



Administrative Conference of the United States

Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists

**Office of the Chairman
Administrative Conference of the United States
Washington, DC**

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Administrative Conference of the United States

The Administrative Conference of the United States was established by statute as an independent agency of the federal government in 1964. Its purpose is to promote improvements in the efficiency, adequacy, and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions.

To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished by direct action on the part of the affected agencies or through legislative changes.

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There is general recognition in the federal government and the private bar that litigation and formal hearing processes often prove too costly and time consuming, and can impede a cooperative government-private sector relationship. Yet for the past 30 years or more, formality has been the trend. In many cases, this formal procedure is quite valuable, even necessary; in many others, it is inefficient and potentially detrimental.

The Administrative Dispute Resolution Act,¹ enacted in 1990, requires each agency to develop a policy for implementing alternative means of dispute resolution (ADR) in its administrative programs. The Act does not require action in any particular case -- in fact, a basic condition for invoking the Act in any dispute is that all parties agree to use alternative dispute resolution. Congress' clear intent, however, is that agencies explore ways to incorporate these processes so as to enhance the operation of government. The Act does require each agency to review for potential ADR application the classes of cases arising in its programs. This review should lead to an agency ADR policy. Developing a policy is a means to foster knowledge of alternative and better approaches to resolving disputes, to identify appropriate cases for ADR, and to plan for necessary training of agency personnel. Ideally, the agency would ultimately develop an infrastructure that permits and encourages the use of several complementary dispute resolution methods.

This document is designed to provide guidance to agencies in developing their ADR policies, and in implementing those policies. It is not intended as an instruction book or a cookbook; rather it seeks to provide ideas and alternatives for agencies to explore.

¹5 U.S.C. §§581-593 (general provisions, confidentiality, administrative arbitration); 5 U.S.C. §556(c) (ALJ authority); 9 U.S.C. §10 (arbitration, judicial review); 41 U.S.C. §§604-607 (contract disputes); 29 U.S.C. §173 (FMCS authority); 28 U.S.C. §2672 (tort claims); and 31 U.S.C. §3711 (a)(2) (government claims); enacted November 15, 1990 by Pub. L. No. 101-552, 104 Stat. 2736. The Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, also contains sections in title 5 of the U.S. Code numbered 581-590. Technical amendments to rationalize the U.S. Code section numbers have been introduced in the House of Representatives.

II. Introduction

ADR methods are numerous and diverse – they range along a spectrum from consensual decisionmaking techniques like mediation to binding arbitral decisions. In common, they tend to emphasize cooperation and creativity in choosing and using processes that can result in more acceptable and more efficiently made decisions, when used in appropriate circumstances.

Alternative dispute resolution is an inclusive term used to describe a variety of joint problem-solving processes that present options in lieu of adjudicative or adversarial methods of resolving conflict. These options usually involve the use of a neutral third party. ADR methods often enhance communication among disputing parties. They offer the options of developing creative solutions to disputes that might be unavailable in traditional dispute resolution forums. They encourage negotiations that focus on parties' real interests, rather than on their positions or demands, thereby enabling parties to address the real concerns underlying the conflict. By emphasizing problem-solving as opposed to gearing up for protracted legal battles, these approaches may consume fewer resources in time, management, and finances. ADR methods have already proven useful in many adjudicative arenas, in policy conflicts that arise over complex regulatory issues outside the realm of adjudication, and in a variety of day-to-day contracting, personnel, environmental, and enforcement disputes.

ADR should be considered when a prompt, equitable, negotiated resolution to the fundamental issues in a dispute is sought. The drain on personnel resources generally is less acute, and management is less disrupted during an ADR process than during litigation, with its motions, requests, depositions, hearings and opinion drafting. Furthermore, because they can be more timely and cost effective, ADR processes may prove more accessible to a large segment of the population.

ADR is a possible option in any dispute in which a negotiated solution is a potentially acceptable outcome. Many ADR methods are in large part designed to facilitate negotiations. Both the quality of each side's decisionmaking and the information on which decisions are based can be improved. Decisions reached through consensus are more likely to be honored because the level of trust among parties is raised, and parties are actively involved in developing the process and terms for resolution.

These positive approaches to joint problem-solving can improve ongoing relationships, even where mutual suspicion has prevailed.

Available data have indicated with remarkable consistency that agreements are reached promptly in about 70 to 80 percent of cases in which parties agree to use ADR. Often, merely discussing an offer to use an alternative process will lead to settlement without a third-party neutral ever being retained. Even when ADR does not result in a complete settlement acceptable to all parties, the resources invested are not lost; preparations for ADR processes contribute to the development of a case. Disputants (other than those who agree to binding arbitration) always remain free to take their conflicts to hearing or to court, where subsequent efforts are likely to be more focused and efficient. The issues are often more clearly defined earlier. In many cases, a partial settlement may result.

Not every dispute is suitable for settlement through one of the alternative dispute resolution processes. For this reason, ADR processes should be thought of as supplementary to, not a displacement of, traditional adjudicative methods of resolving disputes.

Alternative dispute resolution (ADR) is a collective name for a spectrum of processes that vary substantially among themselves. In general, the processes are alternatives to formal processes that use a decisionmaker over whom the disputing parties have no control, either as to the substance of the decision or the applicable procedures. Examples of formal processes include court proceedings and formal adjudications by administrative law judges.

A helpful construct for understanding the distinctions and relations among the various ADR methods is to think of them as points along a continuum, ranging from processes over which the parties have the most control to processes over which they have less control. In such a construct, mediation would be toward one end of the spectrum, and binding arbitration would be at the other.² The number of points along the ADR spectrum is not fixed. Although some ADR processes or methods are well-established (e.g., mediation, arbitration), new processes are continuously being

²It should be noted that some consider dispute avoidance techniques and ombudsmen to be ADR processes.

developed to meet the needs of particular types of disputes or parties. The processes now most commonly used will be described, but this list is not intended to be either all-inclusive or limiting. They are listed more or less in order of decreasing control by the parties. Even these processes are often open to being combined or modified to suit the needs of the parties to a dispute.

Mediation. Mediation involves using a trained neutral third party to help disputants negotiate a mutually agreeable settlement. Negotiations among parties often fail to progress for reasons that have little to do with whether a settlement might be mutually advantageous (such as antagonism between parties, unwillingness to budge first from stated positions, and mutual distrust). A mediator, by talking with each side, together and separately, can often help parties come to agreement, by helping them develop options and explore acceptable settlements. The mediator does not have the power to decide a dispute; rather, the parties develop any resolution themselves. Among the benefits of mediation are the ability to develop solutions outside the parameters of conventional administrative or judicial remedies, and the avoidance of the antagonism that can arise from extended litigation (particularly advantageous where the disputing parties have or will have an ongoing relationship).

