes involving intellectual property rights and authorship of scientific papers. The agency determined that people in conflict are distracted from their responsibilities. Resolution of conflict allows them to concentrate on their work, thereby facilitating accomplishment of the agency's mission and underscoring the credibility and diligence behind the agency's research projects.

### *Office of Equal Opportunity and Civil Rights*

The Office of Equal Opportunity and Civil Rights provides agency-wide leadership and advice on issues of diversity, civil rights, and promotion of a supportive work environment for agency employees. The agency uses ADR to resolve informal discrimination complaints and improve communication.

### *Office of Hearings*

The Office of Hearings mediation program is an alternative to the Medicare/Medicaid formal provider reimbursement appeal process, and gives the provider and fiscal intermediaries an opportunity to resolve cases without going to hearing. The mediation program has a 90% success rate. It is cost-effective, with a cost of approximately \$750 for a mediation session as opposed to the cost of \$11,500 for a one-day formal administrative hearing. The program is also an effective time-saver, with final settlement generally occurring within 180 days after successful mediation, as opposed to several years for the formal appeal process (which then may be followed by a further appeal in federal court).

## DEPARTMENT OF HOMELAND SECURITY

The mission of the Department of Homeland Security is: leading the unified national effort to secure America, preventing and deterring terrorist attacks, and protecting against and responding to threats and hazards to the nation thereby ensuring safe and secure borders; welcoming lawful immigrants and visitors; and promoting the free flow of commerce. The agency is committed to ADR, and to developing a robust and proactive ADR program which serves approximately 160,000 employees. The Department of Homeland Security currently employs ADR in a wide range of areas, from disaster response to enforcement of regulations under the Immigration and Nationality Act.

### *Civil Rights and Civil Liberties*

The Office of Civil Rights and Civil Liberties ADR program improves the morale and productivity of the workforce. Its Alternative Resolution to Conflict Program has a 70% resolution rate for workplace disputes.

### *Citizenship and Immigration Services*

The Office of Special Counsel for Immigration Related Unfair Employment Practices (Customs and Border Patrol) offers conciliation services to manage disputes between employers and workers involving possible violations of the anti-discrimination provision of the Immigration and Nationality Act. Resolution saves the jobs of workers and work-authorized immigrants, and can encourage employers to change personnel policies and address potential systemic problems and patterns or practices of discrimination.

### *Federal Emergency Management Agency*

The Federal Emergency Management Agency's mission is to protect life and property through the coordination of disaster response and recovery. This mission is best fulfilled through teamwork and partnership. The agency's use of ADR facilitates quick and professional problem solving.

The Federal Emergency Management Agency's ADR processes have enabled participants to reach mutually satisfying alternatives to litigation, including:

- The agency created an arbitration program offered to more than 20,000 Los Alamos fire victims who could pursue an alternative to court proceedings.
- The agency uses arbitration to resolve disputes between itself and its insurance carriers under the National Flood Insurance Program. If these insurance companies use mediation to resolve state claims, they may use mediation in resolving their federal National Flood Insurance Program claims. The agency has helped to educate mediators and parties within some state-run mediation programs to resolve the homeowner claims.
- The agency created an appeal process for the 9/11 Heroes Stamp semi-postal fund for families of emergency relief personnel killed or permanently disabled while serving in the line of duty for that event. The ADR Office administers this program.
- The agency assists low-income disaster victims in securing appropriate legal services. People are helped to resolve their disaster-related problems quickly and without cost. They can seek counsel on estates, lost documents, consumer protection and fraud, landlord/tenant issues, insurance claims, home repair/contracting issues, and mortgage concerns.
- The agency administers a vital workplace ADR program which is available to all managers and staff. This program serves both its permanent employees and its non-permanent staff such as the Disaster Assistance Employees.

The Federal Emergency Management Agency is taking a broad approach and applying ADR to a vast array of its activities. This enhances productivity, morale, and customer service.

### *Secret Service*

The U.S. Secret Service is responsible for the physical protection of the President, Vice President, their families and a number of other dignitaries both in this country and abroad, and for enforcement of specific criminal laws. Their ADR program relates almost entirely to EEO or other workplace disputes, which are addressed by the Ombudsman Program serving the agency's 2,300 employees. Timely resolution of workplace conflict enhances the productivity of the agency by encouraging an early intervention which permits all employees to return to work on the important mission of the Secret Service.

### *Transportation Security Administration*

The Transportation Security Administration's mission is to protect the nation's systems of transportation in order to ensure the safe passage of people and commerce. The agency has developed an integrated and proactive approach to managing conflict, both internally and externally.

Internally, the agency has an Integrated Conflict Management System for workplace conflict, supported by its Model Workplace Office, the Office of the Ombudsman and the Office of Civil Rights, to create optimal communication and cooperation for issues, concerns, and decisions. The Office of the Ombudsman, established in January 2003, serves as a resource to employees with any concern relating to their workplace, and tracks patterns of complaints in order to identify needed changes within the organization. All EEO complaints are handled through the Alternative Resolutions to Conflict Program which is committed to addressing the root causes of any problem, in addition to resolving any alleged wrongdoing or conflict, using mediation as their primary ADR tool.

Externally, the Transportation Security Administration offers informal conferences to alleged violators of the Transportation Security Regulations for possible settlement of proposed civil penalty actions. Through its Contact Center, the agency's Office of the Ombudsman is the central point of contact for all public complaints, including passenger screening issues, and also is available as necessary to provide informal and neutral problem resolution services to the traveling public. The office provides a voice and an outlet to the public, and is in a unique position to hear from a wide variety of people in real time. It also collects and analyzes information for use in improving agency performance.

The Agency's Office of Chief Counsel uses ADR to efficiently and effectively resolve procurement disputes and protests before entering into a formal adjudicative process. Only about three of every ten matters proceed to formal adjudication.

### DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

The Department of Housing and Urban Development is responsible for a number of programs which foster the availability of housing and community development, including funding and insuring mortgages, developing and supervising financial support relating to housing, and enforcing fair housing laws throughout the country. The agency primarily uses ADR in resolving workplace disputes. The agency's Early Resolution Program provides managers with the means to effectively and efficiently address many types of workplace disputes, thereby decreasing the time needed for conflict resolution and increasing the time dedicated to accomplishing the agency's goals.

### DEPARTMENT OF THE INTERIOR

The agency's mission is to: protect and manage the nation's natural resources and cultural heritage; provide scientific and other information about those resources; and

honor its trust responsibilities or special commitments to American Indians, Alaska Natives, and affiliated Island Communities. The Department's ADR initiatives directly support these missions.

The Department is comprised of the Office of the Secretary, the Office of the Solicitor and eight Bureaus: Bureau of Indian Affairs, Bureau of Land Management, Bureau of Reclamation, Fish and Wildlife Service, Minerals Management Service, National Park Service, Office of Surface Mining, and the U.S. Geological Survey. The agency issued a broad ADR policy in 1996 covering all Offices and Bureaus and encouraging the broadest possible use of early collaboration, ADR, and negotiated rulemaking.

In 2001, the Secretary created the Office of Collaborative Action and Dispute Resolution to coordinate and oversee implementation of its policy on the use of ADR, negotiated rulemaking and collaborative problem solving to prevent, manage, and resolve conflicts arising in all areas of the agency's work including program areas, workplace and employment, procurement, and policy/regulatory. To advance implementation of the policy, that Office works closely with the Office of the Solicitor to provide coordinated policy and legal guidance, and support for the broadest possible use of ADR and negotiated rulemaking processes, and provides leadership for the Interior Dispute Resolution Council comprised of designated Bureau Dispute Resolution Specialists from each of the Department's Bureaus and Offices.

The agency is expanding its workplace ADR program and used a collaborative process involving all of its stakeholders to participate in the design of an integrated conflict management system called CORE PLUS. This system is being implemented by all Offices and Bureaus to ensure that any type of internal employment conflict is recognized, addressed and resolved at the earliest opportunity and the lowest possible level. The use of ADR processes is one component of this conflict management strategy.

The agency also has successfully used a variety of ADR, collaborative decision making processes, and negotiated rulemaking to address a wide range of natural resource and other external conflicts and disputes. Each Bureau and Office in the agency is committed to increasing and expanding the use of ADR processes to prevent, manage, and resolve internal and external sources of conflicts and disputes.

The Bureau of Land Management, for example, uses ADR/conflict prevention strategies and principles in working with all natural resources stakeholders – tribal and state governments; communities; local, regional, and national interests and interest groups; and the general public – to provide opportunities for early public involvement in agency decision making, to encourage early conflict prevention, and to ensure conflict management and resolution. The community and stakeholder participation processes have been effective in preventing or mitigating the impact of litigation, appeals, and protests in a range of areas: energy and mineral development; resource conservation; land health and safety; grazing; timber; environmental protection versus development and land/resource uses; and recreation.

The National Park Service has successfully used negotiated rulemaking processes to develop driving regulations for several national seashores. In each situation, a diverse group of stakeholders including federal, state and local government entities, local residents, seasonal visitors, environmental groups, and local businesses were included in the negotiation process and reached consensus on regulations that addressed their competing needs and interests in the resource protection, resource use, and recreation on the national seashore.

The Bureau of Indian Affairs has led a pilot project to engage tribes and other interested stakeholders in one region in the collaborative design of a system for resolving internal tribal government conflicts and other disputes that otherwise would be resolved through administrative adjudication and litigation or by senior agency leadership. The conflict resolution process has been developed and all stakeholders are committed to using it. This is a model that can be exported to other regions of the country.

The Office of Environmental Policy and Compliance is committed to increasing the use of collaborative decision making and ADR processes in the implementation of the National Environmental Policy Act, and the U.S. Geological Survey is actively advocating the use of joint fact-finding and other ADR processes to ensure that reliable, credible, technical, and scientific information is available to stakeholders engaged in environmental conflict resolution processes and collaborative resource management efforts.

In the Office of Hearings and Appeals, the Board of Land Appeals implemented an ADR program and is currently reviewing the data gathered from the first year of operation to make any necessary adjustments to increase the use of ADR to resolve matters on appeal. The Board of Indian Appeals refers appropriate cases for ADR assessment.

## DEPARTMENT OF JUSTICE

The Department of Justice serves as the nation's litigator in federal courts throughout the country and handles a broad array of cases, both defensive and affirmative. The Justice Management Division uses ADR solely in EEO matters handled by the Equal Employment Opportunity Staff. Other components use a broad array of processes in litigation in their various areas of specialty.

### *Civil Division*

The Civil Division is involved in both affirmative litigation enforcing the nation's laws, and defensive litigation to uphold the interests of the United States.

In affirmative litigation, the use of ADR has advanced that mission in a variety of appropriate cases, including civil health care fraud and civil consumer fraud, in the following ways:

- crafting creative and broad remedial relief not available through court adjudication;
- developing a global settlement to resolve related disputes;
- formulating resolution in one dispute that can set parameters for the resolution of similar future disputes; and
- achieving significant savings in the costs and delay of litigation and discovery, thereby allowing use of saved resources to handle matters that cannot or should not settle.

In defensive litigation, the use of ADR has supported the mission of the Civil Division with these beneficial results in a broad range of cases such as aviation and admiralty, medical malpractice and wrongful death actions under the Federal Tort Claims Act, class actions alleging discrimination, and actions under the Freedom of Information Act:

- significant savings in the costs relating to litigation and discovery which permits greater resources towards cases which cannot or should not settle;
- significant savings in the dollar amounts of settlements;
- creative solutions which can substitute for the payment of money or reduce potential monetary exposure; and
- savings of both personnel and court time by resolving disputes more quickly than litigation.

### *Civil Rights Division*

The agency's mission is to enforce the laws and defend the interests of the United States, and to ensure fair and impartial administration of justice for all Americans. In enforcement litigation, ADR has supported that work in appropriate cases, as follows:

- The Disability Rights Section offers an administrative mediation program for the Americans with Disabilities Act which allows the agency to achieve meaningful compliance with the law without having to allocate scarce resources to investigate or litigate these disputes. The ADA (Americans With Disabilities Act) Mediation Program enables the agency to more quickly respond to and resolve these discrimination complaints effectively, efficiently, and voluntarily, resulting in the elimination of architectural, communication, and attitudinal barriers for people with disabilities throughout the country. The agency's application of mediation to rights-based disputes is a significant shift away from the traditional adversarial, government-directed, "winner take all" method of resolution. The nature of mediation itself requires the parties to work together to resolve disputes. This cooperative, non-litigious approach preserves, rather than severs, the relationship between the parties, especially important for individuals with disabilities in rural areas who have few options for carrying out business, leisure, and government activities. The use of mediation in this area expands the reach of the statute at a minimal expense to the government.
- The Housing and Civil Enforcement Section, in the Attorney General's words, "...open[s] doors for people as they search for housing.....[and] will not allow

discrimination to serve as a deadbolt on the dream of safe accommodations for their family.” The Section successfully utilized third party assistance to reach resolution in over 60% of the consent decrees it obtained in FY 2005.

### *Community Relations Service*

This agency is the Department of Justice’s “peacemaker” for community conflicts and tensions arising from differences of race, color, and national origin. It deploys highly skilled professional conciliators to assist state and local units of government, private and public organizations, and community groups in preventing and resolving racial and ethnic tensions and civil disorders, and in restoring racial stability and harmony. The agency, through mediation and conciliation, provides an effective and efficient dispute resolution mechanism for communities and is an alternative to costly and often protracted litigation. As part of its results-oriented dispute resolution strategy, the agency works with communities to build local capacity for dealing with racial tensions and conflicts. Its work with communities includes training on the formation of Human Relations Commissions to address local conflicts, and training for law enforcement officers in basic mediation skills.

The Ombuds Program facilitates problem solving between staff and management at an early stage for non-EEO complaints and grievances. When employees are distracted by workplace concerns, their performance may be affected adversely. Having processes in place to address those concerns helps the agency add value to its work product by assuring a consistent quality of service to all of its customers.

### *Environment and Natural Resources Division*

This component represents the United States in litigation involving public lands and natural resources, environmental quality, Indian lands and claims, and wildlife resources. The agency has made great use of ADR to advance various facets of its mission in appropriate cases, as the following examples illustrate:

- In furtherance of its responsibility to reduce water pollution, the agency used ADR to reach an innovative settlement in a highly technical case involving the Clean Water Act. The resolution included a record \$34 million penalty and injunctive relief which addressed 5,500 miles of pipeline and protected the environment from the devastating impacts of oil spills.
- In furtherance of its responsibility to reduce air pollution, the agency used ADR to reach a mediated Clean Air Act agreement with a wood products company and its plants which translated into cleaner air for the communities located near the company’s facilities.
- In furtherance of its responsibility to enforce fish and wildlife conservation laws, the agency used mediation in combination with bilateral negotiations over the course of eight years to reach agreement in a lawsuit involving over 180,000 highly contentious claims involving water rights and endangered species. The agreement established a 30-year framework for balancing interests in water use

- and non-federal timber management compliance under the Endangered Species Act, and can serve as a model for other ADR processes involving complex, multi-party claims.
- In advancement of its responsibility to defend the United States against challenges to its cleanup and compliance actions, the agency successfully concluded pre-litigation mediation in a case seeking contribution to cleanup costs for contamination at chemical facilities. The mediation enabled the parties to exchange 100,000 pages of relevant documents without the necessity for formal discovery or the deposition of expert witnesses. Use of ADR efficiently resolved all of the company's putative claims against the government at an early stage.

#### *Executive Office for United States Attorneys*

The Executive Office provides general executive assistance, policy review, and administrative oversight to the offices of the 93 United States Attorneys. The Equal Employment Opportunity staff of the Executive Office handles EEO complaints from within all of the U.S. Attorneys' Offices throughout the country as well as within the Executive Office. Select employees from U.S. Attorneys' offices, as well as from the Executive Office, are trained to serve as collateral duty mediators. Mediation is employed at both the informal and formal stages of the EEO process. Successful mediation enables agency personnel to return to productive work more quickly without the distraction of unnecessary litigation.

#### *United States Attorneys' Offices*

The U.S. Attorneys' Offices throughout the country defend civil cases in which the United States is a party and institute affirmative litigation to enforce the laws. These offices, which use ADR in both defensive and affirmative litigation, comprise the largest "user" of ADR in the Department of Justice. A statistical analysis of FY 2000 through FY 2003 showed that over 8,000 cases were referred to mediation.

In defensive litigation, ADR has: resulted in numerous settlements of smaller amounts of money than the amounts originally sought in some defensive lawsuits; facilitated more focused discovery; and resulted in more efficient and expeditious case resolution in appropriate cases, including tort and workplace discrimination. Illustrative examples of benefits realized are:

- avoidance of the expense of extensive discovery in employment discrimination cases;
- avoidance of a substantial judgment in a false advertising case when the case settled for payment of no money from the government;
- resolution of tort claims where continued litigation could have resulted in significant expert expenses and the possibility of increased loss of revenues through a judgment.

In affirmative litigation, the various offices prosecute civil cases in which the United States is a party, and collect debts which are owed to the federal government, but are administratively uncollectible. The offices' successful use of ADR in appropriate cases has advanced that mission, as described in the following examples:

- resolution of a civil forfeiture case saved significant sums that would otherwise have been spent on expert witness fees;
- resolution of a suit for false reporting on material used to build a road resulted in road repairs that increased safety and benefited the affected rural communities;
- recovery of damages under a property insurance policy was accomplished many years sooner than would have been possible if the case had gone to trial; and
- resolution of a health care fraud case involving a nationwide fraud scheme saved enormous amounts of staff and court time and attorney hours in trial preparation and trial time.

#### *Federal Bureau of Investigation*

The Bureau is the principal investigative arm of the Department of Justice, investigating violations of federal law through gathering evidence and interviewing potential witnesses. ADR is used throughout the agency in appropriate cases involving workplace disputes in a workforce of over 30,000 employees. By providing a venue to address workplace disputes, especially those that are non-EEO, employees are able to address issues earlier, in a non-adversarial environment, thus preserving working relationships and enabling them to return to their investigative duties.

#### *Federal Bureau of Prisons*

The Federal Bureau of Prisons is responsible for the safety, care and housing of some 185,000 federal prisoners in 113 institutions and 28 community corrections offices, and employs approximately 35,000 people. The agency uses ADR for EEO and other workplace disputes, concentrating on swift and early, front-end resolution of disputes whenever possible, before the dispute undermines effective and safe performance of important duties. The EEO officer also serves as a full-time ADR coordinator. The agency uses primarily mediation and has developed an interagency agreement with the Federal Bureau of Investigation to use FBI mediators at no cost. The agency has a dispute resolution program at 43 different prisons where a collateral duty employee, jointly selected by the warden and the union president, will mediate other workplace concerns. Additionally, the agency offers its dispute resolution program to management staff in two of its six regions.

The agency has had a number of employees trained to present a course for managers on appropriate workplace conduct and communication skills. The focus on early recognition and resolution of disputes is very important to the mission of the agency and decreases or eliminates the possibility of disgruntled or distracted employees who are responsible for the safety of co-workers and prisoners.

The agency also uses various ADR processes in the resolution of procurement disputes, including partnering, mini-trial, early neutral facilitation and mediation.

#### *Justice Management Division, Equal Employment Opportunity Staff*

The Justice Management Division serves as the management arm of the Department of Justice. ADR is available during both the informal and formal stages of the EEO process.

#### *Tax Division*

The Tax Division uses a number of ADR processes, primarily mediation and some arbitration, in a broad array of civil litigation, including individual, business and corporate taxation issues, in both federal district and bankruptcy courts.

### DEPARTMENT OF LABOR

The Department of Labor enforces almost 200 different federal statutes relating to a broad variety of working conditions. The agency's Office of Civil Rights uses mediation to resolve EEO and labor relations personnel issues.

For a period of several years in the early 1990's, the agency established a program for independent neutrals to mediate cases involving a broad range of statutes including Family and Medical Leave Act, Wage and Hour Act, and whistleblower statutes. The program has since shifted those functions to the Administrative Law Judges. The current Settlement Judge Program uses sitting Administrative Law Judges for all mediations conducted during pre-hearing conferences.

### DEPARTMENT OF STATE

The State Department uses formal ADR exclusively in the workplace. The agency reports that the ADR process gives employees and management an opportunity to address and resolve issues quickly and effectively, thereby allowing parties to return their focus to accomplishing the agency's mission of advising the President on all foreign policy. The agency uses mediation in EEO proceedings and uses an ombuds process for non-EEO civil service issues. With expanded video conferencing capabilities, the agency can reach the broad geographic scope of its employees.

### DEPARTMENT OF TRANSPORTATION

The agency's mission is to serve the United States by ensuring a fast, safe, efficient, accessible, and convenient transportation system which meets the vital national interests and enhances the quality of life of the American people, today and into the future. In 2002, the agency issued a Department-wide policy endorsing the use of ADR and collaborative problem solving in advancing national transportation goals by preventing, minimizing and resolving disputes among its employees and with external parties, in a mutually acceptable and cost-effective manner. Areas in which the use of various forms

of ADR are encouraged include: workplace issues; issuance of regulations; enforcement and compliance in issuing and revoking licenses and permits; contract and grant awards and administration; litigation and formal or informal adjudication; and interactions with the public and regulated communities.

The Department of Transportation has established the Center for Alternative Dispute Resolution which works with organizations and individuals Department-wide to increase the knowledge, quality, and use of ADR. The Center provides ADR services and is an information resource to both agency ADR providers and users. The Center, partnering with the Department of Health and Human Services, offers awareness and skill-based training. By working together, both organizations offer a variety of courses, instructors, and coaches to employees and provide them with opportunities to learn in a diverse environment and to recognize the issues they face in a variety of organizational settings. The Center develops and monitors ADR policy and implementation throughout the Department's operating administrations.

The Center for Alternative Dispute Resolution also coordinates ADR policy relating to negotiated rulemaking. The Department of Transportation was the first federal agency to use negotiated rulemaking in the early 1980's. Negotiated rulemaking continues to be used Department-wide to enhance public participation in regulation development.

The One DOT Sharing Neutrals Program, sponsored by the Departmental Office of Civil Rights, is a Department-wide program that uses mediation to resolve EEO complaints. The program maintains a cadre of collateral duty mediators and contract mediators. The program also uses mediators from the Federal Shared Neutrals Program and other ADR programs for use in locations outside the agency's metropolitan area.

Several of the agency's operating administrations have established specific ADR policies to advance their mission. Their actions are highlighted below.

#### *Federal Aviation Administration*

The agency's ADR initiatives extend from contracts and procurement to labor disputes between the agency and the National Air Traffic Controllers Association. The Office of Dispute Resolution for Acquisition is responsible for resolving all protests and contract disputes arising out of procurements and contracts entered into under the agency's Acquisition Management System. It is also responsible for resolving contests involving competitive sourcing of "commercial activities," i.e., activities deemed not inherently governmental under the Federal Activities Inventory Reform Act.

The agency also has instituted a new and rapidly expanding pilot program, the Center for Early Dispute Resolution Pilot Program, which will help employees and managers address workplace disputes at their earliest stages, with the goal of reducing or eliminating the financial impact of conflict on the agency. The Center is freestanding from the EEO office, which also uses ADR. The Center sought to encourage early contacts from management and employees relating to any and all brewing disagreements.

The program is specifically designed to address conflict before it turns into an EEO or other formal complaint.

Additionally, the Federal Aviation Administration has instituted a Neutral Evaluation program which is integrated into the negotiated grievance process for all labor disputes between the National Air Traffic Controllers Association and the agency. This program routes a dispute to an independent neutral third party with expertise in the particular subject matter at issue. The neutral gives a non-binding decision reflecting how a dispute would be determined by a judge or arbitrator. The program provides a powerful inducement to resolution, promotes collaboration, and reduces the negative impacts of conflict because it takes the focus off the people and places it on the issues.

#### *Federal Highway Administration*

The Federal Highway Administration regulates Department of Transportation programs with a broad view towards safety, environment, and operations. The agency has experience in using ADR in negotiated rulemaking and regulatory compliance. For example, the agency conducted regulatory negotiation on incorporation of physical fitness determinations into the commercial driver's license process for state enforcement of medical certification.

The agency also reviews and resolves environmental projects under the National Environmental Protection Act process. For example, in partnership with the Institute for Environmental Conflict Resolution, the agency sponsored eleven regional workshops for collaborative problem solving in areas of tribal and citizen concern.

#### *Federal Motor Carrier Safety Administration*

The agency's primary mission is to reduce crashes, injuries, and fatalities involving large trucks and buses. The agency uses ADR for disputes involving civil sanctions against motor carriers. Its binding arbitration program was developed to expand the options available to motor carriers, brokers, shippers, freight forwarders, and other individuals and entities engaged in the use of commercial motor vehicles in interstate transportation. Through this voluntary program, carriers may elect to submit cases that involve only the amount of a civil penalty to an arbitrator rather than to the agency's Chief Safety Officer.

#### *Federal Transit Administration*

The Federal Transit Administration seeks to improve mass transportation operations, facilities, and equipment through public/private cooperation and assistance for local and state government financing. The agency's workplace ADR program is available for all matters of concern or dissatisfaction. The program goals are to "enhance communication, increase morale and help employees work as a more cohesive team to accomplish the Federal Transit Administration's mission." The agency reported that use of ADR saves time and money and has decreased the number of formal complaints.

### *Office of the Inspector General*

The Office of Inspector General performs all audit and investigative functions in evaluating the effectiveness and efficiency of the Department of Transportation's programs and operations. In 2005, the Office of the Inspector General implemented a two-year pilot program to increase effective and efficient communication within the organization. The program offers voluntary ADR for all types of workplace-related disputes or matters of concern, such as job assignments or employee/supervisor relationships, to agency employees throughout the country.

## DEPARTMENT OF THE TREASURY

### *The Alcohol and Tobacco Tax and Trade Bureau*

The agency's mission is to enforce and administer laws covering the production, use, and distribution of, and to collect excise taxes for, alcohol, tobacco, firearms, and ammunition. The agency's Voluntary Disclosure Program provides cooperative problem solving for civil enforcement. Voluntary disclosure is the intentional disclosure to authorized agency officials of material facts by industry members regarding their non-compliance with the laws and regulations that the agency administers. The Program is intended to encourage compliance with agency laws and regulations and benefit industry members who voluntarily identify and come forward with instances of non-compliance. It allows the agency to expedite the decision-making process and to better manage audit and investigative resources in its field operations. Voluntary disclosures also provide benefits to industry members, e.g.:

- reduction of cost (time and money) inherent in investigations to uncover violations;
- mitigation of actions the agency takes in response to violations by reducing penalties or giving other special considerations when/if the agency proposes administrative action;
- provision of an incentive for detecting and correcting errors early;
- provision of an opportunity to obtain special guidance on future compliance; and
- demonstration of credibility, good faith, trust, and confidence that fosters goodwill and a positive working relationship with the agency.

The Early Complaint Resolution Program encourages the use of ADR techniques to expedite the informal resolution of employment disputes raised in the pre-complaint EEO process. Because the Program helps to resolve complaints quickly and at the lowest possible level, it enables managers and employees to focus on their work. Additionally, overall employee morale can be improved when agency management is viewed as being open-minded and cooperative in seeking to resolve EEO disputes through ADR. In resolving conflicts, ADR helps to create a positive working environment where employees can thrive, resulting in the advancement of the agency, its work, and its people.

### *Bureau of Engraving and Printing*

The agency is responsible for the design and printing of various Federal Reserve notes, postage stamps, and other Treasury securities or certificates. The Bureau Resolution Center is a centralized organization designed to address any type of workplace dispute, using a wide range of ADR techniques including coaching, mediation, and organizational development and team building. The Center's approach is based on the perspective that "a reduction in life stressors is directly correlated to an increase in workplace productivity."

### *Bureau of Public Debt*

The agency administers the public debt through borrowing money backed by marketable U.S. Treasury securities. The agency uses mediation to facilitate dispute resolution in the EEO context and "get our employees back to work quickly."

### *Departmental Offices/Departmental Oversight Office*

Within the various bureaus throughout the Department of Treasury, the Human Resources divisions routinely and effectively use ADR in EEO cases. The Secretary of the Treasury issued a departmental policy memorandum in 2003 which explicitly urged management, wherever possible, to use ADR in the EEO complaint process, finding that a workplace which encourages open communication and conflict resolution fosters a more productive workforce.

### *Financial Crimes Enforcement Network*

The agency fosters and supports investigative cooperation and intelligence sharing among global law enforcement agencies enforcing an array of laws protecting against financial crimes, including money-laundering laws. The agency's Alternative Solutions Assistance Program is available to address all non-EEO personnel matters in the workplace. Overall employee morale is improved by the early resolution of employment and employee concerns which enhances the overall working environment and reduces stress and tension. The use of ADR processes results in reduction of costs associated with processing workplace disputes through formal channels.

### *Financial Management Service*

With a staff of slightly over 2,000 employees, the agency: disburses billions of dollars for almost a million federal payments including Social Security, veterans' benefits, and income tax returns; collects billions of dollars in federal revenues; and manages a daily cash flow of around \$50 billion. The agency's Alternative Dispute Resolution Program addresses and offers early resolution for workplace disputes. The Program decreases the time, cost, and other resources expended in resolving workplace conflict.

### *Internal Revenue Service*

The Internal Revenue Service administers and enforces the country's revenue laws and related statutes through the routine collection of a proper assessment of taxes from the public by working efficiently, effectively, and fairly. The agency has a Taxpayer Advocate Service division which utilizes dispute resolution processes while acting as a liaison between a taxpayer and the agency to resolve taxpayer issues. The agency hosts an extensive and user-friendly Web site and provides personal advisors for a taxpayer's individual issues. Additionally, the Taxpayer Advocate Service collects data and taxpayer comments and input to determine areas requiring systemic revisions.

In the workplace arena, the agency supports early resolution of discrimination complaints in order to increase employee satisfaction and workplace productivity. Employees who feel that their issues are not only heard, but also resolved quickly and fairly, have a tendency to extend this practice to customers (i.e., the taxpayers) and work harmoniously with them to resolve their issues.

### *Internal Revenue Service Appeals*

The mission of this agency is to resolve tax controversies, without litigation, on a basis that is fair and impartial to both the government and the taxpayer, and in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Internal Revenue Service. As the dispute resolution forum for the Internal Revenue Service, the agency used a form of negotiated rulemaking to develop an ADR program that provides dispute resolution to customers, whether involving traditional case resolution authority or ADR techniques. The ADR options facilitate communication, enhance the agency's services to taxpayers and tax practitioners, and offer prompt and less expensive methods for taxpayers to resolve their disputes after traditional negotiations have failed. When agreement between the taxpayer and the Internal Revenue Service is reached, the burdens and costs to both of them are reduced.

The agency also uses ADR for the resolution of EEO complaints.

### *Office of the Comptroller of the Currency*

The Comptroller of the Currency serves as the administrator and regulator of all national banks. The agency has developed an ADR program covering workplace disputes and has initiated, as well, an innovative program to address consumer complaints involving the banks that the agency regulates and supervises.

The agency has a range of ADR policies for resolution of workplace disputes: mediation for the informal stage of the EEO complaint process; the Fair Alternatives and Innovative Resolutions process for workplace disputes that are not EEO-related; mediation in the pre-grievance process to resolve workplace disputes for collective bargaining unit members; and arbitration for the grievance process for collective bargaining unit members. The resolution of workplace disputes, at the earliest opportunity and lowest

level possible, eliminates distractions, promotes increased productivity, and ensures the mission of the agency is accomplished in the most effective and efficient manner.

The agency's Office of the Ombudsman, through its Customer Assistance Group, addresses disputes between consumers and national banks or their subsidiaries. It hosts a user-friendly Web site which includes answers to most consumer questions, as well as forms to submit for formal complaints and Web site addresses for other federal agencies which cover different areas relating to banking and credit. About 70,000 contacts seeking customer assistance are received each year.

#### *Treasury Inspector General for Tax Administration*

The agency provides audit and investigative services ensuring the honest and reliable administration of the tax laws of the country. It uses ADR in workplace and EEO disputes, and finds that the use of ADR techniques increases the chances that workplace complaints and concerns are addressed early in the dispute process. This enables the agency to focus its resources on accomplishing its mission.

#### *United States Mint*

The Mint produces sufficient circulation coinage for current commerce needs and safeguards the U.S. gold and silver reserves. ADR is used for disputes in EEO, labor relations (including grievances), Merit System Protection Board appeals, and Federal Labor Relations Authority actions. The ADR processes improve communication in the workplace, ensure accountability in resolving workplace issues, achieve mutually satisfactory resolution of conflicts, and decrease the time, costs, and other resources expended in resolving conflicts.

### DEPARTMENT OF VETERANS AFFAIRS

The mission of the Department of Veterans Affairs is to serve the nation's veterans and their families to ensure that they receive medical care, compensation and pension, burial services, and other benefits provided by Congress in recognition of the veterans' service to America. The agency is committed to preventing, minimizing, and timely resolving disputes among its employees and with third parties, and uses ADR to address workplace, procurement, and other disputes.

The agency primarily uses mediation and facilitation to address workplace disputes occurring within the workforce of over 235,000 employees. The emphasis on early resolution of workplace disputes has resulted in a decrease in the number of EEO contacts and complaints, thereby saving resources and promoting greater efficiency in accomplishing the agency's mission.

The agency also dedicates resources to training its employees, managers, and union officials on ADR and manages a roster of agency employees who are certified to mediate workplace disputes voluntarily as a collateral duty.

Finally, to improve the work environment and prevent workplace disputes, the agency designed the Organizational Climate Assessment Program. This program is a tool used to examine employee perceptions of the workplace and assists management officials in understanding what drives employee satisfaction or dissatisfaction. The program's focus on early resolution of employee concerns has helped to improve productivity and employee satisfaction.

The agency's Procurement ADR Program uses ADR to resolve bid protests, contract claims, or other procurement issues in controversy before a third party files a related appeal with the United States Civilian Board of Contract Appeals, established in January 2007, or the United States Court of Federal Claims.

## INDEPENDENT AGENCIES

### *Commodity Futures Trading Commission*

The agency is responsible for regulation and enforcement of integrity and fairness in futures trading, and uses ADR in workplace disputes. The agency promotes early and informal resolution of all disputes insuring minimal "down time" and enabling workforce personnel to return their focus to mission accomplishment. The agency reports that improved communication has resulted from dispute resolution efforts.

### *Consumer Product Safety Commission*

The agency's mission is to protect the public from unreasonable risks of serious injury or death from consumer products under its jurisdiction. The agency utilizes ADR for EEO complaint activity. The primary method of dispute resolution is mediation, using a neutral mediator from the Shared Neutrals Program at no cost. The agency reports that its use of ADR provides for a quicker resolution, which results in better employment relationships, and enables all parties to return their focus to productive work.

Additionally, the agency's compliance recalls and corrective action process utilize a broad array of ADR techniques to achieve voluntary compliance with agency-administered statutes and regulations. The voluntary compliance activities result in better corporate compliance with product safety issues, thereby saving lives. An example is the agency's use of mediation to resolve a major dispute involving the risk of carbon monoxide poisoning. After an extensive investigation, the agency's staff had concluded that carbon monoxide could seep from high-temperature plastic vent pipes attached to certain furnaces and boilers, and threaten the lives of residents in up to 250,000 American homes where they were installed. The Conflict Prevention and Resolution Institute for Dispute Resolution gave the Consumer Product Safety Commission its award for Significant Practical Achievement in recognition of its use of mediation to achieve the product safety recall in this case.

The agency's Small Business Ombudsman serves as an effective conduit to facilitate communication between the small business community and the agency. The Ombudsman advises businesses on compliance with applicable statutes and regulations, provides technical assistance to businesses trying to resolve Compliance and Hazard Identification/Reduction issues, and maintains a "one stop shopping hotline" for assistance and information on the agency's programs and regulations.

#### *Corporation for National and Community Service*

The agency provides a multitude of opportunities fostering civic engagement for citizens of all ages in projects relating to education, the environment, public safety, and other citizen needs. The workplace ADR program is used to resolve or minimize the effect of disputes and enhance productivity on the projects undertaken by their employees. The agency's ADR policy covers all types of workplace issues, including co-worker conflict as well as employee/supervisor disputes, and offers a range of processes from facilitation to mediation and group intervention. The agency provides important follow-up training to ensure that agreed-upon modifications are sustained. The agency reports that the use of ADR processes helps in resolving workplace disputes early and that, in particular, the use of group interventions helps to identify barriers to effective group work performance.

#### *Environmental Protection Agency*

The mission of the agency is to protect human health and the environment and foster a cleaner and healthier environment for the American people. ADR is used extensively throughout the agency, as described below.

- Since the 1970s, the agency has been a pioneer in using ADR to prevent or reduce environmental conflicts and promote constructive collaborative problem solving in a wide range of activities and programs. During the past 30 years, the agency has sponsored or participated in environmental ADR cases addressing issues related to all aspects of its mission. The agency encourages the use of various ADR processes in environmental decision making contexts, including adjudications, rulemaking, policy development, administrative and judicial civil enforcement actions, permit issuance, hazardous waste and other site-related determinations, and the administration of contracts and grants. The agency's Conflict Prevention and Resolution Center in the Office of General Counsel provides environmental ADR services to the entire agency, administering agency-wide environmental ADR activities, assisting other agencies' offices in resolving environmental disputes, and coordinating with a network of ADR staff in the agency's ten Regional Offices on environmental dispute prevention and resolution initiatives. Since 1988, the agency has maintained a dedicated contract vehicle to provide access to private sector neutral third parties for environmental ADR. The Conflict Prevention and Resolution Services contract, managed by the Conflict Prevention and Resolution Center, is available to all agency headquarters and regional offices and provides many of the agency's environmental conflict resolution services.

- The ADR program in the agency’s Office of Administrative Law Judges is used to facilitate settlements of administrative civil penalty enforcement cases under a set of federal environmental laws. Parties are offered an opportunity to participate in an ADR proceeding with an Administrative Law Judge serving as a neutral.
- The Office of the Small Business Ombudsman reviews and resolves disputes between the agency and the small business community in the development and enforcement of environmental regulations.
- The Regional Public Liaison Manager (formerly National Ombudsman) assists the public and regulated community in resolving problems concerning requirements under the agency’s hazardous waste programs.
- The agency uses mediation for cases which otherwise would be heard by the United States Civilian Board of Contract Appeals. One of the Board judges points out strengths, weaknesses and common ground for each party’s case, which normally results in the negotiation of a mutually satisfactory resolution of the case. An “outcome prediction” form of ADR is also used for contract protest cases, where the Government Accountability Office attorney who would participate in the agency decision informs the parties of the expected outcome (sustain or deny). If the prediction is that the case would not be sustained, both the agency and the protesting contractor can save money by not proceeding.
- The agency’s Workplace Solutions Staff is a “first stop” option to encourage resolution of workplace problems at the very earliest stage possible. Employees and managers have the opportunity to address concerns prior to utilizing any formal systems of redress. They are given information about avenues of redress as well as agency programs that could support their needs. The workplace initiatives have been very cost-effective, saving the agency resources that otherwise would have been used to process complaints, contributing to increased productivity, and preserving and encouraging effective working relationships.

### *Equal Employment Opportunity Commission*

The agency’s mission is to promote equality of opportunity in the workplace and enforce federal laws prohibiting employment discrimination. Promoting and expanding the use of mediation and other types of ADR is the centerpiece of its framework for accomplishing the agency’s mission.

ADR is an important part of the agency’s private sector enforcement activities:

- Negotiated settlement and conciliation are key components of its enforcement strategy for the private sector charge process. Negotiated settlement attempts often result in resolution of charges of discrimination before a determination is

made on the merits of a charge. Conciliation efforts to resolve a charge after a finding of discrimination are undertaken as required by the statutes which the agency enforces.

- Through its National Mediation Program, the Commission proactively promotes the use of mediation at any stage of the administrative process to resolve private sector charges of discrimination which may have merit. The Commission's program uses a combination of internal mediators as well as some external contract mediators. Many of the mediations result in creative non-monetary resolutions designed to meet the parties' needs and interests.

ADR also is an important part of the agency's EEO complaint processing in the federal sector, where it uses various techniques to resolve complaints at both the hearing and appellate stages of the complaint process:

- Equal Employment Opportunity Commission Administrative Law Judges achieve resolution through a variety of ADR techniques such as settlement, mediation, referral to an agency's mediation program, early neutral evaluation, and referral to an Administrative Law Judge acting as a "settlement judge." Thirty percent of complaints settle during the hearings stage of the process.
- The agency's Federal Appellate Settlement Team program offers ADR techniques to resolve appeals from Final Agency Decisions on the merits.

The agency seeks to provide leadership and serve as a model for other employers. The agency's model workplace initiative is intended to ensure that the very principles and standards which it promotes to private business and other federal agencies are readily apparent in its own operations. The RESOLVE Program, which is a key component of the model workplace initiative, is a comprehensive one-stop ADR program to resolve all types of workplace disputes informally. The agency promotes the use of ADR to provide faster, less expensive and contentious, and more productive results in eliminating workplace discrimination.

#### *Export-Import Bank of the United States*

The Export-Import Bank facilitates and aids in financing exports of U.S. goods and services. The mission of the Bank is to help American exporters meet government-supported competition from other countries and to correct market imperfections so that commercial export financing can be accomplished. The Bank employs ADR in the EEO process, and is in the process of revising its Administrative Grievance System from a grievance model under collective bargaining agreements to a mediation model.

#### *Federal Communications Commission*

The mission of the agency is to regulate interstate and international communications by radio, television, wire, satellite, and cable. The agency's use of ADR has resulted in,

avoided, or reduced litigation before the agency and appeals to the courts, thereby conserving its own staff as well as private resources. Its regulations permit the use of ADR in many of its jurisdictional areas:

- damage complaint cases involving common carriers
- wireless licensing disputes
- collection of debts owed the government
- cost-sharing plan for relocation of licensees
- establishment and publication of standard or industry-wide generic requirements for telecommunications or customer premises equipment
- complaints involving multi-channel video and cable services
- price disputes for sale of existing wiring by multi-video program distributor in multi-dwelling unit
- disputes concerning commercial leased access
- amount of damages in program access disputes
- interconnection disputes
- cable home wiring disputes

Additionally, the agency uses mediation to resolve workplace EEO disputes.

#### *Federal Deposit Insurance Corporation*

The Federal Deposit Insurance Corporation preserves and promotes public confidence in the U.S. financial system by: insuring deposits in financial institutions; managing risks to the deposit insurance fund; and limiting the effect on the economy from depository institution failures. The agency uses a broad range of ADR processes in a variety of substantive areas and is one of the few agencies that also uses voluntary arbitration. The agency established an ADR Steering Committee which is responsible for ADR activities agency-wide and the coordination of ADR policies and programs to ensure a consistent organizational approach.

The agency has an EEO Mediation Program in which mediation is available at both the informal and formal stages of the EEO complaint process. There also is a Workplace Disputes Program which is designed to address disputes arising between employees at all levels. The program is intended to provide a mechanism for employees to resolve conflicts through early intervention and without the need to file a formal complaint.

The agency also has an Office of the Ombudsman that provides ADR services and outreach largely to the public and regulated entities.

#### *Federal Election Commission*

The mission of the agency is to administer and enforce the Federal Election Campaign Act which governs the financing of federal elections. Agency responsibilities include enforcement of the statutory provisions on limits and prohibitions on contributions. The primary ADR process used by the agency is a variation on settlement negotiations – a

bilateral process in which respondents engage in a dialogue with a representative of the ADR office who explains the nature and cause of the statutory violation. That dialogue provides respondents with an opportunity to explain their committee's or organization's actions and their perspective on the nature of the violation. The resulting negotiations between the parties results in a settlement that both sides find acceptable and achieves the agency's goal of promoting compliance with the statute. The ADR program also frees up agency resources so they may be devoted to more compelling and complex violations of the statute.

The agency also offers mediation in EEO and other workplace disputes.

### *Federal Energy Regulatory Commission*

The Federal Energy Regulatory Commission, an independent agency within the Department of Energy, regulates the interstate transmission of electricity, natural gas, and oil. The agency – and its predecessor, the Federal Power Commission – have long endorsed and supported negotiated settlements. In 1994, the agency reaffirmed its policy “to conclude its administrative proceedings as fairly, effectively, and expeditiously as possible.” The agency also has embraced the opportunity inherent in the Administrative Dispute Resolution Act to further develop its policies to “achieve less costly, less contentious, and timelier decisions in its proceedings.”

The agency's dispute resolution initiatives include:

- The Dispute Resolution Service. This service is a neutral unit within the agency which was established in 1999 to provide and promote ADR services for parties engaged in agency-related disputes. The Dispute Resolution Service has mediated and facilitated two-party and multi-party disputes in a range of areas including: hydropower relicensing; gas certificates; electric, gas, and oil tariffs and rates; and business concerns in all arenas.
- The Settlement Judge Process. Under this process:
  - The agency strongly encourages ADR in most cases set for hearing, and typically refers over 85% of all cases set for hearing to an Administrative Law Judge other than the presiding judge for settlement purposes. Approximately 75% of these cases are settled.
  - The use of settlement judges results in substantial savings of time and resources that would have been expended in costly litigation. Use of settlement judges also allows citizens to receive the refunds due much earlier than if the case had proceeded through litigation.
- The Enforcement Hotline. The agency's use of early neutral evaluation through its Enforcement Hotline is an effective tool in addressing disputes prior to formal dispute filing with the agency.

### *Federal Maritime Commission*

The agency's mission is to develop and administer policies and regulations that foster a fair, efficient, and secure maritime transportation system. It is the agency's policy to use alternative means of dispute resolution to the fullest extent compatible with the law and its own mission and resources. The agency considers using ADR in all areas, including workplace issues, formal and informal adjudication, issuance of regulations, enforcement and compliance, issuance and revocation of licenses and permits, contract award and administration, litigation brought by or against the agency, and any other interactions with the public and the regulated community. Parties are encouraged to pursue the use of alternative means through the agency's Office of Consumer Affairs and Dispute Resolution Services in lieu of or prior to initiating an agency proceeding. The Office of Consumer Affairs and Dispute Resolution Services is responsible for developing and implementing the agency's ADR program.

ADR helps resolve disputes with a minimum of government interference in the marketplace, ultimately resulting in a fairer and more efficient ocean transportation system. The agency's Office of Consumer Affairs and Dispute Resolution Services is using ADR in a number of areas to avoid the expense and delays inherent in litigation, and to facilitate the flow of U.S. ocean commerce, including:

- resolution of shipping disputes, e.g., attempts by carriers to increase rates after execution of a service contract;
- provision of ombuds services to participants in ocean shipping transactions (e.g., transportation or handling of cargo, and complaints against cruise operators);
- adjudication of small claims (up to \$50,000) for violations of shipping statutes (e.g., freight overcharges, extensive delivery delays, demand for excessive payments prior to delivery);
- adjudication of applications for permission to apply other than tariff rates;
- adjudication of applications to waive or refund freight charges arising from errors in tariff publications, inadvertent failure to publish an intended rate, or a misquotation of a rate.

### *Federal Mediation & Conciliation Service*

The agency's core mission is to promote sound and stable labor-management relations by providing mediation assistance in contract negotiation disputes between employers and their unionized employees. Their use of ADR promotes the adoption of collective bargaining agreements upon the expiration and renewal of contracts and promotes better employee/management relations.

As a result of the 1990 and 1996 Administrative Dispute Resolution Acts, the agency's role was expanded beyond labor relations. The agency has become a primary provider of mediation, facilitation, training, and other assistance within the federal government. The agency has: convened and facilitated over fifty complex, multi-party negotiations; mediated thousands of federal sector workplace disputes; trained federal employees in

conflict prevention and resolution; and assisted with the design and implementation of conflict management systems for over eighty agencies. The agency also has spread the use of ADR overseas by providing training, consultation, and other technical assistance in dozens of countries around the world.

#### *Federal Reserve Board*

The Board supervises the Federal Reserve System which is responsible for developing banking policy and regulating the banking industry. The Board's ADR policy extends to general workplace disputes, as well as EEO matters. Additionally, the agency's Ombudsman provides mediation and other ADR processes in supervisory matters, permitting affected stakeholders to contact a Board official to address issues of concern.

#### *Federal Trade Commission*

The Federal Trade Commission promotes healthy commercial competition through the prevention of general trade restraints and safeguards the public from fraudulent trade schemes.

The agency is committed to integrating ADR strategies in its mission-related responsibilities to enforce several federal antitrust and consumer protection laws. It uses mediation in civil enforcement cases on an ad hoc basis. In furtherance of its consumer protection mission, the agency is a strong advocate of ADR to help resolve many different kinds of consumer disputes. The agency works to educate consumers about ADR options available to them and works in conjunction with a number of consumer-oriented organizations to ensure that the public is aware of opportunities and rights to mediate and arbitrate disputes concerning purchases of products and services.

The agency also uses ADR to help resolve workplace problems that can interfere with its ability to perform its responsibilities, including relationship problems between employees and managers, performance and conduct-related issues, and labor management matters.

#### *General Services Administration*

An important mission of the agency is to hear and decide contract disputes between government contractors and executive agencies of the United States. Through the United States Civilian Board of Contract Appeals, the agency offers ADR services as an integral part of the contract appeals process, and uses ADR for the prompt, expert, and inexpensive resolution of contract disputes and contract-related matters.

The agency also uses ADR to identify and remedy concerns in the workplace, thereby fostering increased employee productivity.

### *National Archives and Records Administration*

The agency's mission is to: serve American democracy by safeguarding and preserving the records of our government, ensuring that the people can discover, use, and learn from this documentary heritage; ensure continuing access to the essential documentation of the rights of American citizens and the actions of their government; promote civic education; and facilitate historical understanding of our national experience.

The agency uses mediation and facilitation in employment and workplace disputes within its organizations throughout the nation so that problems can be addressed and resolved, and the employees can get back to the work at hand. Because the agency is highly citizen-centered, with much of its mission focused on facilitating public access to materials and exhibits, its workforce must be able to interact effectively with the public. By learning through use of ADR how best to work with one another, the staff can best improve its interaction with the visitors.

### *National Labor Relations Board*

The agency administers the nation's principal labor laws, preventing unfair labor practices and safeguarding employees' rights to organize into labor unions. Its core function employs all of the ADR processes. The agency also uses ADR in its own workplace disputes, allowing parties to resolve their disputes more quickly and easily and saving both time and money for them and the agency. The agency reports that ADR permits parties to reach settlements which are better tailored to the parties' particular circumstances, ensuring that the parties' disputes are more fully resolved and less likely to recur.

### *National Mediation Board*

The agency's mission is to mediate labor-management disputes in the airline and railroad industries, and to minimize work stoppages by facilitating harmonious labor-management relations for airlines and railroads engaged in interstate commerce or travel. Its professional mediators use ADR techniques to resolve the disputes. Since 1997, it has mediated over 600 cases with only four work stoppages (including one that lasted for less than 90 minutes).

### *National Science Foundation*

The National Science Foundation promotes advancement in scientific research and education. The agency uses ADR primarily in the workplace arena and reports that use of ADR enhances communication, which fosters a more productive workforce.

### *Nuclear Regulatory Commission*

The mission of the agency is to protect the public health and safety and the environment from the effects of radiation from nuclear reactors, materials, and waste facilities. The

agency also regulates these nuclear materials and facilities to promote the common defense and security. One of the agency's principles of good regulation is that nuclear regulation is the public's business and it must be transacted publicly and candidly, with the public being informed about and having the opportunity to participate in the regulatory processes. The agency's use of collaborative, facilitated ADR processes allows it to work faster and better, and to establish stronger relationships with the public, in a range of areas, e.g.:

- identification of criteria for the recycling of radioactive materials;
- revision of agency rules and guidance on emergency planning in light of the security issues raised by the 9/11 attack; and
- adoption of rules and guidance governing the use of radioactive material in therapeutic and diagnostic medicine.

Additionally, the agency:

- uses facilitation in public meetings on site-specific licensing issues conducted as part of a public outreach program; and
- uses facilitation for a series of ongoing interagency management meetings to develop a strategy for agency cooperation in the cleanup of a decontamination/decommissioning site.

The agency also is using ADR in enforcement disputes:

- between a licensee and the agency as the agency discharges its responsibility for licensing or certifying applicants to use nuclear materials or operate nuclear facilities; and
- between a licensee and its employee (when the employee has alleged to the agency that the licensee has taken retaliatory action against the employee for raising a safety concern) as the agency discharges its responsibility to investigate violations of agency requirements and other wrongdoing.

Finally, the agency uses ADR as an effective management tool to resolve employment discrimination claims at the earliest stage possible in an expeditious and cost-effective manner.

#### *Office of Personnel Management*

The agency is responsible for the hiring and management of federal workplace personnel throughout the country and uses ADR primarily in the workplace arena. The agency promotes the resolution of EEO complaints and other allegations of discrimination at the earliest possible stage and reports that ADR enhances communication between employees and managers.

The agency hosts a user-friendly Web site, and has included an on-line and updated version of its 2002 report, "Alternative Dispute Resolution - A Resource Guide", on that

Web site ([www.opm.gov/er/adrguide\\_2002/index.asp](http://www.opm.gov/er/adrguide_2002/index.asp)). The Guide provides a wealth of valuable information on ADR usage within the federal government, along with comprehensive descriptions of a broad range of ADR processes. The Web site describes in detail many federal agencies' ADR programs and lists points of contact in the federal agencies covered as well as specific agency Web site addresses.

### *Peace Corps*

The agency, established in 1961, promotes world peace and understanding through a global outreach to the poorest countries throughout the world, placing volunteers who assist local communities with technical skills and education. The agency's ADR policy covers all employees, Peace Corps volunteers and applicants, both current and former, and addresses EEO complaints as well as general workplace issues. The ADR policy requires all management and supervisory staff to participate in EEO cases. The agency's Office of American Diversity Programs provides more than 30 training opportunities each year for employees, supervisors, and managers to learn to use ADR techniques, such as facilitation, in addressing workplace issues proactively, before they grow into disputes.

### *Pension Benefit Guaranty Corporation*

The agency monitors, guarantees and administers private sector defined benefit pension plans throughout the country. The agency uses ADR for workplace disputes, and finds that ADR increases workforce productivity by allowing quicker resolution of disputes, improving continuing relationships with staff, and developing staff talents.

Additionally, the agency uses ADR in areas of agency action, including civil claims by and against the agency, as well as contract and procurement matters.

### *Securities and Exchange Commission*

The agency's mission is to: protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. The agency uses various ADR processes in different areas, including enforcement and workplace.

The agency has reported success and savings in using ADR early in the litigation of enforcement disputes while accomplishing the agency's regulatory functions more efficiently.

In traditional formal workplace dispute processes, there was a significant lag time between conflict initiation and conflict resolution which provided a fertile ground for disputes to fester in an ever-widening circle of conflict and poor morale. By using a variety of ADR techniques, especially anticipatory dispute resolution processes, disputes and resulting problems with productivity and workplace morale are addressed much more quickly and effectively. Early resolution of those disputes saves staff time, improves morale, and increases productivity.

### *Small Business Administration*

The agency's mission is to maintain and strengthen the nation's economy by aiding, counseling, assisting, and protecting the interests of small businesses and by helping families and businesses recover from natural disasters. The agency encourages case-by-case mediation with its participating lenders for regulatory issues such as denial of liability under the agency's loan guaranty agreement with lenders. Use of ADR minimizes conflict and ill-will in regulatory disputes, thereby retaining lenders as participants in the program.

The agency's National Ombudsman assists small businesses with unfair and excessive federal regulatory enforcement, such as repetitive audits or investigations, excessive fines or penalties, retaliation, or other unfair regulatory enforcement action by a federal agency. The National Ombudsman receives complaints and comments from small business concerns and acts as a "trouble shooter" between them and federal agencies. Small business comments are forwarded to federal agencies for a high-level review to consider the fairness of their action.

ADR processes encourage early intervention and resolution of disputes to promote workplace cohesiveness, thereby decreasing potential litigation and other costly means of resolution. Unresolved conflict hinders quality service and diminishes the effectiveness of any organization. ADR is used to improve communication and to achieve fast, efficient resolution of conflict, thereby allowing employees and managers to provide the highest quality of service to the American people.

### *Social Security Administration*

This agency administers the nation's vast network of social insurance programs and uses ADR processes to provide a more efficient and cost-effective means of resolving workplace disputes. When ADR is used successfully early in the dispute process, it significantly decreases the negative impact of those disputes on employee morale and improves employee satisfaction, thereby enabling the agency to devote more of its resources to tasks directly related to its mission.

### *Tennessee Valley Authority*

The agency's mission is threefold: provide affordable and reliable power; promote sustainable economic development; and act as steward of the Valley's natural resources. It utilizes consensus building and public participation as an integral and inherent part of numerous areas of its decision making, for example, in environmental policy matters. It utilizes ADR procedures to conclude disputes expeditiously, economically, fairly, and sensibly.

### *U.S. Agency for International Development*

The agency's economic and humanitarian assistance in more than 100 countries provides a better future for those with greatest needs. About one-half of the agency's contracts and grant awards are negotiated, issued, and administered by its headquarters office in Washington, D.C., and the remainder is handled by staff located at its missions worldwide. The acquisition and assistance programs can be huge in scope and impact. For example, since March 2003, the agency has been allocated over \$5 billion for relief and reconstruction in Iraq. Its awards to different entities are the vehicles for bringing food, security, health, infrastructure, and economic development to Iraq. In sub-Saharan Africa, the agency's program for Sudan totaled more than \$850 million for FY 2005, and its contract awards are supporting reconstruction, humanitarian aid, and food assistance in Southern Sudan. In Afghanistan, the agency is helping build the sort of safe and stable society that eliminates the breeding ground for terrorism.

The agency administers workplace ADR, primarily using mediation, in its Office of Equal Opportunity Programs, sometimes using trained mediators on collateral duty from the Federal Mediation & Conciliation Service.

The Office of the Acquisition and Assistance Ombudsman ensures equitable treatment of all parties participating in the agency's acquisition and assistance programs. It facilitates the resolution of specific complaints, and handles cross-cutting issues such as procurement integrity, consistency in the application of acquisition policies, customer service issues, customer-access outreach, business process improvement initiatives, and acquisition reform.

The Office of the Acquisition and Assistance Ombudsman also facilitates and responds to external complaints about ineffective or unfair contracting. Through its interactions with both external and internal stakeholders, the office can identify vulnerabilities and inconsistencies in the procurement system and become an agent for change.

### *U.S. Institute for Environmental Conflict Resolution of the Morris K. Udall Foundation*

ADR, in the context of environmental disputes, is the agency's primary mission. The agency was established to assist the federal government and other parties in resolving environmental, natural resource, and public lands conflicts. All of its institutional practices and policies are designed to promote the appropriate and effective use of ADR.

The agency's mission and ADR services pertain to a broad spectrum of applications from public policy dialogues and planning settings to site-specific permitting and broad development of regulations, to civil enforcement and administrative appeals, as well as the litigation context. Across these areas, the agency works to assist federal agencies and other parties in reaching agreement and solving problems in a collaborative, non-adversarial manner, sometimes with the assistance of contracted facilitators or mediators.

The agency uses a range of methods or processes, from preliminary consultations to convening and conflict assessment, process design and guidance, large group facilitation, assisted negotiation and mediation, and dispute system design and evaluation. These methods or processes are used to advance the work of the agency to prevent and resolve environmental, natural resource, and public lands conflicts. The process of mediation, for instance, provides stakeholders with an opportunity to work out their differences and arrive at joint solutions with the help of an impartial mediator. Consensus-based processes, such as negotiated rule-making, community-based collaboration, and policy dialogues engage representatives from all groups affected by proposed federal policies or actions in participating in their formulation, revision, or implementation.

#### *U.S. Office of Government Ethics*

The agency was established by the Ethics in Government Act of 1978 and was originally part of the Office of Personnel Management. The agency exercises leadership throughout the Executive Branch for prevention of conflicts of interest on the part of government employees. In partnership with Executive Branch agencies and departments, the agency fosters and promotes high ethical standards and strengthens the public's confidence in the integrity of the federal government and its workforce. The agency promotes the effective use of ADR, primarily mediation and facilitation, in EEO proceedings. Additionally, the agency solicits public review and comments in some core areas of ethics regulations such as application of the criminal conflict-of-interest laws and financial disclosure laws.

#### *U.S. Postal Service*

The Postal Service processes and delivers millions of pieces of mail to people and businesses throughout America. The agency's foresight resulted in development of one of the earliest and most successful dispute resolution programs for workplace disputes called "REDRESS"<sup>®</sup> (Resolve Employment Disputes Reach Equitable Solutions Swiftly). The innovative program uses transformative mediation to resolve an enormous variety of workplace disputes. The Postal Service reports that when disputes are resolved quickly and fairly, employees tend to feel positive about their work environment, and this positive feeling translates into higher morale and greater productivity.

### **III. Advantages of ADR**

Use of ADR in the Executive Branch has been instrumental in producing these advantageous results for the agencies:

- promotion of a citizen-centered government;
- management of the costs of government; and
- support of the strategic management of government resources.

This section of the Report (“Advantages of ADR”) is an overview of ADR’s beneficial impact on federal agencies, coupled with a few specific examples from individual agency programs which illustrate the direct correlation between use of ADR and achievement of particular results. The agency responses are reported more fully in the following section of the Report (“Areas of ADR Programs and Use”) where they are examined in the context of the major substantive areas where ADR is most used: civil enforcement and regulatory; claims against the government; contracts and procurement; and workplace.

#### **A. Promoting a Citizen-Centered Government**

A good government is citizen-centered. It is available to, and effective in meeting the needs of, the citizens it serves, and it provides opportunity for stakeholder involvement in its decision making. In short, a government which is citizen-centered is:

- accessible to the citizens it serves;
- responsive to the needs of the citizens it serves; and
- inclusive of the interests impacted by government initiatives.

The information submitted by the agencies shows that ADR programs are designed specifically to be citizen-centered. The programs give considerable attention to electronic tools, which are employed to improve the ease, expense, time, and comprehensibility of citizen interactions with the federal government.

#### **Accessible**

The first component of good government is access: a government must be accessible to the citizens it serves. The Executive Branch spans an enormous range of functions. While some of its agencies necessarily have more direct interaction with the public than others, agencies across the board are promoting initiatives to enhance their accessibility. Almost every agency has developed a public Web page, which provides a single point of access for the public to learn about agency programs and accomplishments.

Public access points have proven to be valuable agency assets for informing a broad public about agency initiatives as well as an opportunity for more substantive involvement in agency processes. For example, the **Department of Justice/Civil Rights Division** has developed an interactive, comprehensive, and easily navigated Web site for

persons with disabilities and business owners who have questions about their rights and obligations under Americans with Disabilities Act, and about the agency's mediation program for disability rights.

Inextricably linked with access is the ease of an interaction with a government agency. A citizen-centered government must ensure that the entry points provided for citizen involvement are quick, easy, and effective. A prime example of this is the telephone hotline, instituted by many agencies to facilitate public input and involvement.

The **Federal Energy Regulatory Commission** Enforcement Hotline effectively serves citizens through providing early neutral evaluation to address disputes early, before complaints are formally filed with the Commission. The Enforcement Hotline is accessed by a widely-published and easy to use toll-free number. Callers to the hotline are immediately connected with a trained staff member who attempts to resolve the caller's concerns quickly and completely. The Enforcement Hotline has proven to be an efficient method for resolving commercial disputes, as well as a valuable resource for individual landowners involved in a dispute with natural gas pipeline companies. The Enforcement Hotline signals to the public that the agency is committed to responding to the needs of its citizens, and that in turn has a direct impact on the public's confidence in the ability of the government to resolve disputes. Similarly, the **National Mediation Board** staffs a Public Affairs Line to enable the public to submit inquiries and have their questions or concerns addressed in a timely manner. Those who return the calls are trained to educate the general public about the agency's jurisdiction and provide information on resources for callers whose questions or concerns fall outside of the scope of the Railway Labor Act.

In addition to the telephone, agencies are facilitating e-mail interaction with the American public. The **Federal Maritime Commission** ADR Program utilizes e-mail correspondence to assist the public in learning about the services available and to facilitate quicker global communication to resolve problems. The **Federal Energy Regulatory Commission** conducts many of its ADR activities via e-mail, eliminating inconvenience and expense for respondents located throughout the United States who otherwise would have to come to Washington D.C.

The development of resources on the Internet has greatly increased the accessibility of the agencies to citizens with a computer and a need for information. Numerous agencies join the **National Mediation Board** in utilizing the Internet to disseminate general information about ADR. For example, the **Environmental Protection Agency** Web site provides information to the public about the use of ADR at the agency, how to access its ADR services, and relevant law and policy. The agency's Small Business Ombudsman provides Web access for assistance, contacts, useful publications, and additional information on the office. The **Federal Energy Regulatory Commission** Web site provides information about ADR and how to contact its Enforcement Hotline or the Dispute Resolution Service staff if an early neutral evaluator or mediator is needed. The **Federal Trade Commission** relies on the Internet to provide consumers with ADR information, including how to use ADR when in dispute with companies over the

purchase of goods and services. The **Department of Homeland Security/Federal Emergency Management Agency** ADR office provides detailed information on its Web site about all of the ADR services offered to the public. The public can contact the ADR Director via e-mail with questions about dispute resolution. The **Department of the Interior** Office of Collaborative Action and Dispute Resolution and several Bureaus, including the **U.S. Geological Survey** and the **Bureau of Land Management**, provide ADR information on their Web sites to give staff and citizens an understanding of the ADR processes available. The **U.S. Institute for Environmental Conflict Resolution** maintains an on-line searchable database of more than 250 pre-qualified environmental mediators and facilitators, available to agencies and the public who are looking for neutrals to handle their environmental conflict. It also hosts a national conference on environmental conflict resolution every three years for stakeholders, agencies, and environmental conflict resolution professionals. The **Federal Mediation & Conciliation Service** Web site offers access to a variety of tools for obtaining agency dispute resolution services and training, including look-up tools for locating and contacting the nearest agency office. The agency's Web users can: find information on mediation and other ADR services; register for agency meetings, training sessions and conferences; print brochures on agency services and programs; and electronically query the agency.