Mediation has been used in resolving disputes that involve the enforcement and allocation of responsibility under the Superfund program; in selected personnel disputes at the Equal Employment Opportunity Commission (EEOC), Library of Congress, General Accounting Office (GAO), and Department of Health and Human Services (HHS); in grant disputes at the Departmental Appeals Board in HHS and in the Department of Education; in claims disputes among and against failed thrifts at Federal Deposit Insurance Corporation (FDIC) and Resolution Trust Corporation (RTC); in natural resource management by the U.S. Forest Service; and, at the Farmers Home Administration, in farmer/lender disputes.

Convening. Convening helps to identify issues in controversy and the affected interests. The convenor generally determines whether direct negotiations among the parties would be a suitable means to resolve the issues; if it is, the parties are brought together for that purpose. Convening has proved valuable as a first step in negotiated rulemaking (reg-neg) at many agencies and in finding constructive

approaches to varied environmental disputes at the Environmental Protection Agency (EPA) and the Forest Service.

Negotiated rulemaking. Negotiated rulemaking is a process in which the content of a proposed rule is developed through negotiation by representatives of affected interests, including the agency. Reg-neg may be appropriate where there are a limited number of identifiable interests. A separate statute, the Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, applies to this process. Agencies that have used reg-neg include EPA, the Departments of Transportation, Interior, Labor, Agriculture, and the Nuclear Regulatory Commission (NRC).

Early neutral evaluation. Early neutral evaluation (ENE) involves using a neutral factfinder, often one with substantive expertise, to evaluate the relative merits of the parties' cases. This process, which can be used early in the life of the dispute, usually involves an informal presentation to the neutral of the highlights of parties' cases or positions. The neutral provides a nonbinding evaluation, sometimes in writing, which can give parties a more objective perspective on the strengths and weaknesses of their cases, thereby making further negotiations more likely to be productive.

ENE is used in a number of courts, including the U.S. District Court for the District of Columbia. The Departmental Appeals Board at HHS also has an ENE program.

Factfinding. This process involves the use of neutrals acceptable to all parties to determine disputed facts. This can be particularly useful where disagreements about the need for or meaning of data are impeding resolution of a dispute, or where the disputed facts are highly technical and would be better resolved by experts. Factfinding usually involves an informal presentation of its case by each party. The neutral(s) then provide an advisory opinion on the disputed facts, which can be used by the parties as a basis for further negotiation.

Settlement Judges. A settlement judge serves essentially as a mediator or neutral evaluator in cases pending before a tribunal. The settlement judge is usually a second judge from the same body as

the judge who will ultimately make the decision if the case is not resolved by the parties. In some cases, a settlement judge may give an informal advisory opinion.

Among agencies that use settlement judges are the Department of Housing and Urban Development (HUD), Federal Energy Regulatory Commission (FERC), Occupational Safety and Health Review Commission (OSHRC), Federal Communications Commission (FCC), and a number of boards of contract appeals.

Minitrial. A minitrial is not really a trial. It is a structured settlement process in which the disputants agree on a procedure for presenting their cases in highly abbreviated versions (usually no more than a few hours or a few days) to the senior officials for each side with authority to settle the dispute. This process allows those in senior positions to see first hand how their case and that of other parties play out, and can serve as a basis for more fruitful negotiations. Often, a neutral presides over the hearing, and may subsequently mediate the dispute or help parties evaluate their cases. The procedures for minitrials are developed by agreement among the parties.

Among the federal agencies that have used minitrials are the Army Corps of Engineers (in contract and environmental disputes), National Aeronautics and Space Administration (NASA), Department of Interior, Department of Energy (DOE) and the Navy in contract disputes, and FERC in energy-related cases.

Arbitration. Arbitration is a relatively formal process, in which parties jointly select the decisionmaker(s), to whom they turn over the decisionmaking. The arbitrator(s), after hearing each side's case, following procedures agreed on in advance by the parties, issues a decision. The standards for decision may also have been agreed on in advance by the parties. The arbitrator's decision may be nonbinding, or if the parties agree, it may be binding. The ADR Act provides limitations (discussed in section II) on the use of binding arbitration by federal agencies.

Several federal statutes also authorize binding arbitration, including the amendments to the Superfund program. The Corps of Engineers has used nonbinding arbitration in contract disputes.

II. Provisions of the ADR Act

A. Background

The Administrative Dispute Resolution Act establishes a statutory framework for federal agency use of ADR in accordance with reforms advocated by the Administrative Conference in numerous recommendations.³ In the past decade, states, courts, and private entities have increasingly used alternative means of dispute resolution. The Act seeks to prod federal agencies to use ADR methods to enable parties to foster creative, acceptable solutions, and to produce expeditious decisions requiring fewer resources than formal litigation. Mediation, minitrials, factfinding, negotiated rulemaking, early neutral evaluation, settlement judges, arbitration and similar methods have already begun to prove useful in resolving federal administrative conflicts.

Prior to enactment of the ADR legislation, the Administrative Conference had repeatedly encouraged federal agency use of ADR processes, based on the experiences of the EPA, the Army Corps of Engineers, and a few other agencies. But progress had been slow. The legislation seeks to broaden agency authority, resolve legal questions, and prompt agencies to use more consensual processes to enhance the possibility of reaching agreements expeditiously, within the confines of agency authority. It is premised on Congress' findings that ADR can lead to more creative, efficient, stable, and sensible outcomes.

B. Agency Implementation Requirements

Section 3 of the Administrative Dispute Resolution Act provides for agency action to put the provisions of this new legislation into effect. The Act requires appointment of an agency dispute resolution specialist (DRS) and a careful review process for agencies to follow. In this process, the agency, in consultation with the Administrative Conference and the Federal Mediation and Conciliation Service (FMCS), must consider whether, and under what circumstances, ADR techniques may benefit

³See section VIII(C).

the public and help the agency to fulfill its statutory duties more effectively with respect to each of its administrative programs.

Section 581 of title 5 of the U.S. Code, as added by the Act, defines an agency's "administrative program" broadly to include all activities involving "protection of the public interest and the determination of rights...." Agency review is directed to all manner of agency actions. Apart from formal and informal adjudication, these could include (among others) actions involving entitlement programs, grants, contracts, insurance, loans, guarantees, licensing, inspections, taxes, fees, enforcement, services, economic regulation, management, claims, or private party complaints. The Act specifically includes litigation brought by or against the agency, as well as agency adjudication, within the scope of the agency's review of its program as it formulates its ADR policy. Section 582(b) lists factors an agency should use to determine whether particular kinds of disputes lend themselves to any of the ADR techniques.

Section 3 assigns responsibility to implement the provisions of the Act. Each agency head is expected to designate a senior official to be the dispute resolution specialist of the agency. This official generally works at a departmental or comparable level to oversee the implementation of ADR activities and development of the agency policy on ADR. The specialist or a designee would also seek to interact with counsel and program officers, to help these colleagues learn about and make effective use of the range of available dispute resolution options, and to keep them apprised of relevant developments in the public and private sectors. Each agency is expected to make training available to its specialist and other employees involved in implementing the Act. The agency specialist is expected to recommend to the agency head a list of other agency employees for similar or related training. Congress has also designated the Administrative Conference to offer policy and technical assistance to agencies and to report on agency progress.