Some agencies are also utilizing e-tools to disseminate ADR process-related information. For example, the **Consumer Product Safety Commission** provides Web-based ADR services including notifications, evaluations, and decision making communications. The **Nuclear Regulatory Commission** provides, as part of the collaborative process in the area of regulatory policy development and for public meetings on site-specific issues, electronic access to relevant background on the agency Web page and, for large documents, on a compact disc. The agency also has provided for the electronic submission of comments on proposed agency actions. The **Federal Emergency Management Agency** created a Web site for the public (particularly the claimants) to understand the Cerro Grande arbitration process, access information about all of the arbitrators, make their arbitrator selections, and fill out their forms on-line. User-friendly, plain English guidelines were posted on the Web site to help users understand the arbitration program in a clear, step-by-step manner. The Web site provided personal contact information to the public, and the ADR Director was available to answer all manner of questions regarding the arbitration program.

Agencies recognize that — as the **Department of Defense/Department of the Air Force** has expressed — “ADR is still one activity that requires direct human involvement at a fundamental level.” The approach to implementing electronic government must be dynamic, with agencies continually assessing the Internet-based tools and tweaking them to more effectively serve employees and citizenry. The **Department of Homeland Security/Transportation Security Administration** Office of the Ombudsman, for example, is currently tracking the types of calls it receives from the traveling public and using that information to include more customer-focused information on its Web site.

The **Federal Mediation & Conciliation Service** pioneered the use of on-line technology in collective bargaining through the creation of partnerships and labor management

committees. The agency's powerful network of mobile computers and customized software: helps groups brainstorm, gather and organize information, and prioritize, evaluate and build consensus faster than in traditional group meetings; increases the efficiency of group decision making by reducing the number of days required for face-to-face meetings in dispute resolution processes; and enables skilled mediators to solve problems more effectively. The innovative work of the **National Mediation Board** in the area of on-line dispute resolution showcases the dynamic use of technology to improve access between and among the government and disputants. The Board uses videoconferencing and document sharing software that enables parties to meet on-line when they are unable to meet in person. This allows parties to draft tentative agreements, approve language, and resolve arbitration disputes without spending time or money to travel to a different location. The Board also works with other federal agencies to introduce the use of technology into mediation. To date, the Board has delivered over a dozen presentations to other agencies about how to integrate technology into ADR and has worked with mediators from the Sharing Neutrals program, described in detail later, to allow for mediations to take place without travel.

Additionally, there is growing interest abroad in the use of ADR by federal agencies throughout the United States, and many agencies are responding with educational and training programs for foreign government officials. The **Federal Mediation & Conciliation Service** has an entire section, International and Dispute Resolution Services, devoted to such training and has offered training in the prevention and resolution of collective and individual labor disputes in 12 countries in the past three years. The **Department of Justice** Office of Dispute Resolution regularly meets with foreign government officials who have expressed interest in learning more about the use of ADR within the United States government and court system. Similarly, the **Federal Energy Regulatory Commission** meets with foreign government officials to discuss the use of ADR within nascent civil enforcement and regulatory systems. In this regard, the **Federal Energy Regulatory Commission** Dispute Resolution Service has conducted workshops in the use of ADR for the Dominican Republic's Superintendencia de Electricidad, the South Asia Regional Regulators, China's State Electricity Regulatory Commission, the National Energy Regulator of South Africa, and other organizations.

### Responsive

The second component of good government is responsiveness: a government must be responsive to the needs of the citizens it serves. Agencies are achieving this through instituting programs and processes that increase direct interaction between the agency and the public.

A prime example of this kind of service — adopted by a number of agencies — is the ombuds program. An ombuds office provides an opportunity for citizens to talk directly with an agency contact — the ombuds — to raise issues of concern and to solicit assistance in resolving their concern with the agency. The ombuds inhabits a special place outside of the routine bureaucratic channels and has authority to approach high levels of leadership directly for immediate action or decision making. One byproduct of the

ombuds' efforts is that they gain valuable information from citizens on the impact of the agencies' programs and outreach efforts. The ombuds, in turn, are able to provide ongoing feedback to their respective agencies on ideas for enhancing or modifying programs and initiatives to better serve their citizens. They are particularly well-positioned to disseminate information while at the same time serving as a central clearinghouse to gather information on trends or weaknesses in an agency's relationship with the public. Ombuds serve an equally important function as monitors of overall agency effectiveness as well as agents of change where necessary. One illustration is the **U.S. Agency for International Development** Office of the Acquisition and Assistance Ombudsman which serves as a liaison between the private sector and agency personnel. That office fosters good relationships with external business partners by providing a channel through which their voices can be heard in a neutral and confidential environment. The corrective actions instituted by the office contribute to the credibility of the agency's business processes and epitomize the agency's commitment to the principle of accountability for, and transparency in, its operations.

Another good example is the use of ADR techniques to respond to the issue of youth violence. In response to a Congressional mandate, the expertise of the **Federal Mediation & Conciliation Service** is being used to address youth violence prevention and develop conflict resolution programs in the nation's schools. The agency has partnered with communities and organizations nationwide in programs to teach children and young adults the skills they need for the peaceful resolution of conflict. In furtherance of these goals, the agency is a sponsor of "Creating Harmony in the Classroom," a special classroom guide which is designed to help students learn how to manage successfully the conflict in their lives and which is offered without charge to educators on the agency's Web site. In a related project, the agency is developing a "Cool School" computer game which is designed to teach conflict resolution skills to elementary school students and which will be offered to classrooms nationwide for instructional play.

### Inclusive

The third component of good government is inclusiveness: a government must be inclusive of all stakeholder interests which are impacted by government initiatives. Agencies are soliciting input and collaborating with citizens and other stakeholders in the process of generating agency policy. The challenges of managing these multi-party processes, however, are far outweighed by the benefits of inclusiveness: innovative and durable processes and outcomes that are reflective of agency – and citizen – needs.

A number of agencies have involved stakeholders in collaborative processes to discuss and/or develop policy on various agency issues. For example, the **Nuclear Regulatory Commission** has convened collaborative processes – involving a broad spectrum of external interests – to develop regulatory policy on generic issues such as regulations, guidelines, and policy statements. The range of issues addressed includes the recycling of radioactive materials, the revision of agency rules and guidance on emergency planning, and the rules and guidance governing the use of radioactive material. The

processes, facilitated in a roundtable format to encourage dialogue among affected interests, assist the agency in identifying the views of the affected interests, potential problems with implementing particular approaches, the extent of agreement or disagreement on a particular approach, and the development of creative approaches to the issues that might meet the interests of all participants.

The **Department of Commerce/National Oceanic and Atmospheric Administration** uses consensus building and public participation in all of its environmental compliance issues. A case in point is the agency's Cooperative Assessment Process which uses participation between industry and government, in concert with the public, to facilitate the restoration of natural resources and associated services that were injured or lost by hazardous substance releases and oil spills. The agency convened industry representatives, environmental groups, and federal, state, and tribal trustees to develop the process, which is expected to strengthen partnerships with industry and other stakeholders, and provide meaningful opportunities for public involvement.

The **Department of the Interior** is committed to increasing and expanding its use of public participation processes as a means to avoid conflicts and potential litigation by seeking early input from local communities. The National Park Service has used these processes in developing its resource management plans.

The **Department of Energy** created public participation projects to avoid conflicts and potential litigation. Part of the agency's mission is to ensure the environmental cleanup of the national nuclear weapons complex, and its Office of Environmental Management developed a public participation process for stakeholders directly affected by those cleanup activities – local governments, tribal nations, environmental and civic groups, labor organizations, universities, industry, and other interested parties. Future misunderstandings are minimized, and chances of costly legal actions decreased, through discussion and resolution of key issues in an efficient and cooperative manner. The Office of Legacy Management developed a public participation process to target populations – small towns, rural areas, minority and low-income communities – that are limited in their ability to participate in environmental decisions because they lack access to information, technology, expertise, and decision-makers.

## B. Managing Costs

Use of ADR has promoted responsible allocation of limited federal resources. The initial applications of ADR to backlogged court systems demonstrated distinct cost savings advantages over litigation. As ADR has expanded beyond the court system, however, it has become apparent that monetary savings are just one component of ADR's impact.

In addition to monetary savings, ADR has demonstrated its effectiveness in controlling other costs of conflict. Because parties are the architects of their own resolutions, the results achieved through ADR are generally longer lasting than those imposed through more traditional mechanisms, and "repeat conflict" can be avoided. The likelihood of conflict re-emerging is further lessened because, since the process of ADR focuses on

communication, parties engaged in ADR generally avoid the relationship pitfalls inherent to a win or lose “fight to the finish.” ADR also has been demonstrated to save time.

Savings in money and time translate into more responsible allocation of limited resources: agencies are able to redirect resources from conflict management to promotion of the agency mission. As the **Department of Defense/Army Corps of Engineers** noted: “In an era of tightening budgets, the transactional costs that are avoided through ADR translate into additional funding that can be available for mission execution... [fostering] an environment where costs are more manageable and predictable.”

In short, ADR contributes to the effective conservation of limited federal resources in several interrelated ways:

- controlling the costs of conflict;
- producing quicker and more durable results; and
- preserving resources for the mission of the agency.

### Controlling the Costs of Conflict

When ADR is employed, conflict costs are controlled, as evidenced by a number of indicators. The first is money saved, and the reasons for this are clear. The costs associated with litigation have skyrocketed in the past several decades as the complexity of cases, and correspondingly, discovery and motions practice, has increased. The fees and travel costs for expert witnesses — critical to litigating a complex case — have compounded already exorbitant legal expenses. The **Department of Defense/Department of the Army** recognizes ADR’s impact on such expenses: “Litigation expenses are directly factored into the billing rates set by our working capital fund activities, such as our depots and Army Corps of Engineers civil works projects. Early resolution of all disputes reduces these expenses.”

There are many examples of ways in which ADR options result in more cost-effective resolution of disputes. The **Department of Justice/Federal Bureau of Investigation** has found the cost of mediation in workplace disputes to be less expensive than an investigation or a Final Agency Decision. At the **Federal Energy Regulatory Commission**, regulated utilities and their customers who were participants in dispute resolution service processes reported substantial savings through use of ADR. For example, in two cases, four out of ten parties reported that participation in the dispute resolution process resulted in a cost savings of approximately \$400,000. The agency also reports significant savings in avoided personnel costs and time spent preparing for, and participating in, litigation.

In addition to monetary savings, however, ADR results in savings of productive labor that is dedicated to, or lost, as a result of conflict within the workplace. ADR programs provide parties a unique opportunity to address the human emotions that are intertwined with conflict, which is essential to future relationships. All too often, what is filed in the

administrative forum does not reflect the true issue between the parties. ADR is designed to reach those underlying issues that are a drain on the agency's resources and can linger for a significant period of time irrespective of any EEO complaint or workplace lawsuit that might be filed and/or withdrawn. The result is better agreements that reach the real issues in relationships, something that is demonstrated through experience. The **Department of Defense/Department of the Navy** statistics show that 70% of employees participating in mediation agreed that mediation improved the relationships in the workplace. One manager in an ADR process at the **Federal Emergency Management Agency** said that the process helped the employee and manager repair their relationship and helped the employee see that the manager was "not out to get him."

### Producing Quicker and More Durable Results

The use of ADR results in quicker and more durable resolutions. Integral to this is the flexibility inherent to ADR. ADR provides parties a unique opportunity to craft a process and a solution which are tailored to their own needs.

In litigation, the length of time between the onset of a dispute and the final adjudication by an appellate court is measured in years, due to court scheduling constraints. In ADR, on the other hand, mediation or other ADR processes are convened at the will of the parties. The impact of this timing factor is substantial. In FY 2004, 8,086 charges were resolved through the **Equal Employment Opportunity Commission** National Mediation Program. Sixty-nine percent of the over 11,700 mediations conducted resulted in a settlement with an average closure of 82 days. In FY 2004, at the **Department of Justice/Federal Bureau of Investigation** mediations were held within an average of 47 days from the request for mediation, which is considerably faster than the traditional process, which took an average of 180 days. The timeliness of ADR is also critical to managing the relations of those involved in a dispute. The **Securities and Exchange Commission** noted that in its experience, the significant lag time between conflict initiation and conflict resolution exacerbated the conflict.

ADR also provides parties an opportunity to craft a resolution that addresses their interests, thus enhancing the durability of the resolution. For example, the **Department of Energy** Office of Dispute Resolution worked with legal counsel and contracting officers to include ADR provisions in the closure contract for Rocky Flats Environmental Technology Site, a former nuclear weapons site in Colorado slated for cleanup and closure. The contract provisions included a partnering agreement which focused on problem solving. The agreement stipulated that the parties use a standing neutral and work to resolve disputes early and, if necessary, engage in ADR before proceeding on any formal complaints. All potential problems were addressed quickly and the closure mission was accomplished in advance of the targeted deadline. As the **Department of Defense/Defense Contract Audit Agency** reports: "The use of ADR, which puts more outcome control in the hands of the parties in dispute, almost always leads to improved financial performance."

## Preserving Resources for the Mission of the Agency

The use of ADR preserves resources for agencies. Rather than funneling resources to manage ongoing disputes, agencies employing ADR are able to apply resources to achieving the mission of the agency. This finding is reflected throughout the information submitted by agencies for this Report.

One managerial participant in the ADR process of the **Department of Homeland Security/Federal Emergency Management Agency** reported that the efforts of the agency's Dispute Resolution Specialist in resolving conflict provided "a major boost to our mission effectiveness...." The **Department of the Treasury/Financial Management Service** emphasized that employees who feel heard and valued are employees who remain dedicated to the agency for which they work.

The impact of effective conflict resolution in conserving resources is widespread. The **Securities and Exchange Commission** reports a significant agency cost even if an employee decides not to pursue his/her complaint via an administrative route, acknowledging that what an agency saves in dollars, it will lose in human capital for that unresolved workplace conflict. A distracted worker, one whose morale is low, typically also is one whose productivity is reduced. The **Department of Homeland Security/Transportation Security Administration** points out that conflict reaches even beyond employees to "bystanders" – co-workers, other layers of management, and confidantes of the people involved. Conflict can impact even the view of the agency by outside parties. Thus, by resolving workplace disputes early and effectively, the ADR process impacts more than the individuals in conflict – it can have a systemic impact on workforce morale as a whole.

### C. Managing Strategically

Strategic management of government resources – both monetary and human – encompasses efforts to maximize agency resources in a manner that promotes innovation, improvement, and effectiveness.

A prime example of strategic management is the development of the "Shared Neutrals Program" to help resolve workplace disputes. In order to reduce the cost of using ADR to resolve workplace disputes, federal agencies in different regions "share" a pool of federal employees who have been trained as, and are experienced, neutrals. For example, an employee of one agency may act as a mediator for a dispute in a second agency and the second agency, in turn, would provide a similarly-qualified employee to mediate a dispute in the first agency. Shared neutral programs are coordinated through local Federal Executive Boards in a number of regions of the country, for example, Chicago, Dallas-Ft. Worth, Greater Los Angeles, Oregon, Washington State, and Washington, D.C./Baltimore. In the Washington, D.C./Baltimore region (where the program is known as "Sharing Neutrals"), it is the **Department of Health and Human Services** which oversees the administration of the program for sharing of low-cost, high-quality neutrals among over 40 different federal agencies. Agency costs for workplace mediations would

be significant if they had to pay for outside private neutrals charging market rates. Because the mediators are federal employees performing collateral duty, they are available to participating agencies at no cost except reimbursement of travel expenses.

ADR contributes to the strategic management of government resources, both monetary and human, by:

- maximizing resources;
- promoting innovation; and
- fostering continuous improvement and expansion.

### Maximizing Resources

Efforts to maximize agency resources reflect the understanding that not all cases are appropriate for ADR. The issues at stake in some cases demand litigation or a more formal administrative process. In order to maximize agency resources, agencies must assess and identify cases which are appropriate for ADR and those cases which require a more formal disposition, thus ensuring strategic expenditure of effort. The **Federal Election Commission** noted the benefits of early identification: when matters are successfully resolved through ADR, resources are conserved and can be redirected to other, more complex and compelling violations of the Federal Election Campaign Act.

Efforts to maximize agency resources also reflect the understanding that the most valuable resource within the federal government is its human capital. Maximizing agency resources thus encompasses actions to increase the productivity of the federal workforce through the development of, education in, and management over, ADR initiatives. For despite this expansion of ADR use and services, lack of understanding of how ADR can – and should – be used has been a persistent roadblock to the continued advancement of ADR. The Dispute Resolution Service at the **Federal Energy Regulatory Commission** is tackling this roadblock through delivering educational presentations and workshops to internal and external entities, advertising ADR achievements through presentations and an ADR Newsletter, and promoting the use of neutrals in ADR processes such as mediation and arbitration. The Dispute Resolution Service also is working with other national, state, and international regulatory agencies to advance the use of ADR, as shown by the following examples. The Director of the Dispute Resolution Service participated in the training of mediation and early neutral evaluation which was presented to the administrative law judges at the California Public Utilities Commission. The Dispute Resolution Service assisted the Regulatory Commission of Alaska in developing an ADR program for its regulatory activities, including the provision of training in facilitation to the staff of Surface Transportation and the provision of an annual ADR workshop to state and federal regulators at the Institute of Public Utilities Annual Regulatory Program. The Dispute Resolution Service also worked with Canada's National Energy Board on joint projects to advance the use of ADR. In addition, the office's representatives train employees in the development of skills to recognize ADR opportunities and to more effectively work with others – internally and externally – to achieve resolution. Finally, the office provides the

employees with the procedural tools to look beyond their positions in order to achieve and encourage creative solutions to their disputes.

### Promoting Innovation

The institutionalization of ADR is, in many ways, an innovative approach to maximizing the resources of the federal government. The nature of ADR capitalizes on this innovation by providing the opportunity for parties to a dispute to control the terms of their resolution. The resulting resolutions are varied, reflecting the needs and priorities of the parties to the dispute. The results are also surprisingly creative, reflecting options and ideas that may never have been explored through a more formal process. The **Federal Maritime Commission** reports, for example, that its ADR processes provide parties to shipping transaction disputes the flexibility to draft innovative solutions that reflect their assessment of the market as well as their respective responsibilities, while avoiding an agency-mandated outcome.

Several agencies have programs that train employees to avoid and resolve disputes as well as provide mediation and facilitation services. For example, the Early Dispute Resolution Center in the **Department of Transportation/Federal Aviation Administration** serves as a resource within the agency to train others in resolving a broad range of disputes. The Center focuses on getting involved early in any dispute, before “collateral” damage is inflicted on others in the workplace. The Center, freestanding from the agency’s EEO office, facilitates conversations and conducts mediations in both horizontal (peer-to-peer) conflict and vertical (worker-to-supervisor) conflict. On occasion, the Center has been called in to work with an entire section of employees, paralyzed by a rift which began as a simple dispute between coworkers. The Center has focused on ways to measure success and gather data in order to study the best practices the office is developing.

### Promoting Continuous Improvement and Expansion

To enhance the benefits of ADR in preserving resources to realize an agency’s mission — rather than manage conflict — efforts are underway to improve responsiveness and effectiveness of ADR programs through systematic analysis and evaluation. For example, the **Department of the Interior/Bureau of Land Management** measures the cost-effectiveness of its ADR-based stakeholder collaboratives and makes strategic determinations of “where to spend funds so that they are most efficiently utilized.” They report that the ADR/Conflict Prevention Program in the West is resulting in improved financial performance through reduced or eliminated litigation, appeals, and protests. The result is a more responsive decision making process and, correspondingly, better decisions.

Agencies throughout the federal government strategically manage through identifying opportunities to continuously improve and expand upon ADR opportunities and successes. For example, at the **Environmental Protection Agency**, ADR clients can choose from a variety of sources for ADR services that will meet the needs of the

particular case, including the agency's own Conflict Prevention and Resolution Center. The **U.S. Institute for Environmental Conflict Resolution**, through interagency agreements with 12 federal departments and agencies, also provides environmental dispute resolution and collaborative problem solving services to those engaged in environmental and natural resources conflicts.

The **U.S. Institute for Environmental Conflict Resolution** interagency agreement also makes it easy for other federal agencies and non-federal parties to contribute to shared ADR projects. The availability of multiple options reassures parties that there is a process to suit the needs of their particular case, and ultimately translates into increased and more effective ADR use. The agency evaluates each of its environmental conflict resolution cases and provides the results to its program managers, mediators, and parties. Through this evaluation program, the agency is able to give direct feedback on environmental conflict resolution performance and practice that can lead to future project and program improvements.

Another excellent example of an expanding ADR program is the Civil Rights Disability Mediation Program in the **Department of Justice** Civil Rights Division. The program began with a strong impetus in the relevant statute, the Americans with Disabilities Act, enacted in 1990. The law specifically encouraged the use of ADR in place of formal adjudication. In 1993, under a federal grant, professional mediators were trained in both the legal requirements of the statute and in mediating disability rights-based disputes. Since that time, thousands of mediations have garnered voluntary agreements between business owners (such as hotels or restaurants), state and local governments, and individuals with disabilities who seek access to those businesses or services. The extraordinarily high resolution rate of these cases, averaging around 78% since the inception of the program, is bolstered by education provided to the parties before the mediation even begins and the tailored training the mediators bring to the process. The information relating to the rights and obligations of the parties is initially accessed through a comprehensive and extremely popular Web site, which recorded a high for FY 2006 of almost fifty million hits. The mediations are conducted throughout the United States and, in several instances which involved hearing-impaired complainants, were conducted entirely on-line. The resulting agreements are tailored to suit the parties' needs. Oftentimes, the newly-educated business owner, for example, will address a business organization about the rights of individuals with disabilities, or the individual will speak out regarding the organization's responsive correction to inadequate access for those with disabilities. No court in the land could compel these sorts of successful remedies in response to a lawsuit and resulting judgment.

## **IV. Areas of ADR Programs and Use**

This section of the Report describes the specific contributions that ADR has made to the goals of good government. The discussion uses as a framework the four major substantive areas of federal ADR applications:

- civil enforcement and regulatory;
- claims against the government;
- contracts and procurement; and
- workplace.

For the first three substantive areas where ADR is in common use – civil enforcement and regulatory, claims against the government, and contracts and procurement – the discussion demonstrates, with specific agency examples, how ADR programs contribute to:

- promotion of a citizen-centered government by facilitating accessibility, responsiveness, and inclusiveness;
- management of costs by giving better control over resources expended and achieving better outcomes; and
- strategic management of the government’s fiscal and human capital.

For the fourth substantive area where ADR is in common use – workplace – the discussion demonstrates, again with specific agency examples, how the use of ADR:

- has a successful track record in resolving workplace disputes;
- is cost-effective;
- saves agency funds;
- saves agency time;
- is essential to strategic management of the workplace;
- creates collateral benefits for the agency; and
- makes workplace dispute resolution techniques available to all through e-government.

### **A. Civil Enforcement and Regulatory**

#### **Promoting a Citizen-Centered Government**

In civil enforcement and regulatory disputes, unassisted negotiations and litigation have focused traditionally on which party has the stronger position. This is due, in part, to agency statutory and regulatory obligations. Today, many agencies have accepted the notion that their statutory obligations can be met through the use of ADR. Leaders of these agencies have accepted the use of ADR as a supplemental tool that enables them to avoid protracted litigation when unassisted negotiations fail. Indeed, the public interest is

often better achieved when citizens, non-governmental organizations, corporations, state and federal agencies, tribal nations, and other entities participate directly in an ADR process that affords them the opportunity to develop a result that meets the interests of all concerned. Stakeholders (citizens and their government) who work toward a shared, positive outcome often achieve better results than they would have received in court and can create long-term productive working relationships.

Below are summaries of agency ADR programs and success stories in the civil enforcement and regulatory community that demonstrate how ADR promotes a citizen-centered government.

A number of agencies join the **Nuclear Regulatory Commission**, discussed above, in convening stakeholder working groups to assist the agencies in understanding different perspectives and/or developing policy on specific issues. The **Department of the Interior** Bureaus, such as the **Bureau of Land Management**, the **National Park Service**, and the **Bureau of Reclamation**, strongly support and foster the use of ADR in field locations throughout the West and encourage the involvement of a broad array of stakeholder interests in decisions involving natural resource issues. Issues addressed include: development of resource management plans; energy and mineral development; water management; resource conservation; environmental protection; and many other issues that often cross organizational and jurisdictional boundaries and require a cooperative approach to address conflicts and resolve disputes over competing interests. Stakeholders commonly include representatives of: federal, tribal, state, and local governments; local communities; local, regional, and national interest groups; and the general public.

The **Environmental Protection Agency** has convened the Brownfields Mine-Scarred Lands Initiative, designed to be a multi-level effort to engage a broad range of federal partners and local community members, to address mine-scarred lands across the country. For example, a neutral third party was engaged to assess the needs of six local demonstration projects, including the provision of assistance from federal partners. Each community requested further ADR services to facilitate and focus re-use visions and to address more complicated land transfer or liability issues through mediation.

The **Federal Energy Regulatory Commission** encourages negotiated settlement and assists parties in achieving settlement in pre-filing collaborative processes. The collaborative processes, often involving stakeholder representatives of licensees, Indian tribes, environmental organizations, local citizens, commercial enterprises, and state and federal agencies, allow license applicants and parties to take part in fashioning terms and conditions for a license and, in the process, foster a foundation of trust among the parties. Similarly, the **Department of Energy** Office of Environmental Management has found that ADR is a valuable way to involve stakeholders early and often in decision making regarding the nuclear weapons complex cleanup program. Agencies report an important by-product of increased citizen participation through ADR processes: durable agreements that are endorsed by impacted parties.

The **Commerce Department/National Oceanic and Atmospheric Administration**, acting as a trustee on behalf of the public, works cooperatively with responsible parties at oil spills and hazardous waste sites to restore coastal and marine resources. The agency also regularly convenes industry, government, nongovernmental organizations, and other stakeholder groups to identify methods for improving assessments and cleanups, reducing costs, and restoring resources faster and more effectively. It has found that the use of these innovative partnerships is instrumental in reversing the effects of coastal contamination and ensuring that the environment is protected and restored.

A number of agencies have established ombuds offices to improve relationships between the government and its stakeholders. For example, the **Environmental Protection Agency** Regional Public Liaison Manager (formerly Ombudsman) elicits feedback and concerns from citizen complainants through participation in public hearings representing the agency or meetings with complainants in their homes (considered a less intimidating setting for complainants). Established in 1998 by statute, the Office of Federal Student Aid Ombudsman within the **Department of Education** helps to resolve disputes between student loan borrowers and their private lender, loan guaranty agency or servicing agency, or firm collecting on their loan. The Ombudsman also provides senior leadership at the Department with informal feedback about federal student aid programs, enabling the Department to improve the programs and processes for their stakeholders. The **Small Business Administration** National Ombudsman assists small businesses with unfair and excessive federal regulatory enforcement, such as repetitive audits or investigations, excessive fines or penalties, retaliation, or other unfair regulatory enforcement action by a federal agency. The Ombudsman receives complaints and comments from small business concerns and acts as a “trouble shooter” between them and federal agencies. Small business comments are forwarded to federal agencies for a high level review and federal agencies are requested to consider the fairness of their action.

Many agencies are employing a range of citizen-centered settlement options. For example, both the **Environmental Protection Agency** and the **Federal Energy Regulatory Commission** make use of their Administrative Law Judges. At the **Environmental Protection Agency**, ADR in the Office of Administrative Law Judges provides an opportunity for respondents (persons, businesses, and others alleged to have violated environmental laws) to informally and confidentially speak to and present their arguments and defenses to an Administrative Law Judge. Through this process, the judge/mediator can work with respondents who are not represented by counsel, helping them to understand the strengths and weaknesses of their positions and arguments.

At the **Federal Energy Regulatory Commission**, the use of settlement judges fosters settlements among parties in complex litigation, resulting in amicable resolution of cases and preserving long-term business relationships between business counterparts. Because the Chief Administrative Law Judge allows parties to recommend the settlement judge of their choice, the parties feel that they have a role in the process and a say in who will assist them in resolving their differences. The agency also provides a range of mediation and other dispute resolution options to its stakeholders through its Dispute Resolution Service which enables businesses to work with its customers to craft business solutions to

their problems. The dispute resolution staff also assists licensees, Indian tribes, environmental organizations, local citizens, commercial enterprises, and state and federal agencies in resolving environmental disputes. To complement these efforts, the office has become increasingly involved in outreach activities, including: presentations about ADR; workshops and training involving the use of ADR techniques; coaching for entities who want to resolve disputes without the use of a third party neutral; collaborations with federal and state entities to promote greater use of ADR; consultations with other entities about ADR use; facilitations; and publications involving ADR at the agency or generally.

Similarly, the **Federal Maritime Commission** Office of Consumer Affairs and Dispute Resolution Services provides services to assist parties in resolving disputes and shipping problems related to United States ocean shipping commerce and international ocean cargo shipments. These services are designed to be flexible and responsive to the needs of its citizens. Neutrals are provided to assist parties in resolving a dispute without the expense and delays inherent in litigation. The efforts help to facilitate the flow of United States ocean commerce.

The **Department of the Treasury/Internal Revenue Service Appeals** has a comprehensive menu of dispute resolution options to assist citizens in resolving tax controversies, without litigation, on a basis that is fair and impartial to both the government and the taxpayer, and in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the service.

- Under *early referral*, taxpayers with returns under examination may request early referral of one or more developed, disputed issues from Compliance or Collection to Appeals, while the other issues continue to be developed in Compliance.
- Under *fast track mediation*, Small Business/Self Employed taxpayers pursue resolution of disputes resulting from examinations (audits), offers in compromise, trust fund recovery penalties, and other collection actions. An Appeals or settlement officer who has been trained in mediation helps the taxpayer and IRS discuss the issues involved in the disagreement, and possible ways to resolve it with a goal of reaching a jointly agreeable solution, consistent with relevant law, within forty days.
- Under *fast track settlement*, Large and Midsize Business taxpayers expeditiously resolve disputes during an examination while their case is still in the compliance stage. Fast track settlement is also available for Small Business/Self Employed and other **Internal Revenue Service** Operating Division taxpayers on a case-by-case basis.
- Under *post-appeals mediation*, an extension of the Appeals process, a mediator from Appeals — or a non-IRS mediator — assists parties in resolving a tax dispute after good faith negotiations in Appeals have been unsuccessful. Finally, there is *arbitration* — upon request by taxpayers — on factual issues that are already in the Appeals administrative process. The arbitration procedure excludes Collection

cases and Compliance and Appeals Coordinated Issues. If settlement negotiations are unsuccessful, the taxpayer and Appeals may jointly request binding arbitration.

The **Federal Election Commission** is employing a variation on settlement negotiations – a bilateral process in which respondents engage in a dialogue with a representative of the ADR office who explains the nature and cause of the Federal Election Campaign Act violation. That dialogue provides respondents an opportunity to directly explain their committee’s or organization’s actions and their perspective on the nature of the violation. The ensuing negotiations between the parties result in a settlement that is mutually acceptable to the parties and achieves the agency’s goal of promoting compliance with the relevant statutes.

The **Federal Deposit Insurance Corporation** also provides dispute resolution options. For example, recently, the agency’s Community Affairs staff facilitated discussions between community leaders and bank owners regarding the community’s protest against a bank acquisition. The facilitated meetings helped to defuse the tension and anxiety in the community. Bank and community leaders continue to meet quarterly to discuss community reinvestment concerns, including gentrification and foreclosure rates related to predatory lending.

The **Small Business Administration** encourages mediation with participating lenders when it has regulatory issues with the lenders, such as denial of liability under the agency’s loan guaranty agreement with the lender. For example, the **Small Business Administration** resolved a major dispute with an Arkansas lender over a guaranteed loan which that agency made.

### Managing Costs

In the civil enforcement and regulatory arena, ADR programs also are enabling better control over resources expended, as well as better outcomes.

In an affirmative case handled by the **Department of Justice** under the Food and Drug Act involving blood supply, a combination of mediation and negotiation resulted in a revised consent decree saving three years of litigation time. In an affirmative consumer litigation case involving hazardous substances, ADR resulted in a savings of four months of litigation time and \$400,000 in litigation expenses.

ADR processes allow for more effective management and allocation of monetary resources. The **Department of Education** reports that the Cooperative Audit Resolution and Oversight Initiative provides for a more efficient and cost-effective use of Department resources, because it saves litigation time and other costs associated with audit resolution. The **Department of Homeland Security/Federal Emergency Management Agency** emphasizes that for every lawsuit avoided, every grievance not filed, and every complaint withdrawn because of the services of the ADR office, the agency saves untold thousands of dollars. ADR thus allows the agency to better manage

its resources, as opposed to leaving the resolution of disputes to a judge, jury, or other entity outside the agency. The **Department of the Treasury/Internal Revenue Service Appeals** office notes that its ADR programs allow Appeals officers to resolve disputes early in the administrative process rather than waiting for the case to come to Appeals. This optimizes their resources, as the amount of time to resolve the dispute with the agency is dramatically reduced. Similarly, the use of settlement judges results in the conservation of resources at the **Federal Energy Regulatory Commission**. With 87% of all cases set for hearing referred to settlement judges at the outset, the number of cases left for litigation is drastically reduced. During FY 2003 and FY 2004, the Office of Administrative Law Judges certified 168 settlements, while issuing only 45 initial decisions on appeals. This translates directly into cost savings. Because the resources required for conducting settlement negotiations are not nearly as great as those required for litigation, much more work can be accomplished with significantly fewer resources. The **Federal Energy Regulatory Commission** also reports faster processing and savings on hydroelectric proceedings where settlement agreements are reached during the pre-filing period. The **Nuclear Regulatory Commission** reports that the enforcement and investigative resources saved by a 2004 pilot ADR program in enforcement freed those resources for use in other areas.

The timing of ADR responses is instrumental in controlling costs and securing a quick result. Civil enforcement and regulatory agencies aim for early, frequent, and informal dispute resolution at the lowest possible management level and through informal means. For example, the Idaho National Engineering and Environmental Laboratory Federal Facility Agreement and Consent Order includes a dispute resolution process to facilitate early and rapid resolution of disagreements between the state of Idaho, the **Environmental Protection Agency**, and the **Department of Energy** regarding cleanup activities pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act. The dispute resolution process has been used successfully in a conflict over a draft waste management plan, providing parties a cost-efficient and effective resolution in a timely manner. The **Department of Transportation, Pension Benefit Guaranty Corporation**, and the **Federal Maritime Commission** likewise report that cases that are successfully mediated generally cost less and resolve faster than those in more formal government forums, resulting in better, more effective use of resources.

Even though pursuant to statute, the **Securities and Exchange Commission** is unable to agree to a settlement at the mediation table because its Commissioners must review and authorize settlement of all enforcement matters, the agency has realized these types of positive outcomes as the result of mediation in enforcement matters:

- Mediation resulted in an agreement to recommend settlement that was later accepted by the Commission.
- Mediation focused the parties and issues so they were able to reach settlement shortly after the mediation concluded.
- Mediation streamlined the discovery process.
- Mediation enabled the agency's attorneys to assess the defendant's demeanor and how the defendant would appear at trial.

- The mediator alerted the agency to a weakness in its case that had not been sufficiently considered.

Additionally, because of the nature of ADR in focusing on improved communication and party control over outcome, resolutions emerging from ADR processes generally are more durable and informative. For example, the **Department of Education** noted that the use of dispute resolution services has helped to resolve long-standing audits in a way that both promotes collaboration among participants in the audit resolution process and encourages a resolution of audit issues that is responsive and effective, thus preventing recurrence of the audit finding. This approach improves the administration of federal education funding by state and local educational agencies.

The **U.S. Institute for Environmental Conflict Resolution** leadership is developing and implementing a multi-agency performance evaluation system on environmental conflict resolution which will directly contribute to assuring long-term improvements in performance within the federal government. The environmental conflict resolution processes themselves are designed to improve environmental decision making by engaging interested and affected parties in deliberating constructively with shared, comprehensive information about potential impacts and relative benefits of a given governmental decision (see the table below). The agency’s performance evaluation initiative will build upon and enhance these processes.

### Capturing the Value of Environmental Conflict Resolution

| Savings Realized and Benefits Accrued |  |  |  |  |
|---------------------------------------|--|--|--|--|
|                                       |  | <i>Tangible</i> -----  | <i>Less Tangible</i>   |  |
| <i>Short-term</i>                     |  | Saved on <i>direct process costs</i> (e.g., the process costs to mediate were less than litigation)                  | Avoided inflaming relations and escalating the conflict with litigation or unattended conflict                                     | Avoided or reduced negative on-the-ground impacts (e.g., environmental, social, economic)            |
|                                       |  | Likely reduced or avoided the <i>direct cost of appeals</i> (e.g., the solution is less likely to be contested)      | Better outcomes were crafted (e.g., less costly settlements, timely project progression, innovative solutions, reduced monitoring) | Improved stakeholder commitment to the agreement and its implementation                              |
| <i>Longer-term</i>                    |  | Created efficiencies that reduce future <i>indirect process costs</i> (e.g., field staff time dealing with conflict) | Case used as a prototype for resolving other similar problems or conflicts   | Created the potential for stakeholders to work together productively on related issues in the future |

At the **Environmental Protection Agency**, the Conflict Prevention and Resolution Center is developing a process to measure the environmental, economic, and social impacts of collaborative problem-solving and ADR and compare those to traditional processes. The agency plans to use this process to assess the types of environmental decision making contexts that are most amenable to the use of ADR, thus enabling the agency and its stakeholders to invest resources in appropriate decision making processes. Similarly, the **Department of the Interior** is forming a team to analyze the costs of litigation and alternatives to litigation. This team also will look at the possibility of measuring the results of ADR processes and linking these results to agency mission and performance goals under the Government Performance and Results Act of 1993. The **Department of the Interior/Bureau of Land Management** has introduced performance standards into the roles of the State ADR Advisor, through the Bureau's budget process, in order to effectively accomplish budget and performance integration to ensure appropriate results for the resources expended. These efforts will provide the hard numbers to support ADR expansion and assist in better allocation of ADR resources into areas where they will be most beneficial.

### Managing Strategically

In the civil enforcement and regulatory arena, agencies are also building internal capacity to maximize the benefits of ADR. For example, the **Federal Energy Regulatory Commission** has developed training on ADR procedures and negotiation, which it offers to its parties and staff. While the overarching goal of the training is to enhance general understanding of ADR by all employees, the more targeted goal is to assist staff in taking a more proactive role in working with parties in the collaborative pre-filing process. The agency has found that pre-filing processes contribute to achieving settlements before any significant amount of time is spent in developing the formal application documents. The Conflict Resolution Training Program enhances the potential for agreement through this process – and others – by equipping staff with the tools to better understand the conflict, barriers to resolution, and appropriate resolution techniques. More importantly, the Program equips staff to further resolution efforts through the application of an interest-based approach to the dispute.

The efforts of the **Department of the Treasury/Internal Revenue Service Appeals** to institutionalize ADR include an incentive-based training program for mediators. To date, 400 Appeals officers have been trained as mediators. Mediation is a collateral duty for Grade 14/13/12 Appeals officers and it enhances their competitiveness for promotions.

The **Nuclear Regulatory Commission** efforts to institutionalize ADR include the establishment of a 2004 pilot program on the use of ADR in the enforcement arena. The program addresses disputes in two areas: between a licensee and the agency; and between a licensee and its employee when the employee has alleged to the agency that the licensee has taken retaliatory action against the employee for raising a safety concern. To ensure a source of skilled, unbiased neutrals, the agency has engaged the Institute of Conflict Resolution at Cornell University to select and oversee a roster of experienced mediators and to administer the early ADR program.

Similarly, the **Federal Deposit Insurance Corporation** has developed capacity through its Office of the Ombudsman, which provides a range of dispute resolution services to staff and external parties. Recently, the agency's Division of Supervision and Consumer Protection became involved in a difficult situation with bank representatives as a result of a bank examination dispute. The bank had written two letters to its state senator, and was not satisfied with the agency's response to those letters. The Division offered to meet with bank representatives at the bank site to discuss the dispute and requested that the agency's Office of the Ombudsman facilitate this meeting. Through the facilitated meeting, the Division of Supervision and Consumer Protection and the bank were able to resolve the issues at hand and identify a way to potentially eliminate future roadblocks and improve the examination process. The manner in which the dispute was handled resulted in a better relationship between the bank and the agency as a whole. Both sides stated that they thought the meeting was productive, and applauded each other for their efforts in reaching a mutually agreeable solution. Resolving the dispute in this manner resulted in time and cost savings for both the agency and the bank. Moreover, using the internal expertise of the Office of the Ombudsman to facilitate the resolution was a cost-effective and efficient use of government resources.

The **Department of Transportation** Center for Alternative Dispute Resolution offers ADR-related informational and skills-based workshops. The agency offers a variety of courses, instructors and coaches to employees and provides them with opportunities to learn in a diverse environment and to recognize the issues that they face in a variety of organizational settings.

Efforts to exchange resources and experiences have also been widely supported in the civil enforcement and regulatory arena. For example, the **Departments of Agriculture, Commerce, Defense, and Interior** and the **Environmental Protection Agency** are working in concert to implement the President's Executive Order 13352, dated August 30, 2004, on advancing Cooperative Conservation and the related guidance memorandum from the President's Council on Environmental Quality/Office of Personnel Management, dated November 28, 2005, to promote the hiring, training, and rewarding of federal employees who implement the principles of Cooperative Conservation. Through their Chief Human Capital Officers, all five agencies have agreed to support a competency-based approach to building collaboration and partnering skills to accomplish conservation objectives consistent with their agency missions and statutes. As one example of this, the **Department of the Interior** Collaborative Action and Dispute Resolution Office is participating in the development of competencies and performance measures required for effective collaboration and conflict management in the context of natural resources management.

Civil enforcement and regulatory agencies are also working to increase the capacity and understanding of external entities. The **Federal Energy Regulatory Commission**, for example, has worked with the **U.S. Institute for Environmental Conflict Resolution**, the American Bar Association, the Energy Bar Association, and energy-related trade associations, to raise awareness about ADR and share the Commission's experience with

ADR as a process that provides for effective public participation in government decision making, encourages respect for affected parties, and averts future complaints.

Federal agencies are working to enhance the resources available for civil enforcement and regulatory ADR processes. Due in large part to the successes achieved through the use of ADR by both the private and public sectors, and efforts by government representatives to work with outside entities in the development of rosters, there has been an increase in the use of private, third party neutrals. The **Department of Agriculture** reports that some of its sub-agencies are “using contract resources to provide cost-effective, cutting edge resources.” As the use of private third party neutrals in enforcement and regulatory settings continues, federal agencies are working to identify those ADR professionals with enforcement and regulatory experience and expertise. For example, the **Federal Energy Regulatory Commission** Dispute Resolution Service specialists are working with regulated utilities and conflict resolution entities to help develop rosters of energy specialists to serve as third party neutrals. Information submitted by agencies for this Report have mentioned these sources which provide choices in the environmental and natural resources arena:

- The National Roster for Environmental Conflict Resolution Practitioners, maintained by the **U.S. Institute for Environmental Conflict Resolution** (and co-funded by **Department of the Interior, Environmental Protection Agency,** and the **Department of Transportation/Federal Highway Administration**), is a public on-line searchable database of over 250 pre-qualified neutrals that is used internally by the Institute, by other federal agencies, and by other public and private sector parties.
- The **Environmental Protection Agency** has a competitively-awarded prime contract for accessing and sub-contracting with pre-qualified professional neutrals.

These sources (working with the project managers and consistent with the central ADR principle of party self-determination) enhance the quality, responsiveness, and effectiveness of ADR services, and increase the government’s efficiency in selecting practitioners with the right skills for a given conflict.

The by-product of all of these efforts is considerable. As the **Federal Maritime Commission** notes, by “encouraging involvement of commercial parties in finding solutions, many more matters can be resolved with fewer resources.” The **Department of the Interior/Bureau of Land Management** reports that ADR-based stakeholder collaborations are resulting in unique and innovative interest-based solutions to complex, multi-party issues involving major resources and land uses, thus allowing greater efficiency and gains for citizens in the communities. The **Nuclear Regulatory Commission** reports that through its collaborative processes, stakeholders and agency representatives are identifying approaches that are better, and more acceptable, than what the agency might develop without the benefit of the external input. The use of best practices by the agency’s licensees will give the agency more confidence that the

community participation performance requirement in the decommissioning regulations has been met. This will result in cost-savings for both the licensee and the agency.

The ADR process also equips agencies with information to continuously improve and expand ADR options so they are responsive to the evolving needs of their users. For example, the Office of the Acquisition and Assistance Ombudsman at the **U.S. Agency for International Development** reports that its efforts enable it to serve as a check and balance for the agency by identifying types and trends of business practice uses. The **Federal Election Commission** reports that the ADR program itself is an innovative approach to addressing campaign law violations, bringing the efficiency of dispute resolution processes to the agency's task of enforcing federal election laws. The **Federal Deposit Insurance Corporation** Division of Supervision and Consumer Protection reports on the results of a series of informal meetings with bankers who had experienced the new consumer compliance examination approach launched in 2003. The meetings, which took place in each of the agency's six regions, were designed to supplement feedback gathered through anonymous post-examination surveys. The Division knew from the surveys that bankers found certain aspects of the examination process to be particularly burdensome. Through facilitated discussions at the meetings, the Division was able to gain insight into how to refine the examination process to minimize the burden on banks while still ensuring a thorough, high-quality examination. Building on this effort, the **Federal Deposit Insurance Corporation** Office of the Ombudsman has established an outreach program in which it will visit or call all 5,279 federally-supervised institutions over a five-year period. The program offers bankers a way to provide confidential feedback without fear of retaliation. The Office of the Ombudsman also publishes a semi-annual report, the "Ombudsman Report to the Industry," to notify the industry of common issues and concerns gleaned from outreach exchanges, and to provide contact information for those wishing to use ombuds services.

## **B. Claims Against the Government**

Cases involving claims against the government are cases in which the United States is a defendant in a civil action, and the **Department of Justice** defends the interests of the United States. The use of ADR is a fairly common practice in these cases, particularly since all of the federal district courts now are required to offer some form of ADR (typically mediation).

The district courts take different approaches in making ADR available. Some courts require mediation in all civil cases through their own ADR programs. Other courts select individual cases for referral to mediation. Some courts use magistrate judges or retired judges as mediators, while other courts have established a panel of attorney mediators who in many cases work on a voluntary, pro bono basis. In any event, private mediation always is an option at any stage of litigation in any case in which the parties agree it is appropriate.

Additionally, many agencies make an initial determination as to whether to settle a civilian claim before a lawsuit is actually filed, and they use mediation to some degree at

these early stages. For example, the **Pension Benefit Guaranty Corporation**, in one settlement of a class action pension complaint, agreed to the creation of a bi-lateral appeals board to expeditiously hear complaints by individuals disputing their pension amounts, rather than insisting on a case-by-case litigation of claims asserted by often elderly pension recipients. However, without the rights to discovery which accrue with the formal filing of the lawsuit, the parties in many cases may not yet have enough factual information to support a knowledgeable settlement at the pre-filing stage.

One of the goals of the Claims Against the Government Section is to promote more and earlier use of ADR in appropriate cases. The advantages of resolution through ADR are clear:

- savings in costs associated with trials, such as fees and travel expenses for experts and other witnesses;
- savings in time of attorneys, staff, and parties who are federal employees;
- quicker resolution than a trial would offer and thus fewer days that the parties have spent under the cloud of pending litigation;
- creative resolutions acceptable to the parties, but which a court could not impose;
- lower monetary judgments than a jury or judge might impose; and
- a durable and voluntary agreement without any appeals.

Moreover, even in the cases which did not result in resolution, attorneys representing the government consistently have reported other distinct advantages to the ADR process, including:

- laying the groundwork for a subsequent settlement;
- increasing clarification of the issues for trial;
- addressing and evaluating the plaintiff, as well as the strength of the case from plaintiff's vantage point;
- improving or preserving a relationship between the government and one of its citizens;
- promoting a fair and responsive government; and
- inspiring public confidence and trust in the government through a transparent process.

The goal of ADR in these cases is consistent: offering expedient alternatives to citizens while at the same time pursuing the best interests of the government. One **Department of Justice** attorney described the obligations of an attorney representing the United States: “Our mission is to zealously represent the United States in suits brought against it or in suits brought on its behalf. However, we also owe a responsibility to our citizens to act fairly to those litigating with the United States.”

Through an ADR process, citizens with claims against the government have the opportunity to directly access government officials and receive a more immediate response to their dispute than if the case proceeded to litigation. Another **Department of Justice** attorney wrote that because ADR speeds up the process “justice is served more effectively because justice that is delayed can sometimes become justice denied.” While ADR is not appropriate for every dispute, even those agencies that do not have citizen-centric missions – such as the **Army** – are realizing ADR’s potential in providing relief for their stakeholders. The **Department of Defense/Department of the Army** reports, for example, that ADR techniques have been used “to resolve disputes arising over the accessibility of Army activities and facilities to the disabled” (e.g., accessibility of waterways managed by the **Department of Defense/Army Corps of Engineers**).

ADR can serve the best interests of the government and can enhance its relationship with its citizens. In cases alleging injury caused by government negligence, a mediator can help educate a plaintiff about the appropriate economic evaluation of his/her case, which can streamline the issues and diminish unrealistic expectations about the potential outcome of the case. As one **Department of Justice** attorney wrote, “Usually, if a case that should settle fails to settle at mediation, it is because the plaintiff has unrealistic expectations. Most people just want what is fair. If you are able to meet their needs in mediation, [parties] view the government in a positive light and often view the agency as being responsive to their concerns that resulted in their filing the lawsuit in the first place.” Another attorney from the **Department of Justice** noted in the settlement of a case: “If a citizen is satisfied with the outcome of a matter without the expense of trial, and the disruption to business and personal lives, then I consider that a success story that reflects well on that citizen’s government.”

The use of ADR in appropriate cases affords the government more control over its limited resources while producing satisfactory results for all parties. While it is difficult to quantify the difference between a mediated agreement and a judgment because of so many trial variables, it is relatively easy to compare the costs of each process. Litigation costs are fairly predictable and include: attorney and paralegal or staff hours throughout discovery, pretrial motions, and trial; costs of expert witnesses, both for time spent at an evaluation as well as time spent for preparation and trial; and discovery costs including depositions. The costs of mediation are much more limited. A single hour in mediation costs approximately what a single hour of just one deposition costs. Given the other costs of litigation and considering the advantages of mediation, it is clear that use of mediation in appropriate claims against the government contributes to better control over limited agency resources.

Attorneys throughout the federal government are lauding the use of ADR in appropriate cases to effect resolutions that meet the needs of the parties – and the government. The **Department of Justice** Civil Division reports: significant savings in discovery and litigation costs; advantageous settlements resulting in substantial savings in defensive litigation; and large monetary recoveries in affirmative litigation. For FY 2005, in a major civil fraud accounting case, the government recovered \$62 million through the use of mediation and saved four months of trial preparation. In another civil fraud case, use of ADR saved 2,000 hours of discovery time, resolved the case two years sooner than litigation would have done, and prevented other future similar disputes. In FY 2004, the use of mediation in a class action employment discrimination case saved 1,500 hours of discovery time and two years of litigation time. In earlier years, in an admiralty case, the Civil Division reports that the government avoided five days of trial and trial preparation time through a one-day mediation that settled the case for \$500,000 notwithstanding the plaintiff's earlier settlement demands of several million dollars. Mediation in an aviation case resulted in a settlement of \$825,000 which was well below the amount sought by plaintiff.

Engaging in ADR processes saves resources for other agency work through streamlining or eliminating issues in dispute. The **Department of Justice** Civil Division emphasizes that even if a case does not settle, involvement in an ADR process routinely results in a narrowing of contested issues and the scope of discovery. An example was its use of neutrals to negotiate case management and discovery plans in a massive multi-party case, which served to expedite the litigation process to a large degree and thereby saved trial expenses. A related benefit is the impact of a third party intervention in cases with *pro se* plaintiffs who have unrealistic expectations about the value or strength of the case. A neutral mediator can provide a “reality check” for plaintiffs and assist them in understanding their alternatives.

A number of attorneys report that ADR can be particularly useful in certain types of cases. A **Department of Justice** attorney noted: “In employment discrimination, even if [the] plaintiff doesn't get a large award at trial, the attorney's fees which can be awarded after trial can be a significant expense for the government. Mediation greatly reduces that exposure.” Resources that are saved – through a faster resolution process or avoided payments – can be used to handle other matters that cannot or should not settle.

The availability of ADR in appropriate cases provides opportunities to achieve a resolution while maximizing the limited government resources that are available to defend cases. As several divisions within the **Department of Justice** emphasized, “By resolving cases that can be resolved through ADR, attorneys are able to focus their resources and work efforts on the cases that need to be fully litigated. ADR thus strategically allocates ... attorneys' workload. In addition, resolving cases on behalf of the Department's federal agency clients frees our clients to expend their workload and resources on the core missions of their agency rather than on time-consuming litigation.” To enhance the benefits of ADR, some federal district courts utilize the services of a Magistrate Judge or other non-case assigned judges to serve as mediators, fostering both efficiency and cost savings in resources.

The benefits of ADR are realized in the results. A **Department of Justice** attorney reports that ADR has been “helpful especially in higher dollar medical malpractice cases.” ADR’s focus on interests enables parties to move away from their positions – often expressed solely in dollar figures – to their interests, which often reflect more varied considerations such as a timely resolution. An attorney representing the government reflects: “In all ... we can say without hesitation that the cases we have settled using ADR have resulted in a significant savings to the government over what could be reasonably expected to have resulted at trial, and often at a savings of millions of dollars.” More than that, application of an ADR process may result in more creative resolutions that are tailored to meet the parties’ needs and which may go beyond the jurisdiction of a court to order. ADR fosters solutions that may substitute for the payment of money or reduce potential monetary exposure. Even where a case does not settle, ADR can be valuable in narrowing the issues, or helping parties move closer to settlement (or facilitate a later settlement) by demonstrating good faith, improving their relations, or making progress in the negotiations. ADR also may be beneficial in resolving several related disputes in one global settlement, or in settling one dispute that can set parameters for the resolution of similar future disputes. Additionally, ADR can contribute to effective case management by resolving discovery disputes or facilitating the informal exchange of critical information.

An additional benefit of using ADR for claims against the government is that the parties can agree to a wide range of remedies which simply are not available pursuant to a judicial adjudication. Mediated settlements can include reversionary trusts or structured settlements which can provide a better, more tailored settlement than a judge could provide.

**Department of Justice** attorneys have used ADR in appropriate cases in a wide range of litigation including the following areas: admiralty/maritime, medical malpractice, wrongful death, class action discrimination, and natural resources. The results shown in these illustrative examples demonstrate the significant resources that ADR can conserve, as well as its role in achieving a better resolution than would have been likely in traditional litigation:

- In an environmental defense case, mediation saved \$150,000 in litigation/discovery expenses, saved 2,500 hours of attorney/staff time and at least six months of litigation/discovery time, produced a better settlement than would have been likely without ADR, and avoided adverse precedent.
- In an environmental natural resources case, mediation saved \$200,000 in litigation/discovery expenses, saved “hundreds of hours” of attorney/staff time and 18 months of litigation/discovery time, improved the relationship between the parties, and resulted in a better settlement than would have been likely without ADR.
- A case involving federal water rights claims and Endangered Species Act issues was staggering in its scope, complexity, and impact. It involved 180,000 claims to

water rights and three sovereigns (state, tribal, and federal), including numerous different federal agencies. The case was pending for 17 years, and direct negotiations had been ongoing for three years when a mediator was appointed. The mediator worked with the parties for five years. An agreement was reached which has a 30-year term and should provide a model for future settlements of water rights and endangered species issues in the western United States. (A Department of Justice attorney in the Environment and Natural Resources Division received the Attorney General's John Marshall Award for ADR in 2004 for his representation of the Department in the negotiations and his work in ensuring that all federal interests were addressed in the mediation.)

- In two complex aviation wrongful death cases, mediation saved \$3 million in litigation/discovery expenses, saved 2,800 hours of attorney/staff time, and 10 months of litigation/discovery time, avoided adverse precedent, and resulted in a better settlement than would have been likely without ADR.
- In a maritime personal injury case, mediation saved \$150,000 in litigation/discovery expenses, and resulted in a better settlement than would have been likely without ADR.
- In nine tort cases, mediation achieved a better settlement than was likely without ADR, saved \$1,540,000 in litigation/discovery expenses, saved 2,240 hours of attorney/staff time, and 31 months of litigation/discovery time.
- Mediation in a Federal Tort Claims Act case avoided a potential loss of over \$6 million and saved 480 hours of attorney and staff time.
- In a discrimination/sexual harassment case, mediation saved 780 hours of attorney time and six months of litigation/discovery time, and resulted in a better settlement than would have been likely without ADR.
- In an employment discrimination case, the mediator's objective assessment of the plaintiff's claims prevented the government from having to engage in full discovery and summary judgment briefing in a non-meritorious case.
- In another employment discrimination case, mediation saved \$350,000 in litigation and discovery expenses, and nine months of litigation and discovery time, and avoided adverse precedent.
- Mediation in a Fair Labor Standards Act collection action saved over \$100,000 in expert witness and deposition costs, "hundreds" of hours of attorney/staff time, and one year of litigation/discovery time.
- In adversary proceedings in a bankruptcy court case, mediation avoided a potential loss of \$22 million in litigation against the United States, saved years of litigation, and avoided bad precedent.

- The use of ADR in litigation facilitated a settlement which ensures the preservation of the world's oldest stand of old-growth redwood trees for timber holdings, and led to settlement of a 50-year old tribal dispute claim related to the decline of the tribe's timber resources. (An attorney in the Department of Justice's Environment and Natural Resources Division received the Attorney General's John Marshall Award for ADR in 2001 for his work on this litigation.)

Reports submitted by **Department of Justice** attorneys in the two most recent fiscal years estimated that mediation saved almost \$18 million in litigation/discovery expenses, almost 67,000 hours of attorney/staff time, and over 1,350 months of litigation/discovery time.

### C. Contracts and Procurement

This Administration has given special recognition to federal agencies and their private sector federal acquisition partners for their outstanding efforts in fostering the use of ADR to resolve both procurement bid protests and disputes under existing government contracts, through an annual Federal Procurement ADR Awards Program sponsored by the Office of Management and Budget's Office of Federal Procurement Policy. The Awards Program was initiated in 2002 at the suggestion of the Interagency ADR Working Group Contracts and Procurement Section and has been maintained and expanded with the assistance of the Section's leadership. The public sector award winners to date have included: the Department of the Air Force; the Armed Services Board of Contract Appeals; the Army Corps of Engineers; the Defense Logistics Agency; the Federal Aviation Administration; the General Services Administration Board of Contract Appeals; and the Department of the Navy. Detailed descriptions of the specific accomplishments of the Awards Program winners are set forth in Appendix F.

#### Promoting a Citizen-Centered Government

The agencies have made federal procurement-related ADR a transparent process and one which is much more accessible to the American citizenry, particularly to individuals and business entities who regularly do business with the government. Those business entities, when confronted with a contract and/or procurement dispute, seek prompt and fair resolution, something that is in the interest of the government as well. Agencies have designed ADR programs to meet this need, allowing citizens to resolve bid protests and contract disputes at the lowest level and least cost. For example, the **Department of Defense/Department of the Air Force** ADR program seeks to empower its business partners and employees to play an active role in resolving disputes through interest-based collaborative problem solving processes. This increases the sense of teamwork, focuses on sensible outcomes, and creates a shared sense of ownership in dispute resolution processes. The **General Services Administration** "Fuss Busters," a group of mediators in the agency's Southwest Region, voluntarily mediate contract and other disputes. The "Fuss Busters" have shown that volunteer efforts truly serve the taxpayer and sometimes may be more effective than paid programs.

In addition to providing vehicles for dispute resolution, a number of agencies have invested in the establishment of “ADR infrastructure” to inform citizens about their ADR options and ensure that these options are accessible. For example, the **Department of Defense** (the **Department of the Air Force**, the **Department of the Navy**, and the **Defense Logistics Agency**), as well as the **Department of Transportation/Federal Aviation Administration**, have developed user-friendly ADR Web sites that provide complete descriptions of available ADR techniques, sample forms, training in how to engage in interest-based collaborative problem solving processes, and success stories illustrating how and when ADR has been used to create “win-win” solutions that have benefited both the agencies and their private sector partners. Many agencies include information about the use of ADR in contract disputes.

Several agencies also are creatively utilizing the Internet to provide information about and provide access to their procurement ADR resources. The **Department of Defense/Department of the Air Force** uses the Internet “as the principal means of disseminating ADR information and [it] is engaged in new initiatives to promote ADR and negotiation skills training via Web-based e-learning tools, knowledge management systems, and collaborative software.” The Air Force ADR Web site consistently ranks in the top ten in page hits, as measured by the “Google” Web search engine using the search terms “ADR” and “Alternative Dispute Resolution.” The **Department of Defense/Department of the Navy** ADR Program Web site “has extensive explanations of ADR processes...[and] an on-line training program that allows the public, contractors, and employees to hear from [its] senior leadership concerning how ADR can resolve disputes efficiently for all parties.” Information about the Program and its services is clearly set forth with links and contacts to other pertinent dispute resolution programs and contacts within and outside the agency. Likewise, the **Department of Veterans Affairs** reports that it has expanded initiatives in electronic government to make government operations more comprehensible and of greater use to contractors and government employees alike, and to make dispute resolution easier, quicker, and cheaper for persons who have disputes with the agency.

Finally, the **Department of Transportation/Federal Aviation Administration** Office of Dispute Resolution Web site contains a user-friendly guide to its dispute resolution process, including access to model ADR agreements and other forms, ADR success stories, specific filing and contact information, and thorough explanations of the ADR services available to public and private parties.

### Managing Costs

In the contracts and procurement arena, ADR also provides tools to promote the management of conflict in a manner that avoids many of the transactional costs of traditional processes.

Agencies in this arena have begun to demonstrate the monetary savings achieved through ADR, and the results are impressive. For example, the **Department of Defense/Army Corps of Engineers** reports: “In the past three fiscal years, the Corps has resolved 117

claims and appeals using ADR techniques, and the cost savings have been consistent with the historical data. Also during that time, the Corps has resolved 156 claims and appeals without resort to third party neutral assisted ADR. In this venue, the Corps has realized savings of over \$76 million, paying only \$37 million, including interest, on over \$113 million in claims not including interest.”

The **Department of Defense/Department of the Navy** ADR program estimates that ADR achieves significant savings over litigation. As shown in the accompanying table, for 41 cases analyzed, the program estimated about \$1.8 million in direct expenses that were avoided by using the ADR processes. Further, assuming the same outcome on the merits, the program estimates that the agency avoided about \$1.1 million in potential interest because ADR was faster than the administrative process.

| <b>Quantified Costs Avoided FY01-05</b>  |                    |
|--|--------------------|
| Testimony Expenses Avoided               | \$1,096,413        |
| Travel Expenses Avoided                  | 199,608            |
| Other Expenses Avoided                   | 513,600            |
| Less: ADR Unique Costs Incurred          | (24,895)           |
| <b>Total Costs Avoided</b>               | <b>\$1,784,726</b> |
| Estimated Interest Avoided               | \$1,071,468        |
| <b>Total Quantified Expenses Avoided</b> | <b>\$2,856,194</b> |

The **Department of Defense/Defense Logistics Agency** also cites financial benefits from ADR: “The...acquisition ADR program covers both pre and post award disputes. It has an impressive success rate; in FY 2005, 87% of matters taken to ADR were either entirely or partially resolved through ADR. Significant dollar savings have resulted, an estimated \$1.4 million for FY 2005.” Also, the **Department of Defense/Department of the Air Force** reports that its “ADR First” policy in contract disputes has enabled it to avoid an average of \$57.6 million in liability in each of the most recent five years (FY 2002 through FY 2006).

Agencies also acknowledge the time savings achieved through ADR. The **Department of Transportation/Federal Aviation Administration** Office of Dispute Resolution for Acquisition reports that the use of ADR techniques is resulting in short resolution timeframes. Bid protests are resolved through ADR in an average of 24 calendar days, while contract disputes have been resolved by ADR in an average of 67 calendar days.

The use of ADR processes also is contributing to more durable resolutions that reflect the needs of the parties and the government agencies. For example, the **Department of Defense/Department of the Air Force** reports that: “Unlike almost all non-ADR dispute resolution processes, ADR keeps decision making with the parties (one of whom is always the Air Force), thus fostering positive business solutions, rather than ceding it to an outside decision-maker who can only impose win/lose outcomes.” The **Department of Veterans Affairs** states that as the result of its ADR program: “decisions affecting ... resources can be made more quickly and with greater certainty in achieving the [agency’s] mission and meeting the requirements and deliverables [necessary to] accomplish its mission.”