Section 3(d)(1) provides that each agency having significant grant or contract functions is to review its standard contract or assistance agreements to determine if a need exists for amendments to those agreements to authorize or encourage ADR use. Section 3(d)(2) provides that the Federal

Acquisition Regulation be amended to reflect the amendments made by the Act; agencies will need to await these revisions before developing their own amendments.

C. Agencies' ADR Authority

Section 4 of the Act amends the Administrative Procedure Act by providing a new subchapter of title 5 of the U.S. Code.⁴ Section 582(a) authorizes agencies to use any ADR method to resolve any controversy relating to an administrative program. ADR can be used in place of any routine process for deciding disputes, provided all parties agree. The term "alternative means of dispute resolution" is a key term used in the legislation and is defined in section 581(3) as follows:

"Alternative means of dispute resolution" means any procedure that is used in lieu of an adjudication as defined in section 551(7) of this title, to resolve issues in controversy, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, or any combination thereof.

Section 551(7) of title 5 further defines "adjudication" to include "agency process for the formulation of an order"; and an "order" under section 551(6) is the "final disposition . . . of an agency in a matter other than rule making" Consequently, the term "alternative means of dispute resolution," when used in the body of the legislation, can broadly include any procedure an agency may use to resolve any issue in controversy in any federal program activity.⁵ "Issue in controversy" and "administrative program" (sections 581(8) and (2))⁶ are similarly inclusive for agency disputes.

The Act explicitly gives agencies broad discretion as to when and how to use ADR methods. Agency decisions on whether or not to use ADR are not judicially reviewable (section 591(b)(1)). The sole exception allows any nonparty adversely affected by an arbitral award to seek review of an agency decision to arbitrate under the Act (section 591(a)). In such an action, the district court would decide whether the agency's decision to use arbitration was clearly inconsistent with section 582(b)'s criteria for appropriate use of ADR.

⁴See note 1, above.

⁵Rulemaking, of course, is covered by the provisions of the Negotiated Rulemaking Act.

⁶Cases relating to certain federal employee grievances are exempted from the Act. See section 581(8).

Under section 582(b), agencies should "consider not using" ADR where:

"(1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;

"(2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;

"(3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;

"(4) the matter significantly affects persons or organizations who are not parties to the proceeding;

"(5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record;⁷ and

"(6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.

This does not simply mean that the agency should not use ADR in a case involving public policy. A subtler balancing will be needed. In many such cases, mediation, negotiated rulemaking, convening, and similar methods can be very useful. Clearly, cases of greatest concern are those involving arbitration. Agencies should not ordinarily use arbitration to decide a major policy issue or to dispose of a case whose outcome may affect significant interests of parties not present. The statutory language was intended to afford agencies maximum discretion, especially in nonbinding ADR, reinforced by the general nonreviewability of almost all decisions on use of ADR. Note that the provision does not state that the agency "shall not consider," and that the conjunction "and" is employed in section 582(b). In exercising their very broad discretion, agencies should take into account all factors and qualifiers as to when, and what kind of, ADR methods to employ. In no case need a formal finding or justification accompany an agency decision on employing ADR.

⁷The Conference notes that it should be kept in mind that ADR processes can be designed to provide for a public record.

D. Administrative Arbitration

One ADR process – binding arbitration – has evoked significant controversy in the public sector. After Congress passed the U.S. Arbitration Act in 1925, binding arbitration in private sector disputes became a widely accepted alternative to litigation. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), and several other recent Supreme Court decisions have been extremely encouraging to arbitration. Since early in this century, however, the Comptroller General took the view that, unless a federal agency had explicit statutory authorization, it was prohibited from using a private arbitrator to decide the validity of virtually any claim involving the government.⁸ The ADR Act underscores the growing modern acceptance of arbitration by conferring such authority on agencies.

Sections 585-591 authorize parties to administrative proceedings, including agencies, to agree to binding arbitration, but provide that the arbitral award does not become final and binding on an agency party for 30 days. During the interim, the agency head has unreviewable authority to vacate the arbitral award. In such cases, the agency would assume all attorneys fees and expenses of the arbitration process unless an adjudicative officer or other designated official of the agency finds that the award of expenses is unjust. After 30 days, the award would become final and enforceable on the agency, as on other parties. The Act recognizes that certain kinds of government decisions will not be suitable for ADR, particularly binding arbitration, and section 582(b) helps agencies and reviewing courts by delineating factors to consider.

The Act stipulates, in section 589, that the arbitrator shall set a time and place for the hearing and that an arbitration proceeding shall be conducted expeditiously and in an informal manner. The parties may present evidence and cross-examine witnesses, but the arbitrator may exclude evidence that is irrelevant, immaterial, unduly repetitious, or privileged. The arbitrator may interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives. The arbitrator shall make the award within 30 days of the hearing unless the parties agree to some other time limit or

⁸See Berg, *Legal and Structural Obstacles to the Use of ADR in Federal Programs*, in ACUS, *Agency Arbitration* (1987).

are bound by a rule providing otherwise. Arbitral awards have no precedential value, and are subject to review under the U.S. Arbitration Act.

E. Confidentiality

Section 4 of the Act, 5 U.S.C. §584, fosters agency use of ADR by ensuring appropriate protection of parties' and neutrals' communications. In doing so, the Act seeks a balance between the openness required for legitimacy and the confidentiality that is critical if many sensitive negotiations are to yield agreements.

The legislation is intended to provide a definite measure of confidentiality for neutrals and parties. In addition to Administrative Conference Recommendation 88-11, "Encouraging Settlements by Protecting Mediator Confidentiality," three other sources are particularly important in understanding the Act's approach to confidentiality. These are the Federal Rules of Evidence, the Federal Rules of Civil Procedure, and the Freedom of Information Act. Each of these offers limited and, at times, contradictory protection to parties and neutrals in settlement negotiations. The protections of section 584 are consistent with case law under those authorities.

Section 584 generally prohibits disclosure of most settlement communications. Protected communications include the verbal exchange of information among the parties or in caucuses between a party and the neutral facilitator. They also include a "settlement document," which is any written material that is provided in confidence to or generated by the neutral or generated by the parties for the purpose of a settlement proceeding, including memoranda, notes, and work product. Section 584 covers documents that are created specifically for the negotiations and that are furnished in confidence to the neutral by a participant in the negotiation.

Section 584(a)(4) has a few narrow, clearly stated exceptions to confidentiality, most notably for information that could prevent harm to the public health and welfare, prevent a manifest injustice, or reveal a violation of law. In such situations, disclosure or testimony can be ordered, provided the court finds the magnitude of the harm sufficient to outweigh the integrity of the dispute resolution

process, in general. The mere issuance of a subpoena would not be sufficient. The parties may also be required to disclose information that was provided or available to all parties to the proceeding (section 584(b)(7)).

Section 584(j) provides that the Act is not a statute specifically exempting disclosure under section 552(b)(3) of the Freedom of Information Act.⁹ This last minute legislative change may give rise to some uncertainty. It clearly will not pose problems for contractors or other private persons who serve as neutrals; case law makes clear the immunity of such persons' papers under FOIA.¹⁰ Potential questions could arise, though, as to documents possessed by government employees who mediate cases involving their own or other agencies. If FOIA applies, then some might claim access to settlement documents retained by the government mediator. Because of this uncertainty, some government mediators report that they routinely destroy all notes and other settlement documents at the close of discussions. There is some question as to whether such documents are government records, and some case law supports immunity from disclosure for government mediators. Of course, documents with proprietary business information, submitted in confidence, may be exempt.

As to other documents, the Conference has recommended that agencies announce that they will interpret the FOIA to avoid disclosure of settlement communications in administrative dispute resolution proceedings. The Department of Justice has stated its position that any information released in ADR that is protected under the Act is protected from FOIA disclosure. While the protections to confidentiality should be quite firm, especially if agencies take precautions, no court has yet ruled on these kinds of questions.

Neutrals who are requested to disclose protected documents must make an effort to notify the parties of demands for disclosure, and a party that does not offer to defend a neutral's refusal to

⁹ Applicability of FOIA arose at the last minute and was not fully resolved. In a floor colloquy at the time of the Act's Senate passage, Senators Grassley and Levin expressed concern that the Act's current provisions do not adequately protect settlement communications. Senator Leahy, who chaired the Judiciary Subcommittee with jurisdiction over FOIA, pledged "to the sponsor of the bill, Senator Grassley, . . . to work with him next year on this issue and try to determine whether certain dispute resolution communications should be exempt from FOIA." 136 Cong. Rec. S 18088 (daily ed. Oct. 24, 1990).

¹⁰ The Freedom of Information Act does not cover records maintained, for example, by private citizens. Justice Department Guide to the FOIA, included in Department of Justice, Freedom of Information Case List 394 (Sept. 1991).

disclose is considered to have waived any objection. The Act gives parties authority to vary the confidentiality provisions if all parties and the neutral agree to alternate provisions in advance.

F. Amendments to Existing Legislation

The Administrative Dispute Resolution Act was crafted to be "built into" existing agency processes. Specifically amended statutes include:

- Section 4 amends the Administrative Procedure Act, the primary law governing federal agency administrative actions. The Act endeavors, through the APA amendments, to achieve its goals without disruption to any existing authority or dispute resolution system. Section 4 authorizes agencies and parties to administrative proceedings to agree to use neutrals, including mediators, facilitators and arbitrators, to resolve issues in controversy. The Act authorizes agencies to use the full range of alternative means of dispute resolution for their programs. The Act removes any doubt an agency official may have had about the authority to use ADR techniques, and expands arbitration authority. The only conditions are that the agreement to use an ADR technique be voluntary and -- in the case of arbitration -- not inappropriate under the standards set forth in section 582(b).

- Section 6 amends 41 U.S.C. §§604-607, the Contract Disputes Act, to make clear that government contracting officers and boards of contract appeals are encouraged to resolve claims by ADR and have the authority to do so. This includes the new authority to make use of arbitration in appropriate cases. Judicial review is available as in existing law. The amendments to the Contract Disputes Act are supplemental to existing arbitration authority in a few agencies.

- Section 7 amends section 203 of the Labor Management Relations Act to authorize the Federal Mediation and Conciliation Service to make its mediators' and trainers' services available to other federal agencies.

- Section 8 amends the Federal Tort Claims Act (28 U.S.C. §2672) to grant the Attorney General the authority to delegate additional tort claim compromise or settlement authority to agency heads without the necessity of prior Attorney General approval. Such delegations have been fixed at

\$25,000 for nearly all agencies since 1966. They now may be raised by the Attorney General as high as, but cannot exceed, the dollar amount of delegated approval authority given to United States Attorneys to settle claims against the United States (at present \$500,000).

- Section 9 amends 31 U.S.C. §3711(a)(2) to raise agency claim compromise authority without prior Attorney General approval from \$20,000 to \$100,000 or even higher at the direction of the Attorney General.

III. Developing Agency ADR Policies

A. The Act

The "findings" listed in section 2 of the ADR Act indicate an expectation that the public will benefit from the efficiencies, cost savings, and less contentious decisionmaking that ADR can produce. The clear congressional intent is that, as a general matter, agencies should systematically seek ways to incorporate appropriate ADR methods into their dispute handling.

To make this happen, Congress has required each agency to adopt a policy that addresses the use of alternative means of dispute resolution and case management. This means, in effect, that each agency must survey the range of its programs, identify the kinds of disputes arising from each program, and consider whether any of the spectrum of ADR techniques can be used to advantage in resolving those disputes.

The Act directs that in developing an agency's ADR policy the agency shall:

- (1) consult with the Administrative Conference and FMCS; and
- (2) examine possible uses of ADR in connection with --
 - (A) formal and informal adjudication;
 - (B) rulemakings;
 - (C) enforcement actions;
 - (D) issuing and revoking licenses or permits;
 - (E) contract administration;
 - (F) litigation brought by or against the agency; and
 - (G) other agency actions.

The agency's dispute resolution specialist is to be responsible for the development and implementation of the agency's ADR policy. The dispute resolution specialist is a senior agency official appointed by the head of the agency as required by the ADR Act. If an agency has not already chosen the specialist, this should be done as soon as possible. The official chosen should have some familiarity with the range of the agency's programs and the disputes that arise under them. The specialist should be sufficiently senior to be able to speak authoritatively about the agency's policy and management goals, and should enjoy the support and confidence of the agency head. Of course, a

knowledge of ADR methods and a personal commitment to find ways to use them to improve the agency's programs would ultimately prove invaluable attributes. These considerations, as well as the functions of the specialist, are discussed further in the Institutionalization section (section IV).

B. Contents and Scope

The objective of ADR -- resolution of disputes through informal, voluntary consensual techniques -- would be defeated by requiring implementation of ADR procedures across the board. The broad spectrum of ADR techniques, and their flexibility, allows agency managers to tailor these techniques to specific program needs. For this reason, it would not be effective to prescribe a single "model" agency ADR policy. Nevertheless, some basic guidelines can be stated. The purpose of this section is to give general guidance and to identify a number of key issues that agencies ordinarily ought to address in formulating their policies.

The Administrative Conference's approach to constructing an effective ADR policy emphasizes "process" rather than specific elements. By this we mean that *the policy is not a single document fixed in time, but is chiefly a plan for instituting the use of ADR* -- always with the qualifying phrase: where appropriate.

Developing the agency's policy should be a dynamic process, which can itself be used as a management tool to:

- declare official agency support, at the highest levels, for using ADR to improve the operation of agency programs;
- identify sources of delay and inefficiency in existing procedures;
- establish goals and a timetable for reducing delay and inefficiency;
- educate agency personnel about the availability and uses of alternative procedures; and
- foster an interest among agency personnel in using informal consensual methods to resolve disputes -- in other words, changing the agency "culture" to encourage efforts to resolve (and prevent) disputes.