As in other areas, agencies within the contracts and procurement arena are quantifying the effect of ADR. The **U.S. Agency for International Development**, the **Department**

**of Defense/National Geospatial-Intelligence Agency, the General Services Administration, the Department of Homeland Security/Transportation Security Administration, and the Department of Interior/Bureau of Land Management** currently are developing metric systems to measure the impact of ADR use in contracts and procurement disputes as well as issues in controversy in other areas. This will enable them to more effectively allocate ADR dollars to areas where they will be most beneficial.

### Managing Strategically

In the contracts and procurement arena, ADR efforts are also focused on enhancing existing resources to encourage responsive and innovative dispute resolution processes and outcomes. As in other arenas, training is a significant focus, and agencies have implemented training programs to minimize roadblocks to the institutionalization of ADR. For example, the **Department of Defense/National Guard Bureau** Contracts Section delivers annually a series of three or four Claims Avoidance workshops (in addition to other training) to its contracting officers and other Guard personnel. The workshops are designed to avoid contract disputes in ongoing contracts, and routinely are attended by 40-50 people. The **Department of Defense/National Guard Bureau** Contracts Section strongly believes that these workshops have resulted in a decrease of problems and disputes arising from the implementation of contracts.

Some agencies suggest that the ADR process itself enhances the capacity of parties – internal and external – to manage conflict. For example, the **Department of Defense/Department of the Air Force** reports that ADR processes encourage better relationships between the agency and its private sector partners. One by-product of the improved relations is the greater chance that the parties will successfully fashion their own solutions to their future disputes. Similarly, the **Department of Defense/Defense Logistics Agency** reports that its ADR program: “supports constructive problem solving and fosters positive relationships with its contractors. The ADR program advances these objectives while reducing agency costs.” The **Department of Transportation/Federal Aviation Administration** Office of Dispute Resolution for Acquisition expressly recognizes in its mission statement that “it is in the best interests of the agency and its business partners to work together to avoid and resolve acquisition-related controversies in a timely and fair manner.”

The innovation of contracts and procurement ADR initiatives is evident in both program design and outcome. For example, the **Department of Agriculture** demonstrates its program innovations through the use of internal neutrals to minimize travel costs, the consolidation of travel assignments, the contracting of the ADR neutral at the most reasonable possible rates, and the use of telephonic and video-conferencing in place of travel, where possible. The **Department of Veterans Affairs** reports on the innovations in ADR outcomes, noting that it has realized substantial benefits through the use of ADR in contract disputes. The agency reports that it fosters efficiency and innovation by encouraging parties to a dispute to work in partnership to find creative, cost-effective resolutions that will address the needs of the government and other parties to effectively

use money, time and other resources. Such processes foster the efficient use of these resources — and more — by encouraging prompt resolution and avoiding undue litigation delays and costs.

Another innovative program, one which has generated appreciation from the private sector, is that of the **Department of Transportation/Federal Aviation Administration** Office of Dispute Resolution for Acquisition to make ADR available to parties even *before* they file formal bid protests or contract disputes. This program enables parties to address and resolve their contract and procurement concerns before the dispute has escalated to the “formal” level and resources have been invested in building a case. The results are impressive: the office reports that of 79 “pre-dispute” cases where ADR was employed, only three proceeded to formal litigation.

ADR also has been used creatively — and proactively — to promote the goal of competitive sourcing by expanding ADR options into that area. Illustrative are the efforts of the **Department of Transportation/Federal Aviation Administration** Office of Dispute Resolution for Acquisition, which is charged with the responsibility for adjudicating contests arising from competitions pursuant to Office of Management and Budget Circular A-76, and which has developed and implemented A-76 Contest Rules that expressly call for the voluntary use of ADR in these cases. To date, the office has been involved in four contests and has resolved two of them through use of ADR. The successful use of ADR in the two contests resolved significant disputes about the terms of the competition, which allowed the competitions to proceed on terms acceptable to the interested parties, avoided probable litigation delays, and led to completion on schedule. The office also creatively utilized ADR during a contest challenging the outcome of a competition and, while use of ADR did not resolve the contest, it did settle several issues and resulted in a streamlined and timely adjudication process which the parties viewed as fair.

#### D. Workplace

Across the federal government, agencies have found that the availability of workplace ADR increases the ability of employees and managers to resolve internal disputes quickly and effectively, at the earliest possible time, and at the lowest possible level. This is especially important in the workplace, where festering disputes may distract an employee or manager from fulfilling essential work responsibilities. ADR provides an alternative for employees and managers to address concerns relating to their employment and reach a quick resolution so that they may return to their jobs of serving the public.

Federal agencies also have found that use of ADR for management of workplace conflict is cost-effective — it saves money and time because resources are not spent on long investigations and protracted litigation, but rather on resolving disputes more quickly outside of the courtroom. In addition, agencies have found that involvement in the ADR process often forces supervisors to deal directly with the outcome of their, or their subordinate’s, actions. This results in important lessons being learned that have long-term positive effects on the organization’s efficiency. Finally, direct supervisor

interaction with employees often opens avenues of communication that had been closed, resulting in improved working relationships and improved productivity.

In measuring the success of its own internal workplace mediation program, the **Equal Employment Opportunity Commission** found that 94% of participants would use the program again if they were involved in another workplace dispute. Even where managers resist participating in mediation, it is not because they take issue with the concept of mediation as an effective tool to resolve workplace disputes. Rather, the **Equal Employment Opportunity Commission** has found, when managers decline to participate in mediation, it is because they perceive that the complainant's case is completely lacking in merit.

### Background History of Workplace Alternative Dispute Resolution

Mediation in workplace discrimination complaints represents an early broad use of ADR by the federal government. In 1991, the **Equal Employment Opportunity Commission** began a pilot mediation program that ultimately became the key component in its private sector enforcement strategy. Based on the success of the pilot, the agency concluded that mediation was a viable alternative to the traditional investigatory methods it had used to resolve charges of employment discrimination it received, and that an ADR program should be implemented. The result became the agency's National Mediation Program which was fully implemented in 1999. Through the National Mediation Program, the agency proactively promotes the use of mediation at any stage of the administrative process to resolve private sector charges of discrimination which may have merit. At the beginning stage of the process, the agency uses ADR in negotiated settlement attempts to resolve charges of discrimination before a determination is made on the merits of a charge. Again at the ending stage of the process, in accordance with the statute it enforces, the agency uses ADR in conciliation efforts to resolve a charge after a finding of discrimination. The agency's emphasis on use of ADR in lieu of formal adjudication enables the parties to reach an agreement which addresses their respective concerns. Since an adjudicating court is limited in the kinds of remedies it can render, parties often prefer to craft a resolution which is better tailored to their needs, particularly if the work relationship is ongoing.

Another federal pioneer in workplace mediation is the **U.S. Postal Service REDRESS<sup>®</sup>** Program (Resolve Employment Disputes Reach Equitable Solutions Swiftly) which was instituted as a pilot project in 1994 in three locations in Florida. The program was initiated in response to a settlement agreement for a class action in which complainants argued that the traditional equal employment opportunity complaint process was slow and ineffective. The agency has found that REDRESS<sup>®</sup> provides critical assistance in response to the disruption and other costs associated with addressing discrimination complaints throughout an enormous workforce (over 700,000 in 2006). The REDRESS<sup>®</sup> program over time has expanded to encompass a broad range of workplace issues even if they do not rise to the level of illegal discrimination. The focus of the mediation program is to give the parties an opportunity to thoroughly address their concerns and hopefully to resolve them.

Together, the mediation programs of the **Equal Employment Opportunity Commission** and the **U.S. Postal Service** have launched a number of lessons learned:

- On the whole, many managers felt less threatened when they participated in a “problem solving” mediation to resolve a work-related dispute, rather than being put on the defensive in response to allegations of illegal discriminatory conduct.
- The earlier the mediation occurs, the better the chances are that the parties will reach a voluntary settlement, and that the collateral negative impact of the dispute on co-workers and the organization as a whole will be minimized.
- Mediation should be made available at many different stages of a dispute so that it is at all times a viable alternative to continuing with the formal dispute process.
- Voluntary agreements reached through mediation provide a more enduring solution to the issues underlying the dispute than a court adjudication could.

The impact of early intervention is significant because it helps to contain the conflict at an informal stage and prevent it from escalating and draining agency resources. The value of early containment is enhanced when the long-term benefits are considered. ADR promotes both efficiency and durability because it gives parties the opportunity to be actively involved – at an early and informal stage – in negotiating an outcome that effectively meets their interests. As they negotiate a resolution, the parties exchange information that ultimately leads to better decisions. As they craft their own resolution, they are better able to control their own resources and the outcome of their dispute. Additionally, a decision crafted in an ADR process has the buy-in of the parties and hence is likely to last much longer than a decision made by others in an administrative forum. That conclusion is borne out by the fact that there are fewer “return customers” to an ADR program than there are to an administrative forum.

Workplace conflict resolution programs are designed to enhance fundamental agency values at the core of their missions, including workplace diversity, trust, personal and professional growth, mutual respect, and open communications. By offering ADR programs, an agency demonstrates to its staff that management values its human capital as much as its fiscal capital. The **National Archives and Records Administration**, for example, reported the comments of employees who view the agency’s dedication to the dispute resolution program as evidence that the agency values the employees and their contribution.

Lastly, while some agency programs have integrated EEO disputes with other workplace disputes, other agencies have found more success in developing a freestanding workplace dispute resolution center which is separate from the office which addresses EEO complaints. One reason is that they found managers approached a freestanding dispute

resolution center more cooperatively than the EEO office. Some agencies discovered that managers were more reluctant to participate and more defensive about their behavior in an EEO proceeding where they had been accused of unlawful conduct. Other agencies provide mediation services for general workplace disputes even if the presenting complaint is narrowly labeled as an alleged “EEO” violation. Nevertheless, all agencies have consistently found that early intervention is the key factor.

### ADR Programs Are Successful in Resolving Workplace Disputes

The **Equal Employment Opportunity Commission** reported the national settlement rate of EEO cases through ADR was 49%. In favorable contrast, in their information submitted for this Report, agencies reported ADR settlement rates all above 50% and some reaching 75% and above, with significant cost savings.

The **Equal Employment Opportunity Commission’s** own EEO program (RESOLVE) reports excellent resolution rates. In FY 2004, 48 **EEOC** employees came to the program for assistance. Twenty-one of those cases were EEO cases referred to the program by the agency’s EEO office; 27 were non-EEO cases. The resolution rate for EEO cases was 72% and for non-EEO cases was 60%. Moreover, 94% of the participants indicated that they would use the program again.

The **Department of Defense/Washington Headquarters Service** reports that 60% of EEO cases accepted into mediation achieved resolution. The **Department of Defense/Department of the Navy** reports an average resolution rate, for all types of dispute resolution efforts, at 83.5%.

At the **Department of the Treasury/Internal Revenue Service**, ADR is implemented and actively marketed to resolve EEO complaints more quickly and effectively. The latest figures show that approximately 50% of their EEO cases were resolved through ADR.

Dispute resolution processes allow disputes to be resolved at the lowest possible level without escalating the problem. When agreements are reached they usually last longer because they meet all parties’ needs. When parties can “own” the agreement, there is better buy-in and increased satisfaction with the result, as well as increased accountability from both management and employees.

### ADR Programs Are Cost-Effective

ADR programs aimed at resolving workplace disputes conserve human capital in a number of ways. Good communication promotes agency productivity in the workplace. Productive and satisfied employees are less likely to quit their jobs, requiring new expenditures for recruitment and training. A positive work environment impacts new workers and creates loyalty and longevity in the agency’s own work environment.

The **Department of Defense/Department of the Air Force** notes that ADR typically resolved workplace disputes in less than one-eighth the time used for formal processes, using one-eighth the resources. Also, settlement agreements that arise out of the use of ADR are likely to be more innovative than those developed through litigation because they can resolve matters that could not be addressed sufficiently with money. Use of ADR promotes higher morale, lower absenteeism, and employee productivity, and provides positive alternatives to filing EEO complaints.

### ADR Saves Agency Funds

The **Department of Justice/Federal Bureau of Investigation** calculated that in FY 04, its cost was \$2,648 for each EEO investigation and over \$250,000 for a Final Agency Decision. In contrast, its average total cost is \$1,800 for each mediated case. The **Social Security Administration** calculated that the average cost of processing a complaint through the traditional EEO process is approximately \$40,000. In contrast, most of its mediated cases are handled by a shared neutral source and cost under \$50 per case, but even when an outside vendor is used the average cost is only \$1,500 per case. Similarly, the **Department of Defense/Defense Logistics Agency** has calculated that it saves, on average, \$20,000 per EEO case mediated. The approximate savings to the **Department of Defense/Washington Headquarters Service** by using ADR in FY 2004 was \$42,000, and about \$210,000 since the inception of ADR in March 2001. The **General Services Administration** notes that every EEO case resolved in mediation saves the agency approximately \$3,500 to \$4,500 in investigation fees alone.

At the **Department of the Treasury/Internal Revenue Service**, ADR is implemented and marketed to more timely resolve EEO complaints. Generally, approximately 50% of all mediated cases are resolved. In actual dollars, traditional case processing costs \$1,000 per case, as compared to half of that amount where mediation is used.

The **Department of Defense/Department of the Army** pointed out that litigation expenses are factored into the billing rates of working capital fund activities within the Army, and early resolution of disputes reduces these expenses thereby reducing overhead to allow components to remain competitive with other sources.

### ADR Saves Agency Time

Typically, not only are the formal, administrative processes more fiscally costly, but they are also more time-consuming. Time spent by the agency on employment-related issues is time taken from accomplishing agency missions. An ADR session usually can be scheduled and completed within a few weeks while a typical EEO case which proceeds to a hearing may linger for several years.

The **Department of Defense/Department of the Air Force** has compiled statistics that demonstrate that dispute resolution processes resolve nearly one-third of all complaints (formal and otherwise) in an average of 27-40 days versus an **Air Force** average of 390 days for EEO cases which proceed to the formal administrative phase. Thus workplace

conflict is eliminated 13 times faster than it would have been in a more traditional process. In total, the **Air Force** refers almost half of its civilian workplace disputes to an ADR process which averages 30 days or less, achieving full resolution in an average of 75% of those disputes. As a result, the **Air Force** ADR Program disposes of about 1/3 of its annual total of workplace disputes using fast, inexpensive, collaborative processes in lieu of litigation.

One contributor to the time savings realized by ADR processes is the flexibility to identify and attempt resolution of problems much earlier than would be feasible in a more formal administrative forum. The **Department of Defense/Washington Headquarters Service** noted that the average number of processing days for EEO formal complaints (federal-wide) was 469 days in FY 2004. In contrast, its own ADR processes took an average of 39 days. This resolution timeframe, which is twelve times faster than the formal EEO complaint process, fosters active problem solving, interest-based outcomes, and improved working relationships between the parties. In the **Equal Employment Opportunity Commission's** "RESOLVE" program, the average processing time for all cases was 72 days. At the **Department of Housing and Urban Development**, case processing is reduced from 802 days in formal EEO cases to 53 days in mediation. In the **Department of Defense/Department of the Navy**, the average time between a request for mediation and the first session is around 40 days, which is a significant savings in time spent on cases that otherwise would have gone through a formal administrative process.

### Alternative Dispute Resolution Programs Are Essential to Strategic Management of the Workplace

Agencies' descriptions of their workplace ADR programs demonstrate the essential role these programs play in the strategic management of human capital. ADR provides the tools to efficiently and effectively manage workplace conflict at the lowest level and at the earliest time before a dispute can ripen or escalate. The availability and use of ADR programs promote a positive work environment, lower absenteeism, and promote higher morale and employee productivity. Agencies are using cost-effective approaches in their conflict management programs and soliciting feedback to identify areas where the programs can be even further improved.

The intervention of ADR at an early stage of conflict, before parties have built strong emotional attachments to their positions, is particularly valuable. The **General Services Administration's** Greater Southwest Region has developed a mediation training program for managers and other staff to serve as program coordinators to handle the initial stages of the process and provide a free, easily accessible opportunity for disputants to resolve their issues quickly and efficiently. The **Department of Homeland Security/Transportation Security Administration** has developed an Integrated Conflict Management System which aims to align its internal culture (behavior and practices) with its customer service practices. As part of this system, the agency is providing to its employees a four-hour "conflict management essentials" class, which focuses on respectful and effective communication and cooperative problem solving skills and has

been given to over 15,000 employees. Institutionalizing effective communication and problem solving skills is better equipping employees to prevent disputes or, at least, to recognize warning signs and address disputed issues early before the conflict escalates.

The ADR options that agencies provide to employees yield internal benefits that reverberate throughout the agency. At the **Department of Defense/Army Corp of Engineers** and the **Department of Defense/Defense Contract Management Agency**, the availability of ADR demonstrates a concrete commitment to fostering and maintaining a positive long-term working environment for all employees. The **Department of Health and Human Services/Food and Drug Administration** sees less absenteeism and increased focus on mission-related work as two clear by-products of an effective ADR process.

An added benefit of ADR use is the re-direction of agency resources from settling disputes to furthering the achievement of agency goals. The **Department of Health and Human Services/National Institutes of Health** Office of the Ombudsman notes that the provision of a forum to resolve workplace differences frees an agency to make programmatic decisions based on needs rather than personal antagonisms or workplace disputes. The **Department of Defense/Defense Commissary Agency** finds that, because its activities are evaluated based upon unit costs, every instance of quick and efficient resolution through ADR directly affects the financial performance of those units – and the agency’s productivity.

Benefits that are unique to ADR programs extend beyond the immediate dispute. ADR processes are designed to identify and address recurring issues that lead to systemic problems. Through an ADR process, parties have the opportunity to work on the recurring issues, while at the same time working on their relationship and developing the communication and problem solving skills that, hopefully, will enable them to avoid similar disputes in the future. When staff feel they have a voice in resolving conflict, they will feel more vested in the end product and more motivated to help it succeed. When managers participate in dispute resolution processes or attend related training, they develop conflict analysis skills which ultimately will help them make more knowledgeable and appropriate decisions.

The cost-effectiveness of workplace ADR programs across the federal government is enhanced by the use and sharing of internal government ADR expertise. For example, costs are reduced when agencies follow the example of the **Department of Defense/Department of the Navy** and develop an internal cadre of qualified neutrals who can provide ADR expertise. Other agencies, such as the **Department of Justice**, use collateral duty mediators from one agency component to provide ADR services to another component, thereby maximizing their beneficial use of ADR while conserving resources.

Another cost-saving approach is demonstrated by the allocation of resources government-wide in the federal Sharing Neutrals Program, which is administered in the Washington, D.C. region by the **Department of Health and Human Services**. A number of years

ago, as the demand for mediators and other talented neutrals was outpacing the supply, some federal agencies decided to join forces, train volunteers, and develop a roster of agency employees who could be used anywhere in the federal government where there was a need for ADR services. Today, the roster includes over 200 trained neutrals who serve on collateral duty to provide ADR services to other agencies as the neutral's own work load permits. In FY 2006, there were almost 250 requests for the services of a shared neutral, and the caseload has been trending upwards recently. The program's database has information about each neutral, including expertise in ADR areas (e.g., mediation, coaching) as well as substantive expertise (e.g., information technology, EEO or union law, and more general human resources issues). Employee mediators report satisfaction with their participation in the program.

The community of federal agencies has developed other mechanisms to collaborate and share resources. An example is found with the **Departments of Transportation and Health and Human Services** which have formed a partnership to conduct management training that shares resources, knowledge, and experiences to promote a diverse learning environment. The training gives managers an opportunity to collaborate with other managers facing similar issues, and the result is an effective skills class that enhances the managers' ability to manage at very little cost to either agency.

A key tool for any dispute resolution program is the evaluation of the process so that ADR services can be improved or expanded as appropriate. The **Department of Housing and Urban Development** analyzes customer satisfaction surveys which are given to all ADR participants in order to identify ways to increase the efficiency and effectiveness of the ADR program. The **Department of Education** evaluates the staff of its Informal Dispute Resolution Center by how well they are reducing work-related complaints and how well they are helping employees improve their performance and communication skills. The **Department of Homeland Security/Transportation Security Administration** Office of the Ombudsman is staffed by a contractor. The contractor is "rewarded" for improved responsiveness to customers according to measurable standards, which encourages the contractor to identify ways of increasing efficiency and quality of service.

### Workplace ADR Programs Create Collateral Benefits for the Agency

The use of ADR produces collateral benefits for the agency. ADR programs can serve to improve workforce relationships with customers and the public, and to further agency programmatic needs.

When the bureaucracy is compressed, and disputes are resolved, information can flow freely between layers of government. Effective communication ensures that management at all levels has key input from the employees working with the issues that potentially can pose problems for the agency as a whole. A workforce that communicates effectively is more productive and provides a better product for the agency. A good example is the **Commerce Department/National Oceanic and Atmospheric Administration** which opens communication, by using facilitation in internal meetings among its staff and/or

across its programmatic line offices, in order to identify and address problems. In a related vein, the **Department of Veterans Affairs** uses an Organizational Climate Assessment Program, which it designed to examine employee perceptions of the workplace, to improve productivity by addressing employee dissatisfaction.

The use of ADR brings external benefits as well. The **Department of Homeland Security/Transportation Security Administration** reports that its ADR Program, by improving relationships between managers and employees and increasing employee productivity, generates more positive external perceptions toward the agency in particular and the federal government in general. It also may increase the public's confidence in the ability of the government to resolve disputes. Similarly, the **National Archives and Records Administration** and the **Department of Defense/National Security Agency** report that the use of ADR helps staff learn how to better work together, which in turn improves their ability to work with the public and respond to customer needs.

In addition, agencies which partner with their employees to anticipate, and overcome, problems before they occur can in turn help their customers and clients achieve a stronger and more competitive position. Consider the **National Mediation Board**, which fulfills the mission of mediating labor management disputes in the airline and railroad industries. In the past eight years, the Board has mediated over 600 cases in both industries with only four work stoppages (one of which lasted for less than 90 minutes). This is especially important – for employees and customers alike – given the impact that a work stoppage would have on the country. The Board is continually striving to improve the quality and timeliness of its services to avoid an industry stoppage.

Another good example of the value added by ADR is revealed by the role of the **Federal Mediation & Conciliation Service** in the collective bargaining of U.S. businesses. The agency commissioned a study to assess the impact of mediation on collective bargaining negotiations. The study was conducted by the Employment Policy Foundation, a nonprofit nonpartisan public policy research foundation that focuses on workplace trends. The results of the study underscore the benefits for both companies and employees when mediation is used to resolve labor disputes in a timely fashion. The study analyzed six years of case data from the **Federal Mediation & Conciliation Service** and determined that mediation saved \$9 billion in workers' wages and company profits between 1999 and 2004. The savings resulted from the agency's role in preventing or shortening work stoppages. The average annual savings included \$80.7 million in retained company profits, \$640.5 million in retained union members' wages, and \$781.8 million in retained workers' wages among workers in ancillary industries. The study also demonstrated that early involvement by a **Federal Mediation & Conciliation Service** mediator reduces the duration of any work stoppage that does occur. Where mediation began before the contract expired, work stoppage duration was reduced by an average of 46% and this reduction in work stoppages resulted in an average annual benefit of \$217.9 million.

## E-Government Makes Workplace ADR Accessible to All

Agencies with workplace dispute resolution programs report that they view the use of technology as an essential component in their distribution of information about ADR programs, including placing ADR model documents on-line to help educate prospective parties. They also are employing e-tools to conduct parts of the process and facilitate access to it, and to effectively manage the process. Further, they are using technology to ease the transition to e-government.

The Web provides a vehicle for sharing substantive process information, as illustrated by the comprehensive Web site which is maintained by the **Department of Energy** Dispute Resolution Office and can be accessed by all employees. Technology also makes it possible for an agency to offer on-line training which increases the number of staff who can participate and makes attendance easier. A good example is the **Department of the Treasury/Comptroller of the Currency** which developed an on-line training course with an ADR component that meets the No Fear Act requirement. The course will be required training for all new employees and it is available through the agency's automated learning system.

The **Federal Mediation & Conciliation Service** uses a specially developed network of Internet servers, mobile computers, projectors and software in mediations in order to promote better decision making through broad dissemination of information and input of different viewpoints. Agencies also are using electronic case-tracking systems and electronic messaging to report all mediation activity for various statistical reports. The **Department of Defense/Department of the Navy** uses a unique docket system that connects the Human Resources offices worldwide. In addition to standardizing the convening process, this system provides metrics used in program management and reporting.

Several agencies mentioned using e-tools to streamline various aspects of the process such as on-line intake procedures to populate basic data fields more quickly and easily, and on-line evaluation tools to ensure quick and easy feedback on the process. These tools assist agencies in managing and synthesizing aggregate data. It is particularly important that the evaluation form be user-friendly so that the agency can maximize the return of timely responses from participants and have the feedback necessary to effect appropriate improvements in the program. Another tool, video conferencing, is enabling agencies to reduce travel costs and increase effective communication with regional facilities.

Numerous agencies recognize the need to ease employees' fears and concerns about transitioning to an electronic government. ADR processes have helped to smooth this transition. For example, the **National Archives and Records Administration** is facing not only its own conversion to electronic government, but it is also considering how best to meet the needs of its external agency customers who are converting to an electronic world, and the needs of its public customers who want to dealing with the agency through the Web and other electronic means. The changes to an electronic world signal a new

way of doing business for a workforce accustomed to working with paper. Various ADR processes have been, and will continue to be, used to elicit staff's input into appropriate decisions about transitioning to an electronic approach and streamlining the conversion process.

## V. The Future of Alternative Dispute Resolution

### A. Capitalizing on the Potential of ADR

Alternative dispute resolution has become well-accepted in federal agencies as an effective and efficient method for resolving disputes and has been readily adopted as part of a sound business model. All of the agencies responding to the survey convey the fundamental belief that conflict is reduced wherever and whenever communication is improved and acknowledge the positive impact of ADR on both reducing conflict and enhancing communication.

While workplace dispute resolution – particularly in the EEO arena – still represents a significant portion of ADR activity in the federal government, many agencies have broadened their application of ADR into other areas. As more data are collected and analyzed in those areas, it is becoming clear that ADR has met and exceeded the challenge of providing parties a cost-effective and time-efficient approach to resolving conflict.

However, some agencies still describe their workplaces as more conflict-focused than resolution-oriented. Many agencies report a pervasive culture of reacting to crisis rather than taking pro-active measures to prevent it. People often turn to ADR only after the problems have become intractable. Success can be a bit more difficult to attain at this point in the process.

Thus, the Executive Branch is still a long way from employing ADR to its full potential. Alternative dispute resolution is still being used to “fix problems” as they occur; it has not been fully harnessed to address the underlying causes of disputes in order to decrease the actual incidence of conflict. ADR in the next decade needs to grow into a system of pro-active conflict management as opposed to a one-shot reaction to a presenting dispute. The key to reducing conflict is early intervention and anticipatory dispute resolution which prevent an escalation of a mere disagreement into a public dispute, draining agency resources and impeding agency work. Strategic business plans need to address a system which can manage any and all disputes involving the agency: any dispute, at any time, from anyone who in good faith disagrees with an agency action. A citizen or employee who cannot get the attention or “ear” of the agency will otherwise pursue the traditional approach – litigation – as the only way to force the agency to attend to the matter.

There are, however, a number of agencies that have developed programs to focus on early intervention, including: the **Department of Transportation/Federal Aviation Administration** Early Dispute Resolution Center; the **Federal Energy Regulatory Commission** Dispute Resolution Service and Enforcement Hotline; the **Department of the Interior** Collaborative Action and Conflict Resolution Program; the **Department of Justice** ADA Mediation Program for disability rights; and the **U.S. Institute for**

**Environmental Conflict Resolution** work with the other federal agencies on engaging stakeholders early in the process of resource planning or environmental review. All agencies can learn from these trailblazers to recognize the power of conflict, using early recognition of a brewing dispute to diagnose potentially larger and more serious problems in an agency's management. The early intervention in conflict management recognizes that conflict is a symptom of a system that is out of balance – and that a disputant might have information on the imbalances and potential remedies. Successful conflict resolution programs recognize this and value the diversity of viewpoints. Simply put, when more minds tackle a problem, more creative and responsive resolutions can emerge. Conflict is thus transformed, from a negative interaction into a cooperative activity which can infuse value, flexibility, and adaptability into business decisions.

A goal of the Interagency Working Group Sections and Steering Committee is to take dispute resolution to the next level: to help agencies develop integrated systems of conflict management so that disagreement is no longer a drag on the efficient management of agency administration but an opportunity for learning about and valuing different viewpoints. Conflict is endemic to our pluralistic, democratic society and open form of government. Poorly managed disputes, however, reflect a system that is not working optimally. Any organization which is stuck in addressing problems individually rather than systematically will be challenged to stay ahead of the usual and normal disagreements which arise every day in the normal course of business. Instead of making problems “go away” one by one, a smarter organization will adapt to use the information gleaned early on to resolve the systemic issues underlying the presenting problem. The most difficult challenge in developing such an integrated conflict management system is that it necessitates some uncertainty because it must be flexible and responsive to continuous change and innovation. But the benefits are plentiful: in an integrated conflict management system, each employee will be accountable as a problem solver, working with others to ensure the efficient and effective accomplishment of agency business.

## B. Challenges and Opportunities

We offer a roadmap of challenges and opportunities that could assist in fulfilling the promise of ADR in the coming years.

### Leadership

Policy direction and prioritization are powerful tools. Vehicles such as executive orders, policy statements, proclamations, letters of recognition, and awards provide the leadership that can nourish ADR and encourage the results that ADR can produce. A good example is the Memorandum on Environmental Conflict Resolution which was jointly issued by the Office of Management and Budget and the Council on Environmental Quality on November 28, 2005. Through its executive-level call for increasing the effective use of environmental conflict resolution, the Memorandum has: raised the level of awareness about the application of ADR to environmental conflict issues across the federal government; fostered greater interagency learning; focused the

attention of managers on the essential principles of environmental conflict resolution; and guided managers in the value of demonstrating performance outcomes.

ADR is an important business application which can benefit the performance management of all federal agencies. As the use of ADR is broadened in the coming years, similar appropriate expressions of leadership commitment would be very valuable in maximizing the beneficial impact and results of ADR throughout the Executive Branch.

*Proclamation by the President of a National Conflict Resolution Day*

Alternative dispute resolution has become the framework for management of conflict in both the public and private sectors. It is lessening the cost of business, government, and educational institutions and delivering better results to financial stakeholders and the taxpayer. Conflict resolution has become part of the fabric of our society.

A Proclamation by the President for a National Conflict Resolution Day, which recognizes the societal value of conflict management, would inspire and motivate federal employees and all others who work in the field of, or use, alternative dispute resolution. The message may also encourage citizens and private industry to request ADR as a supplement to traditional forms of adjudication.

A draft text of a Proclamation by the President is offered for consideration as Appendix G.

*Letter of Greetings and Commendation From the President to Federal Employees Responsible for Alternative Dispute Resolution*

This Report conveys many success stories that have been made possible by the dedication and effort of federal employees who have utilized alternative dispute resolution programs for the benefit of the government and the public. An imprimatur from the highest level of government would send an unequivocal message of support for continued and expanded use of ADR. A Letter of Greetings and Commendation from the President to federal employees responsible for ADR programs in the Executive Branch would serve as that imprimatur and inspire those employees to more and greater achievements.

A draft text of a Letter of Greetings and Commendation from the President is offered for consideration as Appendix H.

*Establishment of a Federal Council and Annual Conference for Agency Dispute Resolution Specialists*

The Office of Management and Budget or the Attorney General, as the official designated by the President to coordinate interagency efforts to promote and facilitate the use of ADR, could consider constituting a Federal Council of all Dispute Resolution Specialists, who are the top ADR officials designated by the Executive Branch agencies pursuant to

the Administrative Dispute Resolution Act of 1996. The Council would serve as the forum for issuance of appropriate government-wide ADR policy and positions. The Interagency ADR Working Group Sections and Steering Committee would provide the staff support for the Council and would offer expertise, policy recommendations, and other assistance as needed or requested.

An annual conference for members of the Council, and agency lead attorneys and senior managers, would be effective in raising the level of awareness about the application of ADR across the Executive Branch, and foster greater interagency learning. If the President issues a Proclamation for a National Conflict Resolution Day, the timing of the Council conference could be coordinated with the issuance of the Proclamation.

Establishment of the Federal Council and/or the conference would send a strong message of support for ADR.