An agency's policy -- or plan -- for implementing ADR may usefully include any or all of the following approaches:

- issuance of a statement of qualitative goals for the agency to accomplish through use of ADR;
- commitment of adequate resources for implementing ADR, including staff and budget;
- adoption of a plan and a timetable to survey the agency's existing programs, to identify types of disputes and to determine which ADR procedures might be useful;
- identification and evaluation of any existing use of ADR in agency programs;
- identification of intended new applications of ADR, where this has already been determined;
- institution of one or more pilot projects, focused on particular categories of cases or sections of the agency, to test the effectiveness of particular ADR procedures in resolving disputes;
- consideration of whether agency offers to use ADR should be mandated in particular kinds of cases or under specified circumstances and, if so, whether there should be any exceptions;
- consideration of regulatory or procedural changes that might be necessary to foster or accommodate use of ADR, and identification of who would be responsible for implementing the changes;
- assessment of the need for training of agency personnel to enable them to use ADR effectively;
- arrangements for appropriate training;
- identification of sources of information and assistance that will be made available to agency personnel to help them implement and evaluate ADR methods, including taking advantage of the insights of dispute resolution experts and regulated parties;
- establishment of a working group within the agency to assist the dispute resolution specialist in carrying out responsibilities for surveying existing programs, formulating recommendations as to when ADR should be used, arranging for training, and evaluating the results;
- determination of how the public (including regulated entities) can participate in the agency's implementation of ADR and what steps should be taken to obtain the public's acceptance of agency use of ADR;
- establishment of incentives or rewards to encourage agency personnel to increase ADR use;
- encouragement of experimentation with use of ADR;
- monitoring and reporting agency ADR activity;
- periodic evaluation of the steps taken by the agency to implement ADR techniques;

- determination of who will do the evaluations and the methods to be used;
- periodic revisions, as needed, of the agency's ADR policy; and
- consideration of ADR in new and future agency programs.

This list should be taken as suggestive. It is certainly not exhaustive. Some of the items involve issuance of a statement; some require assessment of existing conditions or of goals; and some entail commitment to certain actions. To the extent that an agency is in a position to determine the course it will follow in incorporating ADR into its procedures, the agency's policy may be more or less inclusive of these items. Specific steps that may be taken to carry out these responsibilities are suggested in section IV.

C. Consultation Under the ADR Act

The "consultation" process required by section 3 of the Act should not be viewed as a "clearance" or "concurrence" procedure. The Administrative Conference has no wish to dictate an individual agency's method of implementing ADR, nor to "sign off" on a single document purporting to state the agency's ADR policy. A statement by the agency head, or other top officials, setting forth the agency's approach to using ADR is highly desirable, but in general will be only one element in the agency's overall policy.

The Conference's view of its role in the consultation process is to look at whether the agency has gone through (or plans to go through) a reasonable process to implement the ADR Act. At a minimum, the agency should provide for:

- a survey of the types of agency actions likely to lead disputes;
- some analysis of the types of disputes encountered by the agency;
- consideration of where, when, and what kind of ADR techniques might be useful in trying to resolve the disputes more efficiently or more satisfactorily;
- a plan for incorporating "procedural checkpoints for ADR" in the agency's administrative procedures, so that agency personnel at appropriate times will consider whether cases they are handling are amenable to use of ADR;
- appropriate training for agency personnel;

- some kind of encouragement to agency personnel to be alert for opportunities to use ADR productively;
- a timetable for putting the ADR policy in place and for appropriate subsequent review; and
- a means of informing persons outside the agency, whose activities are affected by the agency's programs, about the agency's use of ADR.

Consultation should be as informal as possible, while ensuring that agencies conduct a thorough review and follow through.

In the interest of simplifying the consultation process, agencies wishing to obtain comment on proposed policies may simply submit requests to the Administrative Conference. It has worked out arrangements to share such requests with the Federal Mediation and Conciliation Service and to incorporate Conference and FMCS comments to the requesting agency in a single reply.

The Office of the Chairman of the Conference is conducting a series of roundtables, meetings, and other services aimed at meeting the needs of agencies and their dispute resolution specialists in implementing the ADR Act. It would appreciate receiving suggestions from agencies about what additional kinds of assistance would be most helpful in developing a policy.

Particularly in the case of smaller agencies, it may be valuable to consider interagency cooperation among dispute resolution specialists, to help avoid duplication and to allow sharing of educational and administrative burdens. The Conference would be pleased to serve as a clearinghouse of information and to support multi-agency joint efforts.

D. The Use of Notice and Comment in Promulgating Agency ADR Policies

Section 3 of the Act requires agencies to adopt "a policy that addresses the use of alternative means of dispute resolution and case management." One question that arises is whether agencies must use notice-and-comment procedures under section 553 of the Administrative Procedure Act in adopting these policies. Although each agency must make this determination for itself in light of the content of its particular policy, our view is that notice and comment is probably not legally required, but agencies are encouraged to use it on a voluntary basis.

Under section 553(b)(A) of the APA, certain types of rules are exempt from the requirements to provide notice and opportunity for public comment before the rules are promulgated. Among the types of rules that are exempt are "general statements of policy" and "rules of agency organization, procedure, or practice." Agency ADR policy statements could be considered exempt from notice-and-comment requirements under either of these exceptions.

Although agencies are probably not legally required to use notice and comment in developing ADR policy statements, the Conference nevertheless strongly encourages agencies to provide the public with an opportunity to comment on proposed ADR policies. In doing so, agencies should make clear that they do not consider themselves legally required to but that they are doing so voluntarily. Providing an opportunity for public input not only can give the agency access to relevant information it may not have on its own, but makes for greater public confidence in, and broader acceptance of, the ultimate agency judgment. The Administrative Conference has therefore recommended in general that where a statement of policy is likely to have substantial impact on the public, an agency should normally provide notice and an opportunity to comment prior to promulgating such policy.¹¹ In any event, the ADR policy must be published in the Federal Register.¹²

¹¹ Recommendation 76-5, "Interpretive Rules of General Applicability and Statements of General Policy," 1 CFR §305.76-5.

¹² 5 U.S.C. §552(a)(1)(D).

IV. Institutionalizing ADR in an Agency

A. What is Institutionalization?

"Institutionalization" in this context is another word for implementation, and refers to creating processes in an agency that allow the agency to take advantage of the benefits of alternative dispute resolution where most appropriate. There is no one way to do this, and there are no foolproof systems. There are, however, a variety of methods that various agencies and institutions have used.

This section introduces some of the steps that agencies can take to institutionalize ADR. The process involves multiple steps, not all of them consecutive. This is not intended to be a detailed roadmap, since no such document could fit all agencies. Instead, it tries to describe some alternatives, many of which may be successfully adapted to the particular conditions that agencies face.

Institutionalization is the most crucial piece of setting up ADR programs that work. Unless an agency has developed a framework for using ADR in particular cases, and has convinced the relevant people that ADR can help them, not much will happen. Like incorporating any new idea into an existing structure, this involves a delicate balance between getting the people in your agency to accept a somewhat new way of thinking about how they do their jobs, and showing them that this "new" idea is often simply an extension of what they currently do.

This chapter will describe some of the ideas that organizations (both public and private) have used in implementing ADR. Among the topics addressed here are the importance of having a "point person" for ADR in the agency, how working groups can be useful, the importance of having visible support from the highest levels, how to analyze when and where ADR might effectively be used, developing pilot projects, developing agency goals, education and training, and developing methods for ensuring that ADR is considered in appropriate cases.

There is considerable literature about ADR and setting up ADR programs. The bibliography contained in this Guidance (section VIII) lists some that can be useful reading.

B. The Dispute Resolution Specialist

The Administrative Dispute Resolution Act recognizes the importance of assigning specific responsibility for overseeing efforts to implement the Act in the agencies. Each dispute resolution specialist (DRS) provided for in the Act serves as the "point person" for his or her agency. The DRS's specific responsibilities are set out in the Act, section 3, but one of the most important characteristics a DRS can have is a commitment to the idea that ADR is a force for positive change. The job of a dispute resolution specialist is not an easy one, but it is an important one.

The DRS has the responsibility to implement the Act and the policy developed by his or her agency. Implicit in this is a crucial role in developing that policy.¹³ The job of a DRS is not a short-term one; the DRS should continue to serve as a resource person even after the agency's ADR program is up and running. Thus, the DRS's role involves serving both as an initial catalyst and a long-term nurturer for the ADR process.

The rest of this section describes some suggestions for carrying out the DRS's assigned responsibilities.

C. Creating Working Groups

Institutionalizing ADR in a federal agency is not a one-person job. It requires involvement of many different parts of the agency. One technique that has been helpful in many organizations is creating one or more working groups. These groups (and their members) not only provide people to share the work, but also offer a way to involve key individuals and parts of the agency in the process and give them an investment in its success.

There are several ways to use working groups. Among the many possibilities is having groups of senior agency officials that can help funnel information across the agency, as well as provide feedback from all of the various parts of the agency that will be involved in setting up ADR programs. Another

¹³The DRS role is also addressed in section III on developing agency policy.

possibility is to create groups of people with particular expertise or ability that relates to particular pieces of the institutionalization process. Of course, these alternatives are not mutually exclusive.

It is important, in creating working groups, to involve as many as possible of the components of the agency that will be affected or whose support is crucial. Among these may be the Office of the General Counsel or its equivalent, the Inspector General, agency rule writers, policy staffs, major substantive agency components, agency administrative law judges, boards of contract appeals, or other adjudicators, and regional offices.

The general counsel's office is a critical part of the institutionalization process, since many agency disputes are currently resolved in some sort of legal arena. In many agencies, although by no means all, the DRS is part of the agency's legal staff. However, institutionalizing ADR should not be considered solely the lawyer's province. It takes more than just the agency's lawyers to make an ADR program work; the clients are equally, if not more, important. Moreover, many disputes may be appropriate for ADR at a point before formal proceedings are instituted.

Working groups should be just that: people working to achieve joint goals. It is important to keep working groups informed and involved.

D. Getting Support From the Highest Agency Levels

It is generally true of most organizations that new programs become incorporated into the existing structure only if there is some support from the top level of the organization. Thus, a key step in institutionalizing ADR in most federal agencies is getting senior government officials to signal support for the effort. Congress has mandated that agencies carefully consider how ADR can work for them, and Executive Order No. 12,778 and an earlier report by the Vice President's Council on Competitiveness called upon executive agencies to promote ADR. A statement from the head(s) of each agency specifically announcing the broadest possible support for the use of ADR and asking agency personnel to cooperate with the DRS should help the specialist gain attention and generate

assistance for his or her specific efforts. The stronger the tone of support, the more effective it will be.

Among the things that might be contained in such a statement are:

- an expression of commitment to using ADR in appropriate disputes;
- indication of support for reasonable settlements reached by means of properly selected ADR methods;
- a list of factors that favor or disfavor ADR use, including the ones in the Act;
- encouragement for developing training programs for agency personnel and educational programs for outside parties and interests;
- a request for cooperation and assistance for the dispute resolution specialist; and
- instructions to the DRS to develop and carry out a detailed implementation plan.

Several agencies have issued or are now developing such statements of support.

E. Analyzing Where ADR Can Be Effectively Used

Analyzing where ADR can be used effectively is one of the most important pieces of institutionalizing ADR in an agency (or any other organization). It requires analyzing the multitude of disputes your agency is involved in, whether internally or with outside parties. It requires understanding the continuum of ADR methods (see section I), and determining, at least in a general way, which methods might be useful in particular types of disputes. It also requires developing the expertise to make similar judgments at appropriate stages in individual cases and disputes.

1. Review of agency disputes

The first step in institutionalizing ADR is figuring out what kinds of disputes or potential areas of dispute the agency is likely to face. The ADR Act lists a number of general categories,¹⁴ which serve as a starting point. A number of agencies have undertaken surveys of their component offices and regions, to determine what types of disputes they deal with, the numbers of such disputes, what kinds of procedures they use, any statutory or regulatory bars to the potential use of ADR, and the extent to

¹⁴See the list in section III on developing agency policy.

which ADR has been used in the particular context. Such surveys can be addressed to the whole range of disputes (i.e., formal and informal adjudications, rulemakings, policy disputes); at a minimum, it should focus on the more formal types of disputes, including court litigation. It is important for an agency to be aware of the "landscape" of its disputes, in order to determine which types of disputes are suitable for ADR use and which ADR methods would be appropriate.

2. Where ADR might be appropriate

Once the agency has a good sense of the kinds of disputes with which it is involved, the next question is whether these types of disputes are likely to be amenable to the use of ADR. There is an extensive list of factors that can be considered in making this determination. A partial list is found below.

a. Suitability of ADR for categories of disputes

ADR may be appropriate in a particular type of dispute where one or more of the following characteristics are present:¹⁵

- Creative solutions, not necessarily available in formal adjudication, may provide the most satisfactory outcome.
- The cases do not involve or require the setting of precedent.
- All the substantially affected parties are generally involved in the proceeding.
- Variation in outcome is not a major concern.
- Maintaining confidentiality is either not a concern or would be advantageous.
- Parties are likely to agree to use ADR.
- Litigation in the particular context is generally a lengthy and/or expensive process.
- Cases of this type frequently settle at some point in the process.
- The potential for impasse is high, because of poor communication among parties, conflicts within parties, or technical complexity or uncertainty.

¹⁵Section 582(b) of the Act lists six specific types of cases where agencies should consider not using ADR.

b. Suitability of particular types of ADR

No one ADR approach is best for resolving all disputes. The nature of the dispute and the disputants will, to a significant degree, determine how the case can best be resolved. Among the factors that might suggest a particular approach over another are the nature of the relationships among disputants, their need or desire for control over the outcome or the process, the utility of an independent analysis of the merits, the urgency to resolve the dispute, and the desire for privacy.