#### *Government-Wide Biennial ADR Achievement Awards Program*

Instituting a government-wide biennial ADR achievement awards program would encourage innovative applications of ADR and the demonstration of performance outcomes. The awards program could be under the auspices of the Office of Management and Budget, or the Attorney General who is the official designated by the President to coordinate interagency efforts to promote and facilitate the use of ADR, and staffed by the Interagency ADR Working Group Sections and Steering Committee. Inclusions of awards for the following areas would encompass the range of federal ADR programs:

- Alternative Dispute Resolution Award in Civil Enforcement and Regulatory Work. This award could recognize federal organizations using ADR to resolve liability and related enforcement or regulatory issues, and to ensure collaborative stakeholder participation in regulatory decisions. The award program could be staffed by the Interagency ADR Working Group Civil Enforcement and Regulatory Section.
- Alternative Dispute Resolution Award in Contracts and Procurement. There is already an annual Alternative Dispute Resolution Award in Acquisition for which the competition is conducted by the Office of Federal Procurement Policy in the Office of Management and Budget. The award, which is the only current government-wide ADR award, recognizes federal and private sector organizations that are innovatively and effectively utilizing ADR to resolve disputes relating to federal acquisitions and contracts. The award program is staffed by the Interagency ADR Working Group Contracts and Procurement Section. The annual program could be continued in its current form, or folded into the proposed biennial government-wide program.
- Alternative Dispute Resolution Award in the Workplace. The Office of Personnel Management used to have a Director's Award for Outstanding ADR Workplace

Programs. The program was discontinued after the 2002 competition and reinstating it is not currently under consideration by the agency. The new proposed award could recognize federal organizations using ADR as part of their strategic management of human capital to foster a positive working environment for all employees and to improve workplace productivity. The award program could be staffed by the Interagency ADR Working Group Workplace Section.

- Alternative Dispute Resolution Award for best new ADR program initiated by an agency. The award would recognize innovative or unique new applications of ADR either in new programs or in new ways that make existing programs more effective and efficient. The award program could be staffed by the Interagency ADR Working Group Steering Committee and Sections.

### Performance Management

Appropriate commitment by agency leadership to the beneficial impact and results of ADR can be instrumental in maximizing those benefits for the agency. One clear manifestation of that commitment is the agency's integration of conflict management principles into its performance management structure. Agency managers will focus on and use the performance management structure and, where it includes conflict management elements, the uses and good outcomes of ADR are more likely to be maximized.

#### *Conflict Management As a Selection and Performance Appraisal Criterion for Executive and Management Positions*

Agencies may or may not have conflict management elements in the selection criteria they use for recruiting and hiring and the performance appraisals of their managers. However, executives and managers who are themselves well-versed in conflict management principles will be more likely to recognize their benefits and apply them in their areas of responsibility. The best way to insure familiarity with conflict management principles is to include them in selection and performance appraisal criteria.

Agency management starts with the Senior Executive Service. The Office of Personnel Management has recently led the way with its Executive Core Qualifications, which define the competencies needed to build teams, serve customers, and produce results. The second Executive Core Qualification is Leading People, and it had long included a generic standard of "support [for] constructive resolution of conflicts." That Qualification was amended effective October 2006 and now includes a pro-active focus which requires these conflict management competencies:

- encourages creative tension and differences of opinions
- anticipates and takes steps to prevent counter-productive confrontations
- manages and resolves conflicts and disagreements in a constructive manner

Since the Office of Personnel Management's Executive Core Qualifications are required for entry into the Senior Executive Service, new waves of executive-level leadership in all of the federal agencies can be expected to have a conflict management orientation. In addition, many agencies choose to use those same Executive Core Qualifications for their own selection, performance management, and leadership development for both management and executive positions. As this trend continues and grows, so does the likelihood of a positive and productive workforce.

### *Conflict Management As a Key Element in Recruitment, Training, and Planning*

A good example of the integration of leadership commitment into performance management is found in the Memorandum issued jointly on November 28, 2005, by the Chairman of the Council on Environmental Quality and the Director of the Office of Personnel Management concerning a Competency Based Approach to Collaboration and Partnering. The Memorandum is addressed to five agencies (Departments of the Interior, Agriculture, Commerce, Defense and the Environmental Protection Agency) on a specific topic (the principle of "cooperative conservation" which specifies that federal decision making will provide opportunities for local inclusion and be conducted in cooperation with tribal, state, and local governments).

However, the Memorandum transcends both the specific topic and addressees, and instead establishes a government-wide beacon for integration of conflict management principles into the performance management of an agency. The Memorandum gives an imprimatur to an agreement of the Chief Human Capital Officers "to support a competency-based approach to developing within their organizations the collaboration and partnering skills necessary to ensure the... objectives." The concepts behind the Memorandum's illustrative examples are relevant here and can be used in whole or in part by agencies across the Executive Branch:

- In recruiting and hiring: include in the selection criteria for appropriate positions relevant conflict management attributes such as a commitment to working collaboratively or experience in consensus-building;
- In training: identify the competencies necessary for effective collaboration in the areas of agency responsibility and develop employee training programs to advance those attributes; and,
- In strategic and management planning: incorporate the competencies for effective collaboration into performance measures for positions that are responsible for program and project planning, development, and implementation.

### *Programmatic Reviews and Evaluations*

If ADR programs are to function optimally, an agency should undertake a baseline programmatic review and periodic evaluations that show measures of improvement and progress in implementing ADR programs. The agency also should be ready to adapt the programs in response to changing needs – of the agency and/or of its stakeholders.

Any ADR programs could benefit from efforts to better articulate program goals and, more importantly, measure progress toward those goals. Many agencies are striving to do so, but it is admittedly a difficult task. To substantiate performance, agency data should be collected and analyzed. While many ADR programs are subject to an ordinary cost-benefit analysis to show the advantages of ADR use, some are not subject to any easy analysis.

There is a great need for research and development of new methods and criteria for evaluation of ADR success in relation to reaching specific agency goals. Public/private partnerships for research purposes have proven valuable in a number of instances in the effort to collect and analyze data. Federal agencies, because of their size, breadth, and centralized leadership, are in an optimal position to collect data relating to the use, effects, and success of their use of ADR within their programs. In several instances, a university has performed research with data supplied by a particular agency. Some examples of successful collaboration efforts are these partnerships:

- between the **Equal Employment Opportunity Commission** and Cornell University;
- between the **National Mediation Board** and the University of Massachusetts; and
- between the **Department of the Interior** and the Community Based Collaboratives Research Consortium.

More active outreach by federal agencies to promote research and cooperation with universities and other private institutions could yield valuable information for the future of ADR.

### External Promotion and Facilitation

One barrier that stands in the way of realizing the full potential of ADR in the enforcement and regulatory arena is the fact that representatives of regulated and other entities may not understand, fully or at all, how ADR works and the benefits it can produce. Agency efforts to educate the entities subject to its jurisdiction, and to promote and facilitate their use of ADR in appropriate cases, would go a long way toward fulfilling the promise of ADR. The experience of agencies using ADR, which are discussed in this report, demonstrates how its use in civil enforcement and regulatory matters can reduce the expenses of adversarial processes, increase inclusiveness and stakeholder participation, and resolve conflict collaboratively. Expanding the ADR knowledge base of the regulated constituencies, and increasing their use of conflict resolution tools, is likely to produce only positive consequences.

The staffing of external promotion and facilitation efforts is likely to be dependent on the availability of resources to do so. With leadership and coordination, federal agencies with regulatory and enforcement responsibilities could conserve their resources – and accomplish more with less – by sharing outreach planning, promotion, and facilitation efforts to the benefit of all.

## Training

In providing information for this report, agencies consistently stressed that the provision of ADR training is a key to success in conflict management. For example, the **Department of Transportation** sees a positive correlation between training and the use of its ADR programs. As a result, many agencies make ADR training as easily-accessible and widely-available as possible. The **Department of Defense/Department of the Navy** takes advantage of information technology to provide on-line ADR training. The **Department of Homeland Security/Federal Emergency Management Agency**, the **Peace Corps**, the **Department of Veterans Affairs**, and the **Department of the Treasury/Bureau of Public Debt** include ADR in training sessions and orientations. The **Department of the Treasury/Office of Comptroller of the Currency** provides a mediation DVD to help managers explain ADR benefits and procedures to all employees. The **Department of Justice/Federal Bureau of Prisons** gives training in “civil treatment” communication skills for managers. The **Federal Energy Regulatory Commission** provides ADR training, internally and externally, for agency staff and for those who participate before the Commission.

All agencies can expect to benefit from the provision of training in ADR techniques including communications skills. At the very least, agencies should consider providing communication skills training for all new employees, and communications skills and conflict management training for all new managers and supervisors. Some agencies currently mix management and employees in the same ADR course, an approach that can have long-term benefits as they gain insight about the perspectives of “the other side” and learn how best to work together. Regardless of how they provide their training, or what they include in it, agencies should consider capitalizing on information technology to make the training available on-line and “on demand” and at minimal cost.

Many agencies offer training through in-house providers, while other agencies utilize external ADR training providers. Regardless of the source of the trainers, the availability of funding for training is a challenge for many agencies. With leadership and some coordination, agencies could conserve resources by sharing in interagency training planning and delivery. Such sharing, perhaps modeled after the Shared Neutrals program, could save overall expenses by increasing the use of internal ADR professionals rather than more costly outside providers. Agencies could also inventory their own training material and create an interagency “lending library” of resources which could be used by any agency and shared by all.

## Interagency Sharing of Federal Resources

Availability of resources is a challenge for all agencies. Finding ways to share resources and tools with other federal agencies can reduce administrative redundancies and improve efficiencies while meeting common needs. The Shared Neutrals program is one example. With leadership and coordination, agencies can consider sharing in many interagency projects beyond those already suggested in this report, such as:

- ADR tracking and evaluation tools;
- Blanket Purchase Agreements to make procurement quicker and easier;
- identification of a cadre of subject matter experts (internal or external) who have, or can develop, ADR expertise to handle disputes that require technical knowledge;
- expansion of the Shared Neutrals program to provide services beyond mediation, e.g., partnering, facilitation, coaching, and mentoring; and
- creation of entry or continuing education for the Shared Neutrals program that would ensure continued high standards and consistent performance for federal mediators.

## Management Support

### *Institutionalization of the ADR Program*

As the contributions of ADR continue to grow and become an essential feature of effective management across a growing number of agencies, there is a corresponding need to ensure that the ADR programs themselves are properly and effectively managed. Historically, many ADR programs began as incidental, temporary assignments. In some agencies, this remains the case, even though the ADR portfolio has extended well beyond initial expectations. It is time for all agencies to integrate and institutionalize their ADR programs within their organizations, budgets, and strategic program planning.

It is important for agencies to provide a viable foundation for the offices which manage their ADR programs. Too often, ADR offices have no dedicated, or insufficient, funding. Several agencies stated that they do not even have enough money to send their own mediators to mediations that have been requested by the parties. Other agencies noted the irony of their situation where, since they lack adequate in-house resources, they must pay the higher cost of contracting outside the agency for skilled ADR assistance. Too often, ADR offices have no dedicated personnel either. Instead, they are dependent on “borrowed” space and “detailed” employees temporarily assigned from other components. This ad-hoc approach is particularly difficult in the workplace arena where, while ADR is almost always offered, it is not always accepted. Managers often distrust the process, or feel that participation might be construed as an admission of wrongdoing. Many agencies also report a limited employee buy-in. The struggle of ADR program managers to change this culture is even more difficult when their own offices have no continuity of personnel handling the workplace ADR processes.

Having an ADR office operate on a “catch as catch can” basis is counter-productive for the agency and is often short-sighted. It has an adverse impact on the stability of an ADR program, drains its credibility, and diminishes the savings and other beneficial results the agency could otherwise expect. It is difficult, or impossible, to evaluate program results effectively, implement program improvements, and formulate strategic or long-range planning.

Continuity of staff and funding will go a long way toward institutionalizing and ensuring successful, well-developed programs. As part of the agency's leadership commitment, an ADR program/office should be given dedicated funding and staffing. Dedicated funding ensures the stability and effective program management of the ADR office. Dedicated staffing ensures the independence of an ADR program, which is essential to the stakeholders and users who must trust the neutrality and confidentiality of the program operations. Institutionalization of the ADR operation would also insure that settlement agreements are properly and consistently vetted, and that data collection and analysis is ongoing, accurate, comprehensive, and used to improve program results.

### *Integration or Coordination of ADR Programs*

In agencies which have established a firm foundation for ADR programs, some have opted for a centralized approach and others have preferred a decentralized one. There is no "one correct answer" but it is important for agencies to consider the advantages and disadvantages of different approaches in deciding what will work best for their own operations. On the one hand, a centralized ADR office can permit easy access for assistance for all types of disputes and facilitate sharing of training and other resources. On the other hand, a decentralized approach can help to ensure that ADR is not over-emphasized in one particular application to the detriment of other areas, and can ensure that ADR is used differently in different settings where appropriate. A middle course can be a "network" approach where different ADR programs share a common leadership vision. One example of the network approach is the **Department of the Interior's** establishment of the Office of Collaborative Action and Dispute Resolution in the Office of the Secretary to provide leadership for an agency Dispute Resolution Council. The Council is comprised of designated Dispute Resolution Specialists for every component to ensure increased leadership support and shared commitment, improved coordination, and reduced administrative redundancy. Another example of the network approach is the **Department of Defense** ADR Coordinating Committee which is chaired by the Department of Defense Dispute Resolution Specialist and composed of the Dispute Resolution Specialist or designee from each component.

Regardless of approach, one overriding principle is that ADR should be integrated into the way people do business in all areas of the agency's responsibilities where use of ADR is appropriate. A second best practice is that decentralized ADR programs should at least share communication. Where independent ADR programs share an agency roof, but no inter-program communication, their opportunity for shared expertise and resources is lost, to the detriment of all.

## **VI. Conclusion**

Alternative dispute resolution is a tool for appropriate cases, not a panacea for all cases. The interests of the United States often are unique. Federal officials can resolve cases only in ways that will not undermine important legal issues, jurisdictional defenses, or policy interests. In appropriate cases, ADR has become a common sense option for the federal agencies. It is cost-effective and time-efficient, it gives the parties control over the outcome, and it involves stakeholders in decisions that affect them.

Today, ADR is an important part of our work, and tomorrow the promise of ADR will be an integral part of our government, business and society.

Twenty years ago, the Internet was not part of our daily lives. Today, we cannot imagine business without the World Wide Web, and indeed business has accelerated to keep pace with the speed of the Internet. The prospect of waiting several years for a dispute to be resolved in a civil action has become unacceptable. Tomorrow's business demands time-efficient dispute resolution.

Twenty years ago, geographic boundaries were defined. Today, the Internet has made them porous. Tomorrow, the global community will need resolution mechanisms that can deal with disputes quickly and well in a multi-cultural, international environment.

Twenty years ago, dispute resolution was not part of judicial operations. Today, ADR is being used every day in the courts of the United States.

Twenty years ago, ADR was just the beginning of an idea. Today, ADR has come of age. It is a framework for management of conflict for both the public and private sectors. It is lessening the cost of business and government, and delivering better results to the American people.

ADR has become so much more than just an "alternative" to litigation. Rather, it is accepted as an "appropriate" dispute resolution technique for an endless array of conflicts. It is the smart approach, it is accepted, and it has become part of our universe. Tomorrow will bring ever-expanding uses of appropriate dispute resolution.

## **APPENDIX A**

### **Definitions of Alternative Dispute Resolution Processes**

**Definitions of Alternative Dispute Resolution Processes**

**MEDIATION**

A process wherein a third party neutral (independent, impartial, and acceptable to all parties), assists the parties in reaching a mutually acceptable resolution and agreement.

**ARBITRATION – BINDING AND NON-BINDING**

An adjudicatory process that involves presenting a dispute to an impartial individual who then issues a decision, either binding or non-binding per prior agreement of the parties.

**FACILITATION**

A process in which a facilitator, who is substantively neutral and has no decision making authority, intervenes to help a group improve the way it identifies problems and makes decisions in order to increase the group's effectiveness.

**SETTLEMENT CONFERENCES**

A process often used in court or administrative proceedings, court proceedings, EEOC hearings, and FLRA hearings, and increasingly in civil enforcement and regulatory disputes, and always conducted by a settlement judge. The settlement judge can employ any of the many alternative dispute resolution approaches in the settlement negotiation. Many settlement judges serve as mediators, working with the parties to find a mutually acceptable resolution to their dispute. Some settlement judges serve as evaluators, providing specific substantive and legal information regarding the strengths and/or weaknesses of the parties' positions in the case should it go to a formal adjudication.

**PARTNERING**

A process which allows stakeholders with divergent views to manage conflict effectively and engage in a series of mutual consensus-building processes.

**CONFLICT COACHING**

In its simplest terms, a coach is a thinking partner, someone who can assist others in identifying and exploring options, support risk taking, and, if necessary, develop the skills necessary to move forward.

## NEGOTIATED RULEMAKING and CONSENSUS BUILDING/PUBLIC PARTICIPATION

ADR professionals bring together representatives of various “stakeholder” or interest groups and officials and managers from a federal agency in order to negotiate the text of a proposed rule. The ADR professional convenes a series of meetings among a well-balanced group representing the regulated public, public interest groups, state and local governments, and any other stakeholders and, working with a representative of the agency, manages an ordered discussion of the responsibilities, rights, and interests of all of the represented organizations.

### OMBUDS

Although there are several types of Ombuds, the workplace or organizational ombuds facilitates fair and equitable resolutions of concerns that arise within an entity. The essential characteristics of an ombuds are independence, impartiality in conducting inquiries and investigations, and confidentiality.

### OTHER PROCESSES

- **Dispute Panels:** A process whereby a panel of more than one impartial individual (usually three members: a management official, a union official, and one member who is jointly selected by management and union) hears arguments, receives evidence, and submits a recommendation to the appropriate deciding official.
- **Early Neutral Evaluation:** A process that provides to the parties an early, honest, and independent evaluation of the merits of a case (both potential outcome as well as reasonable settlement value) by an objective third party hired by mutual agreement of the parties.
- **Fact-Finding:** A process wherein a neutral third party fact-finder studies issues in dispute and reports a finding of substantiated facts to the disputing parties.
- **Consultation:** A process wherein a neutral third party explores the issues, positions, and interests of the parties in an effort to help diagnose the issues and assess the situation. It is a tool for framing and clarifying issues in dispute.
- **Team Building:** Team building is a type of facilitation process in which a third party neutral assists a team or a group of individuals with interrelated roles and responsibilities. The team members operate within a set of norms and rules and define the goals and guidelines for a group to effectively achieve stated goals.

**APPENDIX B**

**Use of Alternative Dispute Resolution Processes Reported by Agencies 2005-06**

Use of Alternative Dispute Resolution Processes Reported by Agencies 2005-06

| Appendix B:                                  | Mediation | Arbitration<br><i>(other than<br/>labor union<br/>grievances)</i> | Facilitation | Settlement<br>Judges | Consensus<br>Building/<br>Public<br>Participation | Partnering | Conflict<br>Coaching | Negotiated<br>Rule<br>Making | Ombuds   |
|--|-----------|---|--------------|----------------------|---|------------|----------------------|------------------------------|----------|
| <b>CABINET AGENCIES</b>                      |           |   |              |                      |   |            |                      |                              |          |
| Department of Agriculture                    | x         |   | x            | x                    | x   | x          | x                    | x                            |          |
| Department of Commerce                       | x         |   | x            | x                    | x   |            |                      | x                            |          |
| Department of Defense:                       |           |   |              |                      |   |            |                      |                              |          |
| 1. Department of the Air Force               | x         | x   | x            | x                    | x   | x          | x                    |                              | x (some) |
| 2. Department of the Army                    | x         |   | x            | x                    | x   | x          | x                    |                              | x (some) |
| 3. Army Corps of Engineers                   | x         |   | x            | x                    |   | x          |                      |                              |          |
| 4. Department of the Navy                    | x         | x   | x            | x                    | x   | x          | x                    |                              | x        |
| 5. Defense Commissary Agency                 | x         |   | x            | x                    |   |            |                      |                              | x        |
| 6. Defense Contract Audit Agency             | x         |   |              |                      |   |            |                      |                              |          |
| 7. Defense Contract Management Agency        | x         |   | x            | x                    | x   |            |                      |                              | x        |
| 8. Defense Finance and Accounting Service    | x         |   | x            | x                    |   |            |                      |                              |          |
| 9. Defense Information Systems Agency        | x         |   |              | x                    |   |            |                      |                              | x        |
| 10. Defense Logistics Agency                 | x         |   | x            | x                    |   | x          |                      |                              | x        |
| 11. Department of Defense Education Activity | x         |   | x            |                      |   | x          |                      |                              | x        |

|  | Mediation | Arbitration<br>( <i>other than<br/>labor union<br/>grievances</i> ) | Facilitation | Settlement<br>Judges | Consensus<br>Building/<br>Public<br>Participation | Partnering | Conflict<br>Coaching | Negotiated<br>Rule<br>Making | Ombuds |
|--|-----------|---|--------------|----------------------|---|------------|----------------------|------------------------------|--------|
| 12. National Geospatial-<br>Intelligence Agency                | x         |   |              |                      |   |            |                      |                              |        |
| 13. National Guard Bureau                                      | x         |   | x            | x                    | x   | x          |                      |                              |        |
| 14. National Security<br>Agency                                | x         |   | x            |                      |   | x          | x                    |                              |        |
| 15. Uniformed Services<br>University of the Health<br>Sciences | x         |   |              |                      |   |            |                      |                              |        |
| 16. Washington<br>Headquarters Service                         | x         |   | x            |                      |   |            |                      |                              |        |
| Department of Education  | x         |   | x            |                      | x   | x          | x                    | x                            | x      |
| Department of Energy   | x         |   | x            | x                    | x   | x          | x                    |                              | x      |
| Department of Health and<br>Human Services                     |           |   |              |                      |   |            |                      |                              |        |
| 1. Agency for Healthcare<br>Research and Quality               | x         |   |              | x                    |   | x          |                      |                              | x      |
| 2. Centers for Disease<br>Control and Prevention               | x         |   | x            |                      |   | x          | x                    |                              | x      |
| 3. Centers for Medicare &<br>Medicaid Services                 | x         |   | x            |                      |   | x          |                      |                              |        |
| 4. Departmental Appeals<br>Board                               | x         |   | x            | x                    |   |            | x                    | x                            | x      |
| 5. Food and Drug<br>Administration                             | x         |   | x            | x                    | x   | x          | x                    | x                            | x      |
| 6. Health Resources &<br>Services Administration               | x         |   |              |                      |   |            |                      |                              |        |
| 7. National Institutes of<br>Health                            | x         |   | x            |                      | x   | x          | x                    |                              | x      |

|   | Mediation | Arbitration<br>(other than<br>labor union<br>grievances) | Facilitation | Settlement<br>Judges | Consensus<br>Building/<br>Public<br>Participation | Partnering | Conflict<br>Coaching | Negotiated<br>Rule<br>Making | Ombuds |
|---|-----------|--|--------------|----------------------|---|------------|----------------------|------------------------------|--------|
| 8. Office of Equal<br>Opportunity and Civil<br>Rights | x         |  |              |                      |   |            |                      |                              |        |
| 9. Office of Hearings                                 | x         |  |              |                      |   |            |                      |                              |        |
| Department of Homeland<br>Security                    | x         |  | x            | x                    | x   |            | x                    |                              | x      |
| 1. Citizenship and<br>Immigration Services            | x         |  |              |                      |   |            |                      |                              |        |
| 2. Civil Rights and Civil<br>Liberties                | x         |  |              |                      |   |            |                      |                              |        |
| 3. Federal Emergency<br>Management Agency             | x         | x  | x            |                      |   | x          | x                    |                              |        |
| 4. Secret Service                                     | x         |  |              | x                    |   |            | x                    |                              | x      |
| 5. Transportation Security<br>Administration          | x         |  | x            | x                    | x   | x          |                      |                              | x      |
| Department of Housing<br>and Urban Development        | x         |  | x            | x                    |   | x          | x                    | x                            | x      |
| Department of the<br>Interior                         | x         |  | x            |                      | x   | x          | x                    |                              | x      |
| Department of Justice                                 |           |  |              |                      |   |            |                      |                              |        |
| 1. Civil Division                                     | x         | x  |              | x                    |   |            |                      |                              | x      |
| 2. Civil Rights Division                              | x         |  |              | x                    |   |            |                      |                              | x      |
| 3. Community Relations<br>Service                     | x         |  | x            |                      | x   | x          | x                    |                              | x      |

|   | Mediation | Arbitration<br><i>(other than<br/>labor union<br/>grievances)</i> | Facilitation | Settlement<br>Judges | Consensus<br>Building/<br>Public<br>Participation | Partnering | Conflict<br>Coaching | Negotiated<br>Rule<br>Making | Ombuds |
|---|-----------|---|--------------|----------------------|---|------------|----------------------|------------------------------|--------|
| 4. Environment and<br>Natural Resources<br>Division | x         | x   |              | x                    |   |            |                      |                              | x      |
| 5. Executive Office for<br>United States Attorneys  | x         |   |              |                      |   |            |                      |                              | X      |
| 6. United States Attorneys<br>Offices               | x         | x   |              | x                    |   |            |                      |                              |        |
| 7. Federal Bureau of<br>Investigation               | x         |   | x            |                      |   |            |                      |                              | X      |
| 8. Federal Bureau of<br>Prisons                     | x         |   | x            | x                    | x   | x          |                      |                              | X      |
| 9. Justice Management<br>Division                   | x         |   |              |                      |   |            |                      |                              |        |
| 10. Tax Division                                    | x         |   |              | x                    |   |            |                      |                              | X      |
| Department of Labor                                 | x         |   |              | x                    |   |            |                      |                              |        |
| Department of State                                 | x         |   | x            |                      |   |            |                      |                              | X      |
| Department of<br>Transportation                     | x         | x   | x            |                      | x   |            | x                    | x                            |        |

|   | Mediation | Arbitration<br>( <i>other than<br/>labor union<br/>grievances</i> ) | Facilitation | Settlement<br>Judges | Consensus<br>Building/<br>Public<br>Participation | Partnering | Conflict<br>Coaching | Negotiated<br>Rule<br>Making | Ombuds |
|---|-----------|---|--------------|----------------------|---|------------|----------------------|------------------------------|--------|
| Department of   |           |   |              |                      |   |            |                      |                              |        |
| Treasury  |           |   |              |                      |   |            |                      |                              |        |
| 1. Alcohol and Tobacco,<br>Tax and Trade Bureau             | x         |   |              |                      | x   |            |                      | x                            | x      |
| 2. Bureau of Engraving<br>and Printing                      | x         |   | x            |                      | x   | x          | x                    |                              |        |
| 3. Bureau of the Public<br>Debt                             | x         |   | x            |                      | x   | x          |                      |                              |        |
| 4. Departmental Offices<br>(Department Oversight<br>Office) | x         |   | x            |                      |   |            |                      |                              |        |
| 5. Financial Crimes<br>Enforcement Network                  | x         |   | x            | x                    | x   | x          | x                    |                              |        |
| 6. Financial Management<br>Service                          | x         |   | x            |                      |   | x          |                      |                              |        |
| 7. Internal Revenue<br>Service                              | x         |   |              |                      |   |            |                      |                              |        |
| 8. Internal Revenue<br>Service Appeals                      | x         | x   | x            |                      | x   | x          |                      | x                            |        |
| 9. Office of the<br>Comptroller of the<br>Currency          | x         |   | x            |                      |   | x          |                      |                              | x      |
| 10. Treasury Inspector<br>General for Tax<br>Administration | x         |   |              | x                    |   |            |                      |                              |        |
| 11. United States Mint                                      | x         |   | x            |                      |   | x          |                      |                              | x      |

|   | Mediation | Arbitration<br><i>(other than<br/>labor union<br/>grievances)</i> | Facilitation | Settlement<br>Judges | Consensus<br>Building/<br>Public<br>Participation | Partnering | Conflict<br>Coaching | Negotiated<br>Rule<br>Making | Ombuds   |
|---|-----------|---|--------------|----------------------|---|------------|----------------------|------------------------------|----------|
| Department of Veterans<br>Affairs                 | x         |   | x            | x                    |   | x          |                      |                              | x (some) |
| <b>INDEPENDENT AGENCIES</b>                       |           |   |              |                      |   |            |                      |                              |          |
| Commodity Futures<br>Trading Commission           | x         |   |              |                      |   |            |                      |                              |          |
| Consumer Product Safety<br>Commission             | x         |   | x            | x                    | x   | x          | x                    |                              | x        |
| Corporation for National<br>and Community Service | x         |   | x            |                      |   |            | x                    |                              |          |
| Environmental Protection<br>Agency                | x         |   | x            | x                    | x   |            | x                    | x                            | x        |
| Equal Employment<br>Opportunity Commission        | x         |   | x            | x                    |   |            |                      | x                            |          |
| Export-Import Bank of<br>the United States        | x         |   |              | x                    |   |            |                      |                              |          |
| Federal Communications<br>Commission              | x         | x   |              |                      | x   |            |                      | x                            |          |

|  | Mediation | Arbitration<br>( <i>other than<br/>labor union<br/>grievances</i> ) | Facilitation | Settlement<br>Judges | Consensus<br>Building/<br>Public<br>Participation | Partnering | Conflict<br>Coaching | Negotiated<br>Rule<br>Making | Ombuds |
|--|-----------|---|--------------|----------------------|---|------------|----------------------|------------------------------|--------|
| Federal Deposit Insurance Corporation        | x         | x   | x            |                      | x   |            |                      |                              | x      |
| Federal Election Commission                  | x         |   |              |                      |   |            |                      |                              |        |
| Federal Energy Regulatory Commission         | x         | x   | x            | x                    | x   |            |                      |                              |        |
| Federal Maritime Commission                  | x         | x   | x            | x                    | x   | x          | x                    |                              | x      |
| Federal Mediation & Conciliation Service     | x         |   | x            |                      | x   |            |                      |                              |        |
| Federal Reserve Board                        | x         |   |              |                      |   |            |                      |                              | x      |
| Federal Trade Commission                     | x         |   | x            |                      | x   |            | x                    |                              |        |
| General Services Administration              | x         | x   | x            | x                    | x   | x          | x                    |                              |        |
| National Archives and Records Administration | x         |   | x            |                      |   |            |                      |                              |        |

|                                      | Mediation | Arbitration<br>( <i>other than<br/>labor union<br/>grievances</i> ) | Facilitation | Settlement<br>Judges | Consensus<br>Building/<br>Public<br>Participation | Partnering | Conflict<br>Coaching | Negotiated<br>Rule<br>Making | Ombuds |
|--------------------------------------|-----------|---|--------------|----------------------|---|------------|----------------------|------------------------------|--------|
| National Labor Relations Board       | x         |   | x            | x                    | x   | x          |                      |                              |        |
| National Mediation Board             | x         |   | x            |                      |   |            | x                    |                              | x      |
| National Science Foundation          | x         |   | x            |                      |   |            |                      |                              |        |
| Nuclear Regulatory Commission        | x         | x   | x            | x                    | x   | x          | x                    | x                            |        |
| Office of Personnel Management       | x         |   | x            |                      |   |            |                      |                              |        |
| Peace Corps                          | x         |   | x            |                      |   |            |                      |                              |        |
| Pension Benefit Guaranty Corporation | x         | x   |              |                      |   |            | x                    | x                            |        |
| Securities and Exchange Commission   | x         |   | x            |                      |   |            | x                    |                              |        |
| Small Business Administration        | x         |   |              |                      |   |            | x                    |                              | x      |
| Social Security Administration       | x         |   | x            | x                    |   |            |                      |                              |        |

|   | Mediation | Arbitration<br><i>(other than labor union grievances)</i> | Facilitation | Settlement Judges | Consensus Building/<br>Public Participation | Partnering | Conflict Coaching | Negotiated Rule Making | Ombuds |
|---|-----------|---|--------------|-------------------|---|------------|-------------------|------------------------|--------|
| Tennessee Valley Authority  | x         |   | x            | x                 | x   | x          |                   |                        |        |
| United States Agency for International Development  | x         |   | x            | x                 | x   | x          | x                 |                        | X      |
| United States Institute for Environmental Conflict Resolution of the Morris K. Udall Foundation | x         |   | x            | x                 | x   |            | x                 | x                      |        |
| United States Office of Government Ethics   | x         |   | x            |                   | x   |            |                   |                        |        |
| United States Postal Service  | x         |   |              | x                 |   |            | x                 | x                      | X      |

**APPENDIX C**

**Past and Current Leadership**

**of the**

**Interagency Alternative Dispute Resolution**

**Working Group Sections and Steering Committee**

**Current and Past Leadership of the  
Federal Interagency Alternative Dispute Resolution  
Working Group, Sections, and Steering Committee**

**Background, Genesis and Authority**

Congress, by the Administrative Dispute Resolution Act (“ADRA”) of 1996, authorized the President to “establish an interagency committee to facilitate and encourage agency use” of alternative means of dispute resolution in the administrative process. 5 U.S.C. § 573(c)

Pursuant to the statutory authority, the President (by Memorandum dated May 1, 1998, for the Heads of Executive Departments and Agencies) directed the United States Attorney General to convene an interagency “Alternative Dispute Resolution Working Group” which would serve as the interagency committee authorized by the ADRA. The President’s Memorandum provides that:

- The Working Group consists of representatives of the heads of the Cabinet Departments and, as determined by the Attorney General, “other agencies with a significant interest in dispute resolution.”
- The mission of the Working Group is to “facilitate, encourage, and provide coordination for agencies” in, among other things, the development of alternative dispute resolution (ADR) programs and the training of agency personnel in “when and how to use alternative means of dispute resolution.”
- The Attorney General may designate a representative(s) to convene and facilitate meetings of “subgroups” of agencies to address “particular issues or subject areas, such as disputes involving personnel, procurement, and claims.”