Below is a partial list of processes and factors that experience has taught tend to make a particular process appropriate. This list is not intended to be definitive; such a list would be impossible to produce, given that new processes and additional experience are continually being developed. This list should be used in conjunction with the portion of this document that describes the various ADR processes (section I).

i. Mediation

Mediation may be a suitable ADR process to use when one or more of the following characteristics are present:

- The parties are looking for a substantial level of control over the resolution of the dispute.
- The parties have, or expect to have, an ongoing relationship.
- Communication between the parties has broken down to a significant degree, or suspicion or personality clashes have developed.
- The legal standards for decision are fairly clear, or neither party has a need to clarify them.
- There are multiple issues to be resolved.

ii. Early neutral evaluation

ENE may be an appropriate process when some or all of the following are characteristics of the dispute:

- The dispute involves technical or factual issues that lend themselves to expert evaluation.
- Parties disagree significantly about the value of their case.

- Top decisionmakers of one or more parties could be better informed about the real strengths and weaknesses of the case.
- The parties are seeking an alternative to extensive discovery.

iii. Minitrial

Minitrials can be useful in cases that have some or all of the following characteristics:

- Getting important facts and positions before high-level decisionmakers for the parties is important.
- The parties are looking for a substantial level of control over the resolution of the dispute.
- Some or all of the issues are of a technical nature.
- A trial on the merits would be very long and/or complex.

iv. Settlement judges

Settlement judges can be useful in cases that have some or all of the following characteristics:

- The case is in formal adjudication.
- The parties have not been able to negotiate a settlement on their own.

v. Nonbinding arbitration

Nonbinding arbitration can be useful in cases that have some or all of the following characteristics:

- Parties are looking for quick resolution.
- Parties prefer a third-party decisionmaker, but want a role in selecting the decisionmaker.
- Parties would like more control over the decisionmaking process than can be had through formal adjudication.

...

There are no clear rules on when to use ADR, or which ADR method is the best in a given situation. Frequently, more than one ADR process will work. Moreover, depending on the resources an agency has available and the degree of flexibility it prefers, an agency can choose to make one or

more ADR methods available for a particular type of case (e.g., minitrial and ENE for contract cases, mediation in EEO cases), or it can make decisions on a case-by-case basis.

3. Starting to use ADR in the agency

Actually getting ADR into use is not a simple task. Each DRS knows the individual characteristics and institutions of his or her own agency. One method of starting the use of ADR in an agency is through one or more pilot programs. (See subsection G -- Developing Pilot Programs.) Encouraging those responsible for administering existing formal adjudication processes (Chief ALJs, boards of contract appeals, offices of general counsel) to actively consider the appropriateness of ADR in their dockets is also a possible starting point. (See subsection I -- Ensuring that ADR is Considered in Appropriate Cases.)

4. Using Consultants

There is considerable expertise implementing ADR programs in the government and elsewhere. This includes methods for analyzing an organization's dispute "landscape," figuring out which kinds of ADR might work best in a particular setting, setting up some standards for case-by-case determinations, and getting a system up and running. Consultation with the Conference and FMCS, as required by the ADR Act, can provide some basic information. Similarly, talking with other agencies, especially those that have already been using ADR methods, and with professionals in the field, can keep each agency from "reinventing the wheel." The Conference and other organizations may be offering seminars on relevant topics.

Particularly at the beginning of an agency's implementation process, it may be helpful to develop or hire expertise in analyzing agency disputes, suggesting when ADR can be used, or training agency staff in making these determinations. The U.S. District Court for the District of Columbia, for example, in its alternative dispute resolution program, uses a consultant on an occasional, ongoing basis to consult with each of the participating judges on recommending mediation or early neutral evaluation in particular cases.

F. Developing Agency Goals

It is generally accepted that a crucial step in developing a new program is determining what the program's goals should be. Obviously, this must be done by each agency individually, but following are a number of suggestions for general goals that ADR programs can aim for in resolving problems through informal consensual procedures:

- Reducing the time it takes to resolve problems and disputes;
- Reducing the costs (direct and indirect) of resolving problems and disputes;
- Freeing up personnel and other resources;
- Creating opportunities for wider ranges of creative solutions and possible options;
- Forging better relationships among disputing parties, inside and outside the agency;
- Improving communication between and within parties;
- Improving the satisfaction level of disputants with both the process and substantive results of the dispute resolution process; and
- Improving the reliability of information on which decisions are based.

An agency can make its goals as broad or as specific as it thinks appropriate. One advantage of more specific goals is that they provide concrete measures for evaluating the program's success. (See section VI -- Evaluating ADR Programs.)

G. Developing Pilot Programs

In a large agency with a broad variety of programs where ADR could potentially be used, implementing ADR programs across the agency at one time could be an extremely large task. It may be useful instead to start with one or more pilot projects. This technique serves many uses. It provides a manageable way to start up; it provides a way (or ways) for the agency to find out what kinds of processes work; it allows the agency to make necessary modifications; and it will likely provide successful experience that can be used to encourage wider awareness of ADR's benefits. It is also a way to teach people (inside and outside the agency) how some of these processes work.

In selecting a focus for a pilot project, an agency has a variety of options. It can focus on a particular type of dispute (e.g., contract cases), or on a variety of disputes involving a particular part or region of the agency, or on a particular ADR process, which it would apply in a variety of disputes across the agency where appropriate. Different agencies have used one or more of these approaches for pilot or demonstration projects. Pilot projects can experiment with case selection criteria and procedures.

In selecting a focus for a pilot project, the agency should consider using some of the disputes that are central to the agency's mission. While this is not to say that an agency cannot use personnel and small contract disputes, for example, as the center of its pilot program, such a choice may limit the subsequent usefulness of the pilot in promoting ADR use in other parts of the agency.

In selecting programs appropriate for an ADR pilot project, agencies should focus on cases that are likely to be appropriate for ADR. (See subsection E -- Analyzing Where ADR Can Be Effectively Used.) Additional factors an agency might want to consider as suggesting that a type of dispute might be appropriate for ADR include (1) whether the disputes involve parties with an ongoing relationship with the agency; (2) whether the disputes occur frequently; and (3) whether these disputes are a type that have a high rate of eventual settlement.

Pilot programs are a particularly good medium for experimenting with some of the difficult issues that implementing an ADR program raises. For example, creative ways of providing incentives to agency personnel can be tested on a small scale, without committing the agency to a particular method. Thus, an agency might include in the performance appraisals of agency employees involved in the pilot project an element relating to active participation. Another idea is to offer recognition and rewards to those who use ADR successfully. Similarly, an agency can experiment with various solutions to the questions relating to budgets, such as trying to ensure that budgets for those who implement ADR programs are not adversely affected.¹⁶

¹⁶For example, some agency budgets are currently keyed to the number of cases in litigation, rather than to the number of cases resolved.

As pilot projects are determined to be successful, they can be expanded. The lessons learned (positive and negative) can be applied more broadly over time.

H. Education and Training

Effectively educating and training relevant people is another important piece of implementing an ADR program. Not only should agency employees be trained, but the agency should take steps to educate that portion of the public that deals with the agency and with whom disputes of various types may arise. Educating people involves not only explaining ADR, its benefits and limits, but overcoming the resistance that often arises in response to new and unfamiliar ideas. This requires encouraging people to change their ideas about how disputes are, can, and should be dealt with. At the same time, it may help to be able to show them that some of the activities they regularly engage in are not very different from, or are included within, the concept of ADR.