In accordance with the President’s directive, the Attorney General, at a meeting of senior agency officials held on September 14, 1998, officially convened the Interagency ADR Working Group. Those in attendance were advised that the Working Group would “devolve” into four subject matter Sections (Workplace, Contracts & Procurement, Civil Enforcement, and Claims Against the Government) and the Attorney General subsequently approved Chairs of the four Working Group Sections.

At the Attorney General’s meeting of September 14, 1998, the attendees were advised that, in addition to the Sections, the Working Group would also “devolve” into a “forum” for discussing “best practices” in the field of ADR. The Interagency ADR Working Group Steering Committee has staffed the work of the Working Group and has served as the “forum” envisioned by the

Attorney General. From its creation, the Steering Committee's membership has included the Chairs and leadership of the four Working Group Sections.

Chairs of the Working Group Sections

*Civil Enforcement and Regulatory Section*

Richard L. Miles  
Director, Dispute Resolution Service and the Office of Administrative Litigation  
Federal Energy Regulatory Commission  
September 2002 – present

Robert Ward  
Senior Counsel for ADR and Dispute Resolution Specialist  
Environmental Protection Agency  
December 1998 – July 2002

David C. Batson  
Senior ADR Liaison Specialist  
Environmental Protection Agency  
October – November 1998

*Claims Against the Government Section*

Office of Dispute Resolution  
U.S. Department of Justice  
October 2005 - present

Jeffrey M. Senger  
Deputy Senior Counsel for Alternative Dispute Resolution  
Office of Dispute Resolution  
U.S. Department of Justice  
February 2002 – September 2005

Peter Steenland  
Senior Counsel for Alternative Dispute Resolution  
Office of Dispute Resolution  
U.S. Department of Justice  
November 1998 – January 2002

*Contracts and Procurement Section*

Anthony N. Palladino  
Associate Chief Counsel and  
Director, Office of Dispute Resolution for Acquisition  
Federal Aviation Administration

U.S. Department of Transportation  
January 2000 - present

Brig. Gen. Frank J. Anderson, Jr.  
United States Air Force  
October 1998 – December 1999

Workplace Section

Cindy Mazur  
Alternative Dispute Resolution Director  
Federal Emergency Management Agency  
March 2004 - present

Andrew Colsky  
ADR Attorney  
United States Postal Service  
May 2000 – February 2004

Martha McClellan  
Counsel  
Federal Deposit Insurance Corporation  
February 1999 – May 2000

Mary Elcano (Co-Chair)  
General Counsel  
United States Postal Service  
Erica Cooper (Co-Chair)  
Deputy General Counsel  
Federal Deposit Insurance Corporation  
October 1998 – February 1999

Chairs of the Steering Committee

Jerry W. Jones, Jr.  
Director, Alternative Dispute Resolution Program  
Office of Departmental Equal Employment Opportunity  
U.S. Department of Housing and Urban Development  
November 2006 - present

Gregory A. Burke  
Ombuds  
Office of Resolution Management  
U.S. Department of Veterans Affairs  
May – October 2006

Anthony N. Palladino  
Associate Chief Counsel and  
Director, Office of Dispute Resolution for Acquisition  
Federal Aviation Administration  
U.S. Department of Transportation  
April 2005 - April 2006

Richard L. Miles  
Director, Dispute Resolution Service and the Office of Administrative Litigation  
Federal Energy Regulatory Commission  
October 2004 – March 2005

John A. Dietrich  
Alternative Dispute Resolution Counsel and  
Deputy Dispute Resolution Specialist  
U.S. Department of the Navy  
April - September 2004

D. Leah Meltzer  
Deputy Dispute Resolution Specialist  
Securities & Exchange Commission  
October 2003 - March 2004

Sarah Rudgers  
Director, Dispute Resolution Program  
National Archives and Records Administration  
April – September 2003

Andrew Colsky  
ADR Attorney  
United States Postal Service  
August 2002 – March 2003

Christine M. Kopocis  
Department of Defense ADR Liaison  
February 2002 - July 2002

Eileen B. Hoffman  
Commissioner, International and Dispute Resolution Services  
Federal Mediation and Conciliation Service  
July 2001 – January 2002

Hon. Richard C. Walters  
Office of Dispute Resolution for Acquisition  
Federal Aviation Administration  
U.S. Department of Transportation

January 2001 to June 2001  
(now Board Judge, United States Civilian Board of Contract Appeals)

Jody Lee  
Dispute Resolution Specialist  
Office for Civil Rights  
U.S. Department of State  
July 2000 – December 2000

David C. Batson  
Senior ADR Specialist  
Environmental Protection Agency  
March – June 2000

Peter Steenland  
Senior Counsel for Alternative Dispute Resolution  
Office of Dispute Resolution  
U.S. Department of Justice  
Charter Chair

Vice-Chairs of the Steering Committee

(Note: The Steering Committee created the position of Vice-Chair, and incorporated it into the Steering Committee Governance Document, in July 2006)

Dale Gentry  
Director, Conflict Prevention and Resolution Center  
Department of Agriculture  
November 2006 - present

**APPENDIX D**

**Current Membership**  
**of the**  
**Interagency Alternative Dispute Resolution**  
**Working Group Steering Committee**

## Appendix D

### **Federal Interagency Alternative Dispute Resolution Working Group Steering Committee Membership**

#### **April 2007**

#### **Executive Office of the President/Cabinet Representatives**

Office of Management and Budget/Executive Office of the President:  
Robert A. Burton  
Associate Administrator  
Office of Federal Procurement Policy

Department of Agriculture:  
Dale Gentry  
Director, Conflict Prevention and Resolution Center

Department of Commerce:  
Brian D. DiGiacomo  
Chief, Employment and Labor Law Division

Department of Defense:  
Christine M. Kopocis  
Department of Defense ADR Liaison

Department of Defense/Department of the Air Force:  
Kenneth Lechter  
Associate General Counsel (Dispute Resolution)

Department of Defense/Department of the Army:  
Dennis Dean Kirk  
Special Assistant to the General Counsel

Department of Defense/Department of the Navy:  
John A. Dietrich  
Assistant General Counsel (ADR)  
Office of the General Counsel

Department of Education:

Kathryn A. Ellis

Senior Counsel to the Deputy General Counsel for Program Service, and

Agency Dispute Resolution Specialist

Office of the General Counsel

Department of Energy:

Kathleen M. Binder

Director, Office of Dispute Resolution

Office of the General Counsel

Department of Health and Human Services:

Neil H. Kaufman

Chief, Alternative Dispute Resolution Division

Departmental Appeals Board

Department of Homeland Security/Federal Emergency Management Agency:

Cindy Mazur

Alternative Dispute Resolution Director

Department of Homeland Security/Transportation Security Administration:

Deborah A. Katz

Model Workplace Program Executive

Department of Housing and Urban Development:

Jerry W. Jones, Jr.

Director, Alternative Dispute Resolution Program

Office of Departmental Equal Employment Opportunity

Department of the Interior:

Elena Gonzalez

Director, Office of Collaborative Action and Dispute Resolution

Department of Justice:

Linda A. Cinciotta

Director, Office of Dispute Resolution

Senior Counsel for Alternative Dispute Resolution

Department of Labor:

Annabelle T. Lockhart

Director, Civil Rights Center

Department of State:

Jacqueline A. Canton

Chief, ADR and EEO Counseling Section

Chief, Complaints Management Division

Department of the Treasury:  
[awaiting designation of agency representative)

Department of Transportation:  
Judith S. Kaleta  
Senior Counsel for Dispute Resolution and  
Dispute Resolution Specialist

Department of Veterans Affairs:  
Rafael A. Torres  
Deputy Assistant Secretary for Resolution Management  
Deputy Dispute Resolution Specialist for Workplace ADR

**Independent Agency Representatives**

Environmental Protection Agency:  
David C. Batson  
Senior ADR Specialist

Equal Employment Opportunity Commission:  
Douglas A. Gallegos  
Attorney Advisor

Federal Deposit Insurance Corporation:  
Marianne Robb  
Counsel, Alternative Dispute Resolution Team  
FDIC Legal Division

Federal Energy Regulatory Commission:  
Richard L. Miles  
Director, Dispute Resolution Service and the Office of Administrative Litigation

Federal Mediation and Conciliation Service:  
Kimberly Y. Beg  
Director, FMCS Institute

General Services Administration:  
Brenda F. Ward  
Senior Assistant General Counsel  
Office of the General Counsel

National Archives & Records Administration:  
Gary M. Stern  
General Counsel

National Mediation Board:  
Rachel Barbour  
ADR Program Specialist

Office of Personnel Management:  
Ana A. Mazzi  
Deputy Associate Director for Workforce Relations and Accountability Policy

Securities and Exchange Commission:  
D. Leah Meltzer  
Deputy Dispute Resolution Specialist

U.S. Institute for Environmental Conflict Resolution:  
Kirk Emerson  
Director

U.S. Postal Service:  
Patricia Morgese Richter  
Manager, National EEO Compliance and Appeals Program

**Additional Representatives Currently Serving on the Steering Committee  
Who Are Initial/Grandfathered Members of the Steering Committee**

Howard Gadlin  
Ombudsman  
Department of Health and Human Services/National Institutes of Health  
(grandfathered at National Institutes of Health, Department of Health and Human Services)

Eileen Hoffman  
Commissioner, International and Dispute Resolution Services  
Federal Mediation and Conciliation Service  
(grandfathered at Federal Mediation and Conciliation Service)

Fern Feil Kaufman  
Counsel for Dispute Resolution  
Center for Alternative Dispute Resolution  
Department of Transportation  
(grandfathered at Federal Labor Relations Authority)

Anthony N. Palladino  
Associate Chief Counsel and Director  
Office of Dispute Resolution for Acquisition  
Department of Transportation/Federal Aviation Administration:  
(grandfathered at Federal Aviation Administration/Department of Transportation)

Hon. Richard C. Walters  
Board Judge  
United States Civilian Board of Contract Appeals  
(administratively organized in the General Services Administration)  
(grandfathered at Department of Transportation/Federal Aviation Administration)

**Recorder/Archivist**

Terry Fenton  
Conflict Prevention and Resolution Center  
Environmental Protection Agency

## APPENDIX E

### **Federal Agencies Which Provided the Information Used in This Report**

**Federal Agencies Which Provided Information Used in This Report**

**Cabinet Agencies**

**Department of Agriculture**

**Department of Commerce**

**Department of Defense**

1. Department of the Air Force
2. Department of the Army
3. Army Corps of Engineers
4. Department of the Navy
5. Defense Commissary Agency
6. Defense Contract Audit Agency
7. Defense Contract Management Agency
8. Defense Finance and Accounting Service
9. Defense Information Systems Agency
10. Defense Logistics Agency
11. Department of Defense Education Activity
12. National Geospatial-Intelligence Agency
13. National Guard Bureau (Air Force and Army)
14. National Security Agency
15. Uniformed Services University of the Health Sciences
16. Washington Headquarters Service

**Department of Education**

**Department of Energy**

**Department of Health and Human Services**

1. Agency for Healthcare Research and Quality
2. Centers for Disease Control and Prevention
3. Centers for Medicare & Medicaid Services
4. Departmental Appeals Board
5. Food and Drug Administration
6. Health Resources & Services Administration
7. National Institutes of Health
8. Office of Equal Opportunity and Civil Rights
9. Office of Hearings

### **Department of Homeland Security**

1. Civil Rights and Civil Liberties
2. Citizenship and Immigration Services
3. Federal Emergency Management Agency
4. Transportation Security Administration
5. Secret Service

### **Department of Housing and Urban Development**

### **Department of the Interior**

### **Department of Justice**

1. Civil Division
2. Civil Rights Division
3. Community Relations Service
4. Environment and Natural Resources Division
5. Executive Office for United States Attorneys, and United States Attorneys' Offices
6. Federal Bureau of Investigation
7. Federal Bureau of Prisons
8. Justice Management Division, Equal Employment Opportunity Staff
9. Tax Division

**Department of Labor**, Office of the Administrative Law Judges

**Department of State**

**Department of Transportation**

1. Federal Aviation Administration
2. Federal Highway Administration
3. Federal Motor Carrier Safety Administration
4. Federal Transit Administration
5. Office of Inspector General

**Department of the Treasury**

1. The Alcohol & Tobacco Tax & Trade Bureau
2. Bureau of Engraving and Printing
3. Bureau of the Public Debt
4. Departmental Offices (Departmental Oversight Office)
5. Financial Crimes Enforcement Network
6. Financial Management Service
7. Internal Revenue Service
8. Internal Revenue Service Appeals
9. Office of the Comptroller of the Currency
10. Treasury Inspector General for Tax Administration
11. United States Mint

**Department of Veterans Affairs**

**Independent Agencies**

Commodity Futures Trading Commission  
Consumer Product Safety Commission  
Corporation for National and Community Service  
Environmental Protection Agency  
Equal Employment Opportunity Commission  
Export-Import Bank of the United States

Federal Communications Commission  
Federal Deposit Insurance Corporation  
Federal Election Commission  
Federal Energy Regulatory Commission  
Federal Maritime Commission  
Federal Mediation & Conciliation Service  
Federal Reserve Board  
Federal Trade Commission  
General Services Administration  
National Archives and Records Administration  
National Labor Relations Board  
National Mediation Board  
National Science Foundation  
Nuclear Regulatory Commission  
Office of Personnel Management  
Peace Corps  
Pension Benefit Guaranty Corporation  
Securities and Exchange Commission  
Small Business Administration  
Social Security Administration  
Tennessee Valley Authority  
U.S. Agency for International Development  
U.S. Institute for Environmental Conflict Resolution  
U.S. Office of Government Ethics  
United States Postal Service

**APPENDIX F**

**Office of Management and Budget**

**Office of Federal Procurement Policy**

**Procurement ADR Awards Program**

## Appendix F

### Office of Management and Budget Office of Federal Procurement Policy Procurement ADR Awards Program

In 2002, the Contracts and Procurement Section of the Interagency ADR Working Group worked with the Office of Federal Procurement Policy (OFPP) and the Procurement Executives Council to develop and implement an award program that would recognize federal agencies and private sector companies that have used ADR effectively to resolve government contracts disputes. The OFPP has been presenting awards on an annual basis every year since 2002. The awards are made on a competitive basis after nominations are judged by a disinterested panel of public and private sector ADR experts.

The award program serves the important functions of recognizing agencies and contractors who have distinguished themselves in their effective use of ADR for the avoidance and resolution of federal procurement disputes and of encouraging other agencies and companies to utilize ADR to the maximum extent practicable to resolve public contracting disputes.

The following are highlights of programs and accomplishments of the agency recipients of the OFPP Procurement ADR Award.

#### **1. Department of Defense**

##### **a. Air Force**

The Air Force ADR Program is now heading into its thirteenth year. In 1998, the Air Force began executing ADR agreements with its top 25 contractors, and in 2000 it implemented the “ADR First” policy in place to this day. As a direct result, large disputes that took an average of five years to resolve through litigation are now being resolved by the use of ADR in an average of just over 12 months. In the past six years, the program has won six national awards for excellence, and has grown to encompass the highly successful use of ADR to resolve workplace disputes in one tenth the time and at one tenth of the cost of traditional litigation.

The challenge is to keep the Air Force ADR Program’s core acquisition and workplace ADR programs strong while encouraging change and innovation in Air Force business processes that will reduce the potential for disputes to arise in the first place. The concept of an Integrated Conflict Management System (ICMS) is critical in balancing these elements. The Air Force ICMS is composed of, first, a robust ADR system to resolve disputes as efficiently as possible, and second, a conflict management system that works to prevent disputes from arising in the first place. Key to making such a conflict management system work is training in negotiation and communication skills. The Air Force ADR program office is currently conducting large scale negotiation training for supervisors of civilian personnel, and has spearheaded the establishment

of the Air Force Negotiation Center of Excellence, which will ensure that effective negotiations becomes a core competency of the Air Force across all functional areas.

### Overview of ADR in Air Force Contract Disputes

Of the 644 appeals pending at the ASBCA in FY 2005, the Air Force contributed only 80—or 12.4 percent. The Army Corps of Engineers had 183 appeals, or 28.4 percent, the Navy had 125 or 19.4 percent, DLA/DCMA had 107 or 16.6 percent, and the Army had 105 or 16.3 percent. However, there was a slight uptick in the AF's docketed appeals in 2005 from the 2003 and 2004 levels.

Prior to institution of the Air Force “ADR First” policy, less than 10 percent of Air Force contract disputes were resolved by ADR. Afterwards, over 28 percent of disputes, on average, are resolved by ADR. This number is misleadingly low, however, since it does not include disputes that settled after the ADR process had begun (those are included in a “negotiated settlement” category). From July 2005 on, disputes that settle after an ADR agreement is entered into will be shown as resolved through ADR. In addition, this statistic does not include ADR resolutions reached before an appeal is docketed. These early ADR resolutions are becoming a significant percentage of the total.

One key metric for any ADR program is cycle time—that is, how long it takes to resolve disputes. That is because prolonged disputes are costly and disruptive to ongoing programs regardless of the ultimate outcome. For FYs 2000 through 2005, average cycle times for Air Force contract disputes from docketing to resolution were as follows:

- Trial and decision 37 months
- Negotiated settlement 19.8 months
- ADR 17.9 months

The most important statistic, though, is that from the time the parties **agreed to use ADR** until the dispute was resolved, an average of only **8.2 months** elapsed.

In recent years, the Air Force has emphasized early resolution of contract disputes. We want to resolve disputes prior to the issuance of a contracting officer's final decision, and preferably prior to the submission of a formal Contract Disputes Act claim. Therefore, the Air Force FAR Supplement (AFFARS) instructs contracting officers to submit proposed final decisions to the Directorate of Contract Dispute Resolution at Wright Patterson Air Force Base for review prior to issuance. AFFARS 5333.291. Final decisions in excess of \$500,000 are also to be submitted to the Deputy General Counsel for Dispute Resolution for review. *Id.* A primary purpose of the review in both instances is to ascertain whether ADR should be used to resolve the dispute before it enters the formal disputes process. Air Force policy is to use ADR techniques once unassisted negotiations have reached an impasse. AFFARS 5333.090.

### **b. Army Corps of Engineers**

The U.S. Army Corps of Engineers has been a pioneer in the use of ADR and was the first federal agency to establish an ADR program in acquisition. The Corps began this initiative in

1984, six years before the enactment of the Administrative Dispute Resolution Act of 1990. This initiative was the result of the Corps' recognition of the need for an alternative means to litigation for the resolution of contract disputes, because the Corps was experiencing a dramatic increase in its litigation case load and the concomitant transactional costs associated with this litigation.

The Corps' ADR program is managed by the Engineer Chief Trial Attorney and implements a three-prong approach designed to alter the prevailing mindset and to provide the means to use alternative means of dispute resolution. This program consists of the training of managers and attorneys, the publication of instruction manuals, and technical support in designing ADR processes and drafting ADR agreements.

Engineer Trial Attorneys are encouraged to evaluate claims and appeals for resolution through ADR procedures constantly throughout the process from submission of a claim, through issuance of a final decision by the Contracting Officer, and through proceedings before the Armed Services Board of Contract Appeals.

The Corps has employed the full range of the continuum of ADR methods, but the use of the Settlement Judge in a mediated format has been employed over 80 percent of the time. In addition, ADR has been employed at all phases in the claims and appeals process. The Corps recently has used ADR at the "pre-appeal" stage and successfully resolved claims without incurring the significant transactional costs associated with litigation. Similarly, use of ADR in the early, pre-discovery, stage of proceedings has led to successful early resolution of claims and appeals.

In the last ten fiscal years, the Corps has processed 248 claims and appeals using ADR procedures, and has settled 235 of those matters, for a 94.7% settlement rate. Through use of ADR, the Corps has realized savings of more than \$260 million, paying only \$198 million, including interest, on over \$460 million in claims not including interest.

In the past three fiscal years, the Corps has resolved 117 claims and appeals using ADR techniques, and the cost savings have been consistent with the historical data. Also during that time, the Corps has resolved 156 claims and appeals without resort to third party neutral assisted ADR. In this venue, the Corps has realized savings of over \$76 million, paying only \$37 million, including interest, on over \$113 million in claims not including interest.

Over the past three fiscal years, the Corps has litigated 77 claims and appeals to decision before the ASBCA and the United States Court of Federal Claims. In those cases, the claims and appeals aggregated more than \$81 million, and the tribunals returned findings of liability of only \$3 million. The Corps views these results as validating the evaluations by trial attorneys as to the appropriate venue for resolution of claims and appeals.

In an era of ever-tightening budgets, ADR represents an invaluable tool to the Agency in resolving claims and disputes in a time-efficient and economical manner. The Corps continues to recognize when resolution can be obtained through means other than litigation, the associated cost savings represent an important step in allocation of resources.

**c. Department of the Navy**

The Department of the Navy embraces the use of alternatives to litigation in procurement disputes. The formal policy of the Navy is:

Using ADR to the Maximum Extent. ADR techniques shall be used as an alternative to litigation or formal administrative procedures to the maximum extent practicable. Use of these techniques may resolve the entire issue in controversy or a portion of the issue in controversy. The goal is to resolve disputes and conflicts at the earliest stage feasible, by the fastest and least expensive method possible, and at the lowest possible organizational level prior to litigation. Every issue in controversy, regardless of the subject matter, is a potential candidate for ADR.

SECNAV Instruction 5800.13A, "Alternative Dispute Resolution (ADR) Policy and Mission of the DON ADR Program Office," 22 December 2005, at ¶7.a.

Protests, Claims and Appeals

The table below summarizes procurement ADR activity for several past fiscal years for claims, appeals and protests.

|                          | FY99 | FY00 | FY01 | FY02 | FY03 | FY04 | FY05 | Totals |
|--------------------------|------|------|------|------|------|------|------|--------|
| Early Neutral Evaluation |      |      | 7    |      | 1    |      |      | 8      |
| Facilitation             |      | 2    |      |      | 0    |      |      | 2      |
| Mediation                | 12   | 6    | 6    | 4    | 4    | 4    | 2    | 38     |
| Non-binding Arbitration  |      |      | 2    | 2    | 0    |      |      | 4      |
| Settlement Judge         | 1    |      |      | 1    | 3    | 1    |      | 6      |
| Summary Trial            | 10   |      | 4    | 5    | 2    | 7    | 4    | 32     |
| Other                    |      | 7    | 3    | 3    | 2    | 1    |      | 16     |
| Resolutions              | 22   | 14   | 18   | 13   | 12   | 13   | 6    | 98     |
| Resolution Rate          | 96%  | 93%  | 82%  | 87%  | 100% | 100% | 100% | 92%    |

(Table 1)

While recognizing that the language of FAR Part 33 could support counting cases that settle without the services of a neutral, the DON generally only tracks those cases that use a neutral of some sort. The trend in numbers is downward, but at the same time, it should be noted that across the government, appeals at the Boards of Contract Appeals are down.

The DON ADR program estimates that ADR achieves significant process savings. As shown in table 2, for 35 cases analyzed, the program estimated about \$1.4 million in direct expenses that were avoided by using the ADR processes, and another \$1.7 million saved if the trial schedule had proceeded as expected.

| <b>Quantified Costs Avoided FY01 04</b>  |                    |
|--|--------------------|
| Testimony Expenses Avoided               | \$987,138          |
| Travel Expenses Avoided                  | 139,500            |
| Other Expenses Avoided                   | 327,100            |
| Less: ADR Unique Costs Incurred          | (30,131)           |
| <b>Total Costs Avoided</b>               | <b>\$1,423,607</b> |
| Estimated Interest Avoided               | \$1,720,366        |
| <b>Total Quantified Expenses Avoided</b> | <b>\$3,143,973</b> |

(Table 2)

The figures in table 2 do not include costs that cannot be monetarily quantified. For example, writing a typical ASBCA post-hearing brief can be an expensive effort that produces hundreds of pages, and involves the input of clients, witnesses, experts and attorneys. But quantifying “costs avoided” for briefs that were never written, about trials that never occurred is not possible. Likewise, the costs of responding to a discovery request cannot be reliably estimated without knowing the scope of the request. So, the program simply tabulates the reported documents that the DON did not have to produce, and recognizes that each represents a significant but non-quantifiable cost avoided. See Table 3.

| <b>Non-Quantified Costs Avoided:<br/>Documents not Written</b> |           |
|--|-----------|
| Pleadings  | 6         |
| Discovery Requests   | 12        |
| Motions  | 10        |
| Other Documents  | 4         |
| Briefs   | 26        |
| <b>Total</b>   | <b>58</b> |

Collaborative Methods

The DON encourages the use of collaborative efforts in resolving and preventing disputes. Examples include effort in construction partnering, and recent training provided to Task and Delivery Order Ombudsman.

(Table 3)

its renewed FAR 16.505

Construction & Facilities Support Partnering

The Naval Facilities Engineering Command (NAFVAC) issued a revised partnering policy in December, 2004. The policy requires the use of partnering for all construction and Facilities Support Contracts, and defines partnering as the result of “mindset + commitment + process.” The mindset element is described, in part, as:

... working together with the other partners to remove unnecessary roadblocks that stifle success. To a great degree, this is accomplished through effective communication, proactive contract administration, mutual trust, honesty, integrity, cooperation, open-mindedness, and the courage to do the right thing.

The DON is committed to ADR for all issues in controversy, including procurement matters. ADR clearly saves money and other resources. It promotes collaboration and the best outcome for both the DON and its contractors.

**d. Armed Services Board of Contract Appeals**

The Armed Services Board of Contract Appeals (ASBCA or Board) is an independent tribunal that for over fifty years has been responsible for resolving contract disputes across the entire spectrum of federal government construction, supply or service contracting activity, from the acquisition of major weapons systems or complex construction projects to routine items of supply or service. The ASBCA is currently responsible for resolving contract appeals for all elements of the Department of Defense and designated civilian agencies, including the National Aeronautics and Space Administration, Agency for International Development and Department of Health & Human Services.

From 1995 forward, the Board has aggressively advanced the use of ADR, and willingly experimented with various techniques, albeit with due regard to the voluntary nature of ADR. In the process, the ASBCA has quietly refocused its dispute resolution processes. Consistent with the mandate of the Contract Disputes Act to “provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes,” the Board has placed ADR on a par with its other traditional litigation-type procedures, while urging that it be the first choice of the parties for resolving their dispute.

The initial focus of the ASBCA’s ADR efforts was its own docket. In recent years, the Board has been approached with requests to provide its ADR services in other, “off-docket,” matters. One category of requests involves pre-appeal disputes where the parties seek mediation. This category often carries a greater risk to a successful outcome because the record is typically less developed. Nevertheless, the ASBCA is willing to undertake the higher risk, if it can be assured of the parties’ good faith commitment to trying to make the process work, and has done so with success.

Another source of off-docket ADR matters is a request from organizations not subject to the Board’s Contract Disputes Act jurisdiction. This category includes: requests under the Interagency Neutral-Sharing Arrangement, discussed *infra*; requests by the Department of Justice and private parties for mediation assistance in contract matters pending in the United States Court of Federal Claims or, in one instance, a civil fraud matter peripheral to a contract dispute; and a request by a state and local governmental entity for mediation services in connection with Boston’s “Big Dig.”

The Board’s Notice describes three ADR techniques that are regularly used with success at the ASBCA: (1) summary trial with binding decision; (2) settlement judge; and (3) minitrial. The first is a binding procedure, while the second and third are non-binding techniques. The great majority of ADR matters have been resolved through either a summary trial with binding decision or a straightforward mediation, *i.e.*, the settlement judge model. However, with the assistance of the Board, the parties have crafted a wide variety of agreements.

Over the last few years the Board has conducted a number of “Med-Arb” proceedings. This method combines the elements of non-binding and binding ADR. Typically, the process begins with a full mediation. The parties agree that if the mediation is not successful, it will be followed—after a cooling-off period—by a summary trial with binding decision. A further variation on the “Med-Arb” method has been dubbed “Last Chance Arbitration.” This technique is built around a summary trial proceeding. Under another variation of a non-binding ADR that borrows from the “Med-Arb” approach, the parties agree that they will be bound by the neutral’s decision of a narrow, discrete issue that has become an obstacle to achieving a full settlement during the mediation.

To date the Board has received requests for its ADR services in over 1,200 matters. The vast majority of the matters for which ADR was requested have been successfully resolved. The scope of ADR activity is indicated in the table below.

## A GUIDE TO ADR ACTIVITY AT THE ASBCA

| Year    | Appeals  | Binding<br>ADR | Non-Binding<br>ADR | Success<br>Rate** |
|---------|----------|----------------|--------------------|-------------------|
| FY87-94 | 187      | 83             | 104                | 93%               |
| FY 95   | 61       | 13             | 48                 | 92%               |
| FY 96   | 53       | 31             | 22                 | 100%              |
| FY 97   | 68 (4)*  | 18             | 50                 | 100%              |
| FY 98   | 116 (10) | 41             | 75                 | 99%               |
| FY 99   | 123 (11) | 49             | 74                 | 99%               |
| FY 00   | 76 (4)   | 35             | 41                 | 98%               |
| FY 01   | 165 (7)  | 45             | 120                | 97%               |
| FY 02   | 136 (13) | 63             | 73                 | 95%               |
| FY 03   | 86 (11)  | 16             | 70                 | 97%               |
| FY 04   | 60 (20)  | 11             | 49                 | 94%               |
| FY 05   | 140 (55) | 20             | 120                | 99%               |
| TOTALS  | 1271     | 425            | 846                | 97%               |

\* Includes off-docket matters in parentheses

\*\* Percentage of Non-Binding ADRs

Binding ADRs are, by their nature, always successful. They resolve the issue presented finally and in less time than would be the case if standard dispute resolution procedures were followed. Non-Binding ADR proceedings, on the other hand, leave the ultimate resolution of the matter to the parties. The high success rate reported in non-binding ADR proceedings underscores the utility of this method of dispute resolution. It also attests not only to the commitment of the parties, but to the skill of the neutral.

ADR success stories abound. The Air Force has reported on two major mediations that received considerable publicity. The first involved \$785 million in claims by the Boeing Company for the design, development, integration, test and production of the AC-130U Gunship aircraft pending at the United States Court of Federal Claims. The second involved claims of \$200 million by Northrop Grumman in connection with the "Joint Surveillance Target Attack Radar System" (J-STARS) pending at the ASBCA. Both were successfully resolved with the assistance of a Board judge.

For every high visibility ADR, there have been dozens of other factually complex, multi-issue, high dollar cases resolved with the assistance of ASBCA judges. Moreover, it is not just the high-dollar cases that count. The ADRs that have been presented to the Board cover the full spectrum of issues that can arise in the performance of government construction, supply and service settings. Examples include matters involving construction of military housing and hospitals, cleaning of mess halls, ship maintenance and readiness, aircraft maintenance, building electrical maintenance, asbestos and lead paint abatement, painting contracts, installation of natural gas lines, construction of a pier, maintenance dredging, ventilation system upgrades, a

cable TV franchise agreement, installation of computer systems and supply of military weapons and weapon systems.

Apart from the individual success stories, the Board's ADR program has had a salutary overall impact on the Board's docket. The ADR program has led to a more timely resolution of appeals, with a corresponding reduction in the costs of litigation. ADR has materially contributed to the Board's ability to reduce its overall docket. In response to the mandate of the Contract Disputes Act to provide informal, expeditious, and inexpensive resolution of disputes to the maximum extent practicable, the ASBCA has developed a highly successful ADR program. The Board has been at the forefront in promoting the ADR movement in the government contracting community.

#### **e. Defense Logistics Agency**

DLA's ADR policy is to use ADR to resolve all acquisition disputes when unassisted negotiations are not successful. Litigation requires approval at a level above the contracting officer, and should be coordinated with the activity ADR Specialist. The DLA acquisition ADR program covers both pre and post award disputes. It has an impressive success rate; in FY 2005, 87% of matters taken to ADR were either entirely or partially resolved through ADR. Significant dollar savings have resulted, an estimated \$1.4 million for FY 2005. DLA won the OFPP Alternative Dispute Resolution Award for Acquisition (2004).

ADR is integrated into the positions of all lawyers at DLA. The DLA General Counsel is the Dispute Resolution Specialist. The DLA Associate General Counsel, Dispute Resolution, serves as the overall ADR Program Manager. The DLA senior acquisition counsel is in charge of the acquisition component of the ADR program. Each Chief Counsel at DLA field activities is responsible for the ADR program at their locations, and each designates an ADR specialist in their office. All these individuals are rated, either directly or indirectly, on ADR and/or dispute resolution. ADR training is mandatory for all DLA lawyers; refresher training is mandatory for acquisition lawyers.

One of the unique features of DLA's acquisition ADR program is use of in-house neutrals to resolve acquisition disputes. (Many agencies use in-house neutrals to resolve personnel disputes, but this is rare for acquisition). These neutrals, who serve in addition to performing their regularly assigned duties, must have expertise in acquisition as well as ADR. They consider themselves truly neutral since their job is to uphold the integrity of the ADR program. Contractors certainly do not have to use DLA in-house neutrals, but many do. Using an in-house neutral can be easy and quick to set up, and can appear less threatening or complicated if a party is hesitant about ADR.

DLA uses ADR frequently to resolve pre-award disputes. GAO's Outcome Prediction ADR (or any alternate ADR) is specifically identified as an agency "best practice" for GAO protests. Getting GAO's predicted outcome lets DLA proceed with confidence if GAO supports DLA's position, or take corrective action quickly and move forward with the acquisition if not. DLA protests handled through ADR at GAO are resolved in half the time they would otherwise have been. DLA has also been successful in resolving GAO protests by using its in-house neutrals to

mediate the dispute before the agency report is filed. Telephone facilitations have been surprisingly effective, which is particularly helpful given the short time-frame for filing the agency report.

DLA has several policies to try to integrate ADR into the contract dispute arena. A contract clause addressing ADR is required for all acquisitions; it can be tailored to the acquisition or the interests of the parties. A DLA policy stresses that ADR should be addressed in all post-award orientations, to set the stage for cooperative problem solving. Contracting Officer's final decisions require a statement about ADR options as well as appeal rights to the Board or Court. DLA also encourages the use of ADR in "non-traditional" acquisition disputes arenas. DLA has offered ADR to SBA to resolve disputes concerning small business and bundling issues, and has suggested ADR in response to Congressional inquiries on contract issues.

DLA uses an in-house database to help measure the success of the acquisition ADR program. Any ADR attempt is entered in the database, which captures data such as the type of ADR, the result, duration of the dispute, days saved, and costs saved/avoided. Acquisition ADR statistics are reported annually to senior officials. The statistics reported earlier come from this data base. The agency also gets feedback from contractors who participated in agency ADR proceedings; several have praised DLA for their ADR experience.

DLA supports constructive problem solving and fostering positive relationships with its contractors. The ADR program advances these objectives while reducing agency costs. The program has been in place for many years, maturing steadily with proven results. More information is available on DLA's ADR Web site, <http://www.dla.mil/adr>.

## **2. Department of Transportation-- Federal Aviation Administration**

The FAA's Office of Dispute Resolution for Acquisition ("ODRA") provides the Agency and its contractors with a streamlined dispute resolution process that places heavy emphasis on the use of ADR techniques. The ODRA's Procedural Rules establish ADR as the primary dispute resolution method to be employed by FAA for procurement disputes. Pursuant to the Rules, whenever a protest or contract dispute is filed with the ODRA, an ODRA Dispute Resolution Officer ("DRO") is immediately designated to serve as a potential neutral in order to explore ADR options with the parties. The parties also may opt to use Board of Contract Appeals judges in lieu of DROs to serve as ADR neutrals or may employ third party compensated neutrals for ADR proceedings. In a related action, the FAA's Acquisition Executive executed an ADR Pledge to express the FAA's top-level commitment to early expeditious resolution of procurement controversies by ADR.

Since its inception, the ODRA has managed more than 460 cases, including bid protests, contract disputes, pre-disputes and other procurement-related disputes. Of these, ADR settlements were reached in 65% of all contract disputes and 90% of all bid protests filed with the ODRA. The aggressive use of ADR techniques by the ODRA is partly responsible for the comparatively short resolution timeframes achieved by the ODRA. Bid protests are resolved through ADR in an average of 24 calendar days, while contract disputes have been resolved by ADR in an average of 67 calendar days.

The FAA Administrator also has delegated authority to the ODRA to provide dispute avoidance and early resolution services in matters that have not yet developed into formal disputes. To date, the ODRA has provided “pre-dispute services in a total of 79 cases. Of these, only 3 cases have evolved into formal litigation. Finally, through an Interagency Agreement, the ODRA also provides adjudicative and dispute resolution services to the Transportation Security Administration (“TSA”) of the Department of Homeland Security. The ODRA has provided dispute resolution services in a total of 24 cases. ADR resolutions have been achieved in 70 % of the TSA cases. The ODRA also is responsible for adjudicating contests arising from OMB Circular A-76 competitions. The ODRA A-76 Contest Rules also call for use of ADR. To date the ODRA has been involved in 4 contests and has resolved 2 through the use of ADR.

### **3. General Services Administration Board of Contract Appeals**

The General Services Administration Board of Contract Appeals (the Board or GSBCA) has been assisting federal government agencies and their contractors in resolving disputes through alternative dispute resolution (ADR) for more than a decade. The Board recently was merged along with other boards of civilian agencies into a new Civilian Board of Contract Appeals. The Board's experience in deciding bid protests quickly and efficiently has made its judges attentive to the need for prompt, fair resolution of all disputes. The judges have found that ADR is often an effective means for reaching this objective. They have applied this lesson by successfully providing ADR services to agencies throughout the government on a wide variety of contract- and procurement-related matters.

The GSBCA provides ADR services as a means of resolving a wide variety of contract-related disputes. Any of the Board's seven judges will assist with ADR when requested. The purpose of the Board's ADR program is to offer litigants and potential litigants the opportunity to resolve their disputes without resorting to a formal hearing before the Board or trial before a court. The GSBCA was established under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as an independent tribunal to hear and decide contract disputes between government contractors and the General Services Administration (GSA) and other federal executive agencies. Offering ADR in these disputes enables the Board to discharge its statutory responsibility to "provide to the fullest extent practicable, informal, expeditious and inexpensive resolution" of contract appeals. 41 U.S.C. § 607.

In addition to offering ADR to federal agencies and contractors in contract appeals, the Board will also provide ADR to any federal agency in any procurement matter, either before or after it is the subject of a contracting officer's decision. These disputes may include bid protests as well as disputes between a prime contractor and a subcontractor on a government contract. Flexibility has been the paramount consideration in designing the Board's rules on ADR. Consequently, ADR is not defined by a single procedure or set of procedures, and the Board will consider the use of any technique proposed by the parties which is fair, reasonable, and in the best interest of the parties, the Board, and the resolution of contract disputes.

The Board will provide ADR services either in the context of a contract appeal filed with the GSBCA or in any other contract- or procurement-related matter. When a contract appeal is filed with the Board, it is immediately docketed and assigned to a judge, who is the panel chairman

for the case. The judge encourages the parties to consider the feasibility of using ADR. Upon request, the Board will make a judge available for an ADR proceeding involving any federal agency procurement matter at any stage of a procurement, even if no contracting officer's decision is issued or is contemplated.

In summary, Board statistics reveal that from fiscal year 1991 through fiscal year 2004, the Board handled 207 ADR matters; 151 disputes were successfully resolved following an ADR proceeding, and 16 were either settled or dismissed after ADR was elected but before an ADR proceeding was conducted. Forty ADR proceedings were unsuccessful.

**APPENDIX G**

**Draft Proclamation by the President**

**of a**

**National Conflict Resolution Day**

## Appendix G

### **Draft Proclamation by the President of a National Conflict Resolution Day**

#### **National Conflict Resolution Day, 2007**

A Proclamation By the President of the United States of America

On National Conflict Resolution Day, citizens are urged to learn more about alternative dispute resolution, and how it can be utilized to manage effectively the inevitable conflict of everyday life.

Most people would like to avoid conflict whenever they can. However, conflict is not all bad. It can be constructive and a catalyst for growth. It is also inevitable, both in business and in life. Too often, litigation or other adversarial processes have been the means most commonly invoked to deal with conflict. There is a better way, and it is called “alternative dispute resolution.” That is just an umbrella term for techniques that use the services of a neutral third party to assist in the management and resolution of a conflict. Mediation is the most commonly used technique.

Alternative dispute resolution has become a framework for management of conflict in both the public and private sectors. Statutes and other directives require the availability of dispute resolution alternatives in the federal agencies and trial courts. Use of those alternatives has met with success and served as a catalyst for expansion.

Alternative dispute resolution is being used in the courtrooms, the boardrooms, the classrooms, our personal lives, and on the streets. Students from an early age use peer mediation to resolve their disputes. Mediation is being used for nursing homes and geriatric care issues. Police officers use mediation skills to resolve conflicts without force. Community leaders use conflict resolution techniques to deal with racial and ethnic tensions.

Alternative dispute resolution is conserving resources, preserving relationships, and enabling organizations to do more with less.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim \_\_\_\_\_, 2007, as National Conflict Resolution Day. I call upon government, industry, education, and community leaders to provide their constituencies with information about how dispute resolution techniques can be used to defuse conflict in a constructive manner, and I encourage all citizens to take an active role in using non-adversarial dispute resolution techniques to deal with the conflict in their lives.

IN WITNESS WHEREOF, I have hereunto set my hand this \_\_\_\_ day of \_\_\_\_\_, in the year of our Lord two thousand seven, of the Independence of the United States of America the two hundred and thirty-first.

**APPENDIX H**

**Draft Letter of Greetings and Commendation**

**From the President**

**To**

**Federal Employees Responsible for Federal Alternative Dispute Resolution**

**Draft Letter of Greetings and Commendation From the President to  
Federal Employees Responsible for Alternative Dispute Resolution**

THE WHITE HOUSE

Washington

Date: \_\_\_\_\_

I am pleased to send greetings to the federal employees whose responsibilities include the use of alternative dispute resolution on behalf of the Executive Branch of the federal government.

Our Nation depends on the hundreds of thousands of federal employees who work to ensure that government functions effectively. These dedicated men and women deliver services that are important to our communities and to our way of life.

A recent Report to the President has documented how the use of alternative dispute resolution has made government more efficient and cost-effective by managing conflict effectively. It has saved time, money, and other resources, and has enabled the government to do more with less. It has produced lasting results and preserved relationships. It has invited collaborative inclusiveness in policy formulation and decision making, and has promoted a citizen-centered government.

I commend the dedicated federal employees who have worked hard to make alternative dispute resolution a successful framework for conflict management in the federal government. The results you have achieved make a difference and are an effective contribution to our service on behalf of the American people. Best wishes for every continuing success.

George W. Bush

**ADDENDUM**

**Report from the Attorney General to the President**

**On**

**The Interagency Alternative Dispute Resolution Working Group**

**(May 2000)**

## **Addendum**

### **REPORT TO THE PRESIDENT** **ON THE INTERAGENCY ADR WORKING GROUP**

The President

The White House

Washington, DC 20500

Dear Mr. President:

The Report of the Interagency Alternative Dispute Resolution (ADR) Working Group, which is hereby submitted, marks the end of the first year of this government-wide effort to promote more collaborative ways to handle disputes. The report, prepared pursuant to your Memorandum creating the Working Group, was written jointly by the Department of Justice and officials from more than ten agencies, including the Environmental Protection Agency, the Federal Deposit Insurance Corporation, the

U.S. Postal Service, and the Department of the Air Force, whose staff served as chairs of individual sections of the group. As you will see from the report, there has been a great deal accomplished during the past year, and we plan to do much more in the months ahead.

In the past, the government has relied heavily upon traditional, adversarial processes to resolve both internal matters and disputes involving the public. Experience teaches us, however, that there are many costs to this approach. Even when the government wins a case, it can find that victory has come at too high a price. Litigation can destroy the underlying relationships between the parties, and this can be far more harmful in the long run. In the workplace area, for example, formal complaints often force employees working in the same office to take sides against one another. During the months or years required to process a complaint, and even long after it is over, the dispute can be extremely corrosive to the productivity of the office and the morale of its employees. Similarly, when contract and other disputes arise involving outside parties, previously healthy and productive relationships can be damaged if formal, adversarial processes are used.

Our experience has shown that ADR can resolve disputes in a manner that is quicker, cheaper, and less adversarial. For that reason, I call it "appropriate" dispute resolution, rather than "alternative" dispute resolution. In ADR, parties meet with each other directly, under the guidance of a neutral professional who is trained and experienced in handling disputes. They talk

about the problems that led to the complaint and the resolution that will work best for them in the future. With the assistance of the neutral professional, they are able to retain control over their own dispute and work collaboratively to find creative, effective solutions that are agreeable to all sides.

We believe that every well-run agency should have at least one ADR program. Over the past year, the Working Group has worked to make this a reality. The Group has sponsored programs in the following areas: workplace, contracts and procurement, claims against the government, and civil enforcement. There have been more than 50 training sessions, meetings, and colloquia on all aspects of ADR. More than 500 representatives from across the government have been participating. We have created a Federal ADR Web site that has received tens of thousands of requests for information from across the country.

We have found many specific examples of time and money saved through the use of ADR. The U.S. Postal Service, for example, has one of the leading workplace mediation programs in the country. It has mediated more than 12,000 EEO complaints under this program. Its average mediation takes just 4 hours, and 81 percent of mediated cases are closed without a formal complaint being filed. Participants in the mediation are twice as satisfied with the amount of control, respect, and fairness in the ADR process compared with the traditional adversarial process (88 percent satisfaction rate versus 44 percent). The mediation program has also increased communication in the workplace, creating lasting and beneficial changes that help prevent future complaints. In the first year after full implementation of this ADR program, the number of new complaints filed by U.S. Postal Service employees dropped by 24 percent compared with the previous year. This translates into thousands of fewer complaints per year, which represents a huge cost savings, not to mention savings in morale and productivity.

In the contracting arena, the Department of the Air Force has used ADR to resolve more than \$1 billion in recent procurement disputes. It has used mediation in more than 100 cases, and more than 93 percent have settled. Relations with contractors have improved, and parties on all sides are very pleased with the results. Due to the success of these programs, the Secretary of the Department of the Air Force has now committed to include ADR provisions in its contracts and ordered employees to use ADR "to the maximum extent practicable."

In addition to these savings in time and money, agencies have reported other important benefits. By emphasizing consensual resolution of disputes, these processes allow the participants to retain control over the outcome of the conflict. By moving away from winning and losing, and focusing instead on problem solving, these programs encourage the parties to identify what they really need to get the controversy resolved. We often see parties jointly engaged in finding creative, mutually acceptable solutions to disputes that no board, judge, or court would have the authority or the knowledge to impose.

Over the coming year, we will also work with individual agencies to assist them in developing ADR programs. While our first year was devoted to offering a broad-based introduction to ADR, we see our second year as requiring work with agencies on a more individually tailored basis. We hope to draw upon the expertise of agencies that have already been using ADR successfully to persuade and assist agencies that are not as well developed in this field.

As I wrote to you when I accepted the position of chair of this Working Group, I believe that ADR has the potential to transform significantly the way that Federal departments and agencies resolve disputes. We look forward to a continuing growth in the use of ADR and the establishment of new programs that can provide our citizens with a maximum amount of respect and a minimum amount of adversity. With your continued support, we look forward to a future where all government employees facing conflict will be able to act as peacemakers and problem-solvers.

Respectfully,

/s/

Janet Reno

Enclosure

## **REPORT TO THE PRESIDENT ON THE INTERAGENCY ADR WORKING GROUP**

### **I. INTRODUCTION**

Disputes are inevitable. They arise in the course of doing our jobs as public servants and are part of life itself. Unfortunately, existing administrative systems to handle conflict are often overburdened and ineffective. They are clogged with delay, which often exacerbates the disputes, making negative feelings fester and grow. The formalistic procedures used tend to divide people rather than unite them. The parties involved in the dispute are often silenced by the process and rarely meet with each other directly. When a court or administrative body makes the final decision, parties have given up control over their own dispute. Even if the government wins a case, the relationship involved may be destroyed, and this can be far more costly in the long run.

The goal of Alternative Dispute Resolution (ADR), is to ensure that communication comes first and litigation comes last, if at all. Parties meet with a neutral third party who is trained and experienced in handling disputes, and they seek a resolution of their problem directly. Participants report that the opportunity to talk with each other, under the guidance of a dispute resolution professional, is often far more satisfying and effective than having their lawyers fight against each other before a tribunal.

The Interagency Alternative Dispute Resolution Working Group was created by Presidential Memorandum dated May 1, 1998, to assist agencies in utilizing these more effective ways to handle conflict. This Report sets forth the activities and successes of the Working Group thus far.

### **II. BENEFITS OF ADR**

In the Memorandum directing all Federal agencies to promote greater use of ADR, the President recognized that ADR can "make the Federal Government operate in a more efficient and

effective manner." Indeed, the Working Group has found numerous examples of advantages that ADR provides. The following chart sets forth the ten most common benefits of ADR that agencies reported to us:

| TEN COMMON BENEFITS OF ADR  |
|---|
| Complaints are processed more quickly and resolved earlier.                           |
| Litigation and other costs are lower.   |
| Future complaints are avoided as parties learn to communicate better with each other. |
| Parties are more satisfied with the problem solving process and with the results.     |
| Relations with contractors and other outside parties are improved.                    |
| The process leads to more creative solutions.   |
| Internal morale is improved.  |
| Turnover is lower.  |
| Parties comply better with their settlement agreements.                               |
| Productivity is improved.   |

These benefits are demonstrated in the following specific examples from agencies that have participated in the Working Group.

**United States Postal Service**

The U.S. Postal Service has one of the nation's leading ADR programs in the workplace area. The average mediation takes just four hours, and the parties successfully resolve 61 percent of the cases at the mediation table. Overall, 81 percent of mediated cases are eventually closed without a formal complaint being filed. Satisfaction with the program is extremely high. Exit surveys completed anonymously by 26,000 participants show that 88 percent of employees are highly satisfied or satisfied with the amount of control, respect, and fairness in the ADR process. This figure is very significant because the satisfaction rate for the Postal Service's traditional adversarial workplace process is only 44 percent. Moreover, both employees and supervisors are equally satisfied with ADR.

Another benefit of the Postal Service program has been that mediation seems to be changing the behavior of people in the workplace. With the increased communication that mediation provides, employees and supervisors appear to be learning to get along better. In the first year after full implementation of the program, the number of complaints dropped by 24 percent as compared to the previous year. Formal complaints have continued to drop in FY2000, by an additional 20 percent. In an agency as large as the Postal Service, this reduction of several thousand complaints per year leads to huge cost savings. Processing a simple workplace case can cost the government \$5,000 in administrative expenses alone, and a more complicated case that reaches a formal adjudication can cost up to \$77,000. Thus the Postal Service program saves millions of dollars each year, in addition to improving morale and productivity.

## **Department of the Air Force**

The Air Force has found ADR very effective in the government contracts area, where it has used ADR in more than 100 cases, and more than 93 percent have settled. Of particular note is the agency's recent successful use of ADR to resolve a \$785 million contract claim with the Boeing company that had been unresolved, prior to the use of ADR, for more than ten years. This is one of the largest contract claims ever settled through an alternative dispute resolution process. In another recent major case with the Northrop Grumman Corporation, the agency settled a \$195 million contract claim. Litigating either of these extremely large and complex cases through trial would have been enormously expensive and uncertain in outcome. Litigation could also have damaged relationships with some of the military's most important suppliers. The Secretary of the Air Force has recognized the success of these programs and codified them in formal agency procedures. It is now official Air Force policy to use ADR "to the maximum extent practicable."

The Air Force has also used ADR in more than 7,000 workplace disputes in the last three years, with a successful resolution rate exceeding 70 percent. This ADR program has helped make the agency's EEO process one of the most efficient in the Federal government. While Federal agencies require an average of 404 days to settle an EEO complaint, Air Force settlements require an average of only 258 days, a 37 percent difference.

Another measure of the impact of ADR at the Air Force is its EEO complaint flow-through rate, which is the rate at which employees who receive counseling (including ADR) nevertheless file formal complaints. In a recent typical year, this figure was only 23 percent, which is approximately half the Federal government average. The Air Force believes its aggressive use of ADR is a major component of this success.

## **Department of Health and Human Services**

Before using ADR, the Provider Reimbursement Review Board at the Department of Health and Human Services (HHS) had a backlog of 10,000 pending cases. Although HHS had been able to settle 90 percent of its cases without assistance, most of these settlements occurred on the eve of the hearing, after three years of delay. HHS instituted an ADR program that has saved all parties both time and money. ADR resulted in settlements of 44 of the first 48 cases where it was used. Since then, use of ADR has increased. In 1999, the Office of Hearings and Appeals completed mediation of 81 cases and had mediation underway in an additional 53 cases. ADR has also reduced the time required to resolve these disputes from three years to six months.

HHS has also used ADR successfully to resolve state government challenges involving Food Stamp and Medicaid claim adjustments. All of the forty-one states that elected mediation under the Departmental Appeals Board's mediation program have successfully negotiated settlements. ADR has resolved more than \$500 million in disputed funds in each of the past five years, and HHS estimates that it has saved the Federal government \$600,000 in potential adjudication costs. In addition, the process saved considerable time, because administrative appeals could have taken two years, while mediation took an average of nine months. Finally, by the parties' own assessment, mediation allowed for a fairer and less acrimonious settlement of differences, preserving ongoing relationships between state and Federal officials involved.

## **Department of Energy**

Ombuds staff at the Sandia National Laboratories assisted employees in more than 400 cases during FY 1999. Ombuds personnel counseled employees on available options for handling their disputes and advised them on how to proceed. Most of the work was with agency employees, but agency suppliers and technology transfer partners also used the ombuds services in some cases. Benefits of the program included improved productivity, lower turnover, and higher decision quality. The agency believes that a conservative estimate of the program's savings last year is \$600,000 (50% more than the program cost). The program also generated considerable improvements in morale. Litigation and EEOC charges against Sandia have dropped well below the levels experienced prior to the creation of the program.

## **Federal Emergency Management Agency**

After Hurricane Georges wreaked havoc on the Island of Puerto Rico in September 1998, a local community had disputes regarding a debris removal contract, including disagreements as to which company actually performed the work, the total amount of debris, and the amounts of money owed to the companies. This difficult situation was further complicated by an FBI criminal investigation, the incarceration of the community mayor, litigation filed against the community by a subcontractor, allegations of fraud and conspiracy by all parties, death threats, and bankruptcy petitions. Without a consensual resolution, expensive and time consuming litigation involving all parties to the seven relevant contracts was virtually inevitable.

FEMA suggested mediation. The Governor, the local community, and the three contractors agreed. The mediation was very difficult, but the mediators were able to craft an acceptable agreement. The principal contractor later wrote a letter to FEMA saying the following: "I write this letter to praise certain individuals who have gone above and beyond the call of duty in representing FEMA and the people of the United States.... Through [FEMA's] initiative and good judgment, mediation was arranged.... Had [FEMA] not pursued the matter with uncommon vigor, it would probably be wrapped up in court for many years."

## **Federal Labor Relations Authority**

The FLRA has instituted an ADR program that encourages agencies and unions to resolve their problems before an unfair labor practice charge is filed. Following implementation of this program, the number of charges filed has fallen sharply, from 8,764 in 1993 to 5,686 in 1999. Even in instances where charges are not resolved and complaints are issued, these disputes as well are settling through the use of ADR. For example, 12.4 percent of all complaints went to trial in 1993. In 1999, only 9.2 percent of complaints went to trial. Significantly, cases are settling more quickly as well. The number of expensive, last-minute "courthouse steps" settlements (settlements reached immediately prior to hearing) have declined to just 1.9 percent of all settlements as parties have used ADR to settle their cases earlier in the process. In earlier years, these costly late settlements comprised as many as 15 percent of all settled matters.

## **Environmental Protection Agency**

The Environmental Protection Agency (EPA) used a variety of ADR processes to facilitate settlement of the GE Pittsfield case, involving the cleanup of widespread contamination of the Housatonic River in Massachusetts. The agency used mediation to facilitate settlement discussions between eleven parties including EPA, GE, and other state and Federal regulatory agencies. The team of mediators assisted the parties in reaching agreement on a wide range of difficult issues including the cleanup of contaminated sediments and restoration of natural resources. EPA values the work to be accomplished by GE pursuant to this settlement at upwards of \$200 million. Without the use of ADR, according to the EPA, negotiations among this large group of parties would have been very difficult. ADR has also permitted the parties to fashion their own remedy, including elements that a court would not have been able to order on its own. For example, in order to ensure meaningful public input, a neutral facilitator organized and is facilitating meetings of a Citizens Coordinating Council. The Council is composed of representatives of local communities affected by the cleanup. Finally, the parties established a neutral peer review process to resolve conflicts regarding technical aspects of the required remedial activities.

The EPA has also used three different types of ADR to resolve the Helen Kramer Landfill Federal and state litigation, concerning contamination at a hazardous waste site in New Jersey. EPA provided an internal convening professional to help the parties organize settlement efforts and retain a mediator. The efforts of the convener enabled a large group of defendants to coalesce and enter into a mediation agreement. Two experienced mediators then assisted the parties in reaching an agreement on the allocation of costs associated with remedial activities at the site. Finally, the parties entered into mediated discussions with EPA to resolve their liability for site contamination. The complex convening and mediations involved more than 200 parties and third party defendants, including forty-four municipalities. The resulting settlement totaled more than \$95 million. The agency believes that this case would have been enormously time-consuming and expensive to litigate if ADR had not been used.

### **III. ACCOMPLISHMENTS OF THE WORKING GROUP**

The Working Group expects that success stories such as those described above will continue across the government as more agencies use ADR in the future. Our major goal for this first year was to assist every agency in creating at least one new ADR program or substantially enhancing an existing program. We are pleased to report that every cabinet agency and most administrative agencies met this goal.

The Working Group has built upon earlier government initiatives to increase the use of ADR. In 1996, Congress permanently enacted the Administrative Dispute Resolution Act, 5 U.S.C. §§ 571-584, which requires all executive agencies to promote the use of ADR. Specifically, this Act directs each agency to do the following:

- Adopt a policy that addresses the use of alternative means of dispute resolution;
- Designate a senior official to be the dispute resolution specialist of the agency;
- Provide ADR training on a regular basis; and

- Review each of its standard agreements for contracts, grants, and other assistance to encourage the use of alternative means of dispute resolution.

All agencies now have a senior official designated as their dispute resolution specialist. All cabinet agencies and most administrative agencies now have adopted ADR policy statements. Most agencies provide ADR training, and many have been taking advantage of the resources of the Working Group in this regard. With the assistance of the Contracts Section of the Working Group, agencies are increasing their use of ADR in the contracting arena as well.

In preparing this report, we conducted the first government-wide tabulation of Federal ADR resources. We learned that some 410 employees now work full time on ADR in the Federal government. Agency ADR programs now receive \$36 million annually in dedicated budgets. Moreover, many agencies staff ADR programs through the use of collateral duty employees and fund these operations from their general budgets. Counting these resources, the government's total commitment is even higher than the figures mentioned above.

### **Working Group Activities**

The Working Group began on September 14, 1998, with an initial organizing meeting hosted by the Attorney General and the Deputy Director for Management at the Office of Management and Budget. More than one hundred high-level representatives from nearly sixty Federal agencies attended this meeting. At this meeting, the Attorney General gave all agencies the goal of creating at least one new ADR program or substantially increasing an existing program by the end of 1999.

To assist agencies in developing specific programs to meet this goal, the Working Group created four Sections, organized by subject matter, to provide technical assistance and guidance on best practices in ADR program development. Sections have operated simultaneously to cover disputes in the following areas: civil enforcement, claims against the government, contracts and procurement, and workplace.

The Sections have conducted more than fifty training sessions, meetings, and colloquia on all aspects of ADR. Representatives from across the government have been participating. Topics have included incentives for Federal employees to use ADR, finding quality neutrals, designing an ADR training program, dispute systems design, evaluation of ADR programs, obtaining resources for ADR programs, overcoming barriers to ADR, ethics, confidentiality, and conflict assessment/case selection.

### **Materials Created by the Working Group**

The Working Group has produced substantial materials to assist agencies in developing ADR programs. Most noteworthy are two resource books covering best practices in ADR. The Federal ADR Program Manager's Resource Manual is more than 200 pages long, and it is a comprehensive guide to creating and operating an ADR program in the Federal government. It includes relevant laws and regulations, links to Federal and private Web sites, and an extensive bibliography. The Electronic Guide to Federal Procurement ADR is an exhaustive manual

covering procurement ADR programs, managing the process, training, neutrals, and resources. The guide includes hyperlinks to ADR-related materials, a listing of Federal ADR mentors, detailed profiles of existing procurement ADR programs, success stories, and sample ADR agreements. Both of these manuals are available on the Web site for all Federal employees and interested members of the public.

The Group created a Web site at [www.financenet.gov/iadrwg](http://www.financenet.gov/iadrwg) that has had tens of thousands of requests for information in the year it has been in existence. The Web site includes agendas and minutes from Working Group meetings. A number of key ADR-related documents are available on the site, including the Administrative Dispute Resolution Act, the Presidential Memorandum creating the Working Group, a model Policy Statement on ADR, and a statement of key elements of a successful ADR program. The site includes additional links to other Federal agency ADR programs and private sector ADR organizations.

The Forums section of the Web site provides an opportunity for users to exchange information electronically (via e-mail) and to tap into the ADR-related expertise of hundreds of others around the country who are involved in government ADR programs. This feature of the Web site has facilitated productive discussions on such topics as recommendations of qualified neutrals, the availability and development of ADR training courses, and establishment of ADR policy.

To capture the current state of ADR in the Federal government, the Working Group asked each participating agency to complete an ADR survey on its activities. These surveys include contact information for each agency's dispute resolution specialist and ADR staff, data on its dedicated ADR budget and employees, a description of its ADR programs, success stories from these programs, and a statement of its ADR goals for the future. All of these surveys are available on the Working Group Web site.

### **Accomplishments of the Sections**

The Civil Enforcement Section has provided participating agencies with information, training, and support to enable them to develop ADR programs in enforcement and compliance activities. Twenty-six agencies with unique statutory and regulatory missions, requirements, and regulated communities have participated in Section activities. Section consultation teams provided personalized assistance to agencies in a wide variety of areas, from dispute system design to training. Robert Ward of the EPA served as chair of the Section, with the assistance of David Batson and Lee Scharf of the EPA.

The Claims Against the Government Section has worked with agencies to use dispute resolution techniques to supplement traditional administrative adjudication of claims for money that are filed against the government. More than forty representatives from twenty different agencies have participated in the work of the Section, which was chaired by Peter Steenland of the Justice Department, with the assistance of Jeff Senger of the Justice Department.

The Contracts and Procurement Section has focused on assisting agencies with developing and operating ADR programs in the contracting arena. More than thirty agencies participated in the work of the Section. In addition to holding meetings on program design, ADR process, training,

and neutrals, the Section produced the Electronic Guide to Federal Procurement ADR described above. The Section was chaired by Brigadier General Frank Anderson of the Air Force, with the assistance of Joseph McDade and Major Becky Weirick of the Air Force, as well as Tony Palladino and Rich Walters of the Federal Aviation Administration.

The Workplace Section, which was the largest in the Working Group, covered a broad range of workplace issues, including Equal Employment Opportunity, Federal Labor Relations Act, and Merit Systems Protection Board cases as well as grievances. Total attendance at the twenty-six programs the Section sponsored totaled more than 1000 participants. Section mentoring programs resulted in the formation of the Small Agency Caucus, an organization devoted to addressing the unique ADR program and resource needs of small Federal agencies. The Workplace Section was chaired by Erica Cooper of the Federal Deposit Insurance Corporation (FDIC) and Mary Elcano of the United States Postal Service (USPS), with the assistance of Cathy Costantino and Martha McClellan of the FDIC, and Cindy Hallberlin and Kim Brown of the USPS.

Further information about these accomplishments is provided in the Reports from the Sections to the Attorney General attached at the end of this report.

### **Plans for the Future**

During the second year of its existence, the Working Group plans to offer additional seminars and discussions that are open to all government employees. We also plan to focus on mentoring agencies that desire to create new programs or improve existing ones. We will continue to offer consultation teams of experienced ADR professionals to assist agencies with their ADR efforts on an individualized basis.

The Working Group will also coordinate with the newly created ADR Council, a group of senior executives who will develop ADR policy guidance for the executive branch. This Council will focus on issues that cut across ADR programs at all agencies, such as confidentiality, best practices, and procedures for the use of arbitration.

### **IV. CONCLUSION**

Congress effectively summarized the problems with traditional administrative approaches to conflict and the benefits of ADR when it passed the Administrative Dispute Resolution Act of 1990:

[A]dministrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes; alternative means of dispute resolution . . . in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious; such alternative means can lead to more creative, efficient, and sensible outcomes.

With the continued assistance and support of the President, the Office of Management and Budget, and all participating agencies, we look forward to working together to use these processes to enhance the operation of the Government and better serve the public.