Among the components of an education and training program are (1) promoting ADR within the agency; (2) overcoming resistance; (3) providing specific training for key personnel; and (4) educating the public. As in other areas discussed in this chapter, there are many different ways to approach the subject, and these suggestions are not intended to be all-inclusive.

1. Promoting ADR in the agency

It is easier to get cooperation from agency people if they understand the potential implications and benefits of using ADR in their programs. This requires an educational effort in most situations.

Among the benefits that ADR can generate are:

- Savings of time by resolving disputes at earlier stages than they might otherwise be resolved;
- Savings of money if disputes are resolved before substantial time and effort have been expended;
- Opportunity for more creative and useful solutions than may be available in formal adjudications;
- Reduction in levels of antagonism between parties to disputes;

- Opportunity for increased confidentiality; and
- More control over the outcome than in formal adjudication.

Ways of providing information to relevant people include meetings with groups within the agency to explain what ADR is and how they may be able to use it, newsletters publicizing activities within the agency, using the working groups to transmit information to their various components, and collecting reading material and videotaped information that interested people can use. Persons who will be affected should be given the opportunity to provide ideas and input on how ADR might be used.

One of the most effective ways of promoting ADR is to persuade people that it has been successful in other, similar contexts. ADR has been and is being successfully used in many different organizations, including courts, several federal agencies, states, and the private sector. Finding comparable programs where ADR has worked is one of the best ways to promote it in your agency's programs. Among the sources of information on where ADR is working are ADR-related publications, other dispute resolution specialists, ADR professionals and organizations, and the Administrative Conference, which serves a coordinating role in implementing the ADR Act and may therefore be aware of what is working elsewhere and what is not. The Conference's coordinating role may be particularly helpful to smaller agencies seeking to avoid expensive duplication of efforts.

Showing that ADR has a proven track record is one way of addressing the myriad objections that will be raised by people who either do not understand how ADR works or believe that it is not applicable in their particular contexts.

2. Overcoming resistance

One of the more difficult aspects of implementing ADR programs is overcoming resistance from people (inside and outside the agency) who, for a variety of reasons, are initially opposed to experimenting with this "new" system. The list of objections that people come up with is potentially endless (in this context, as in any context involving a possibly significant change in the way a problem is approached). A few of the most common ones are addressed briefly.

ADR may be fine elsewhere, but my cases are too (big, important, controversial).

ADR works in a variety of different contexts. Large cases are often the best arena for ADR, because the litigation alternative is potentially so expensive and time-consuming. Controversial cases are also frequently good candidates, because of the increased confidentiality available using ADR. Moreover, some ADR processes, like mediation, are a potential way to diffuse controversy, because they give all parties a voice and an investment in the outcome. However, ADR is not appropriate for all cases. If a case is expected to be important as a precedent, for example, formal processes may be needed.

Most cases settle eventually already, so why do we need ADR?

It is true that the majority of cases in litigation are eventually settled, but too often they are settled on the courthouse steps, or so far along in the process that tremendous amounts of time, effort, and money have been invested in them. Using ADR methods, disputes can frequently be settled at an earlier point, reducing expenditures of time and money, as well as antagonisms between parties, and freeing up agency resources.

I have too much else to do to learn about ADR.

There is no question that most government employees are very busy. Reluctance to learn about these potentially valuable processes, however, is taking a very short-term view. ADR methods can often result in resolving disputes at an earlier stage, and more quickly, than otherwise. Thus, learning about ADR can save time in the long run.

ADR may save money for some other part of the agency, but it will cost me.

It is true that costs and savings from ADR do not always accrue to the same program. Agencies need to create rewards to encourage those whose efforts save time and money, even if the savings accrue to other parts of the agency's budget. Moreover, even if time and money savings cannot be

documented in a particular case, the agency should not lose sight of indirect savings stemming from better relations with the public.

Using ADR will mean that I will lose control over my cases.

To the contrary, ADR methods usually give parties significantly more control, over both the process and the outcome, than do traditional adjudicatory processes. For example, in mediation, the parties negotiate a mutually agreeable solution with the help of an agreed-upon neutral third party. Unless they agree, there is no resolution; moreover, the universe of possible negotiated resolutions is much larger than those available in judicial or administrative forums. Similarly, in minitrials or arbitration, the parties can create a decisionmaking process that suits the parameters of their particular dispute.

To the extent that litigation is not resolved at the agency level, cases may end up in court, with the Justice Department generally taking the lead. Many courts around the country have instituted mandatory ADR programs. An agency's case may end up in an ADR process anyway, much later in the case, and in a context where the agency has somewhat less power over the outcome.

ADR might take up too much managers' time.

ADR processes, in order to be most effective, do require a certain amount of time and participation from those with authority to settle the dispute involved. Managers with such authority have to focus on the merits of the case to determine whether the case warrants the resources to litigate it, and/or whether particular settlement parameters are acceptable. Ideally, those with settlement authority participate in the negotiations. (In many ADR processes, ready access to someone with authority, rather than actual participation, may be acceptable.) But this should be true of all cases, whether an ADR process is being used or not. Where agencies are unwilling to delegate settlement authority below senior officials, ADR-assisted settlements may require the attention of senior officials. Ideally, the requisite settlement authority should be delegated to those with the ability to actively participate in settlement decisions.

3. Training agency personnel

Although the concepts underpinning ADR are not extremely complicated, they are new for many people. Moreover, some of the skills that are helpful in using alternative means of dispute resolution require specific training. The level of appropriate training obviously varies depending on the personnel being considered. A few suggestions follow.

- As discussed above, support from senior management is crucial to the success of any ADR implementation program. However, most of these people do not have much time, even if they have the inclination, to spend learning about ADR. A number of agencies have put on a 1- to 3-hour program for senior staff that explains, and seeks to answer questions about, the ADR Act's requirements, how ADR processes have worked in other agencies, and how they might be used in a particular agency. Such a session can help generate the understanding and awareness necessary to promote the program, while offering an opportunity for decisionmakers to discuss some of their concerns. To the extent that senior staff are willing to devote more time to learning about ADR, additional and more detailed programs can be developed.

- More intensive training should be planned for agency personnel who will be actively involved in the ADR program. There are a number of different types of training that can be extremely helpful.

The building blocks for most ADR processes are interest-based negotiation and mediation. Skills-building training in these processes can be very useful, not only in setting up an ADR program, but also in ensuring that the agency gets the most it can out of its participation in particular dispute resolution processes.

All ADR processes require the use of negotiation at some point in the process. Understanding how to negotiate by focusing on the real interests at stake rather than on negotiating positions can not only help agency employees understand how ADR processes may help the agency, but can make them better negotiators. Thus, training in negotiating skills is a useful thing to provide to selected people in the agency, even those who believe that they already know how to negotiate.

Similarly, mediation is a key building block for many of the ADR processes. Providing mediation training for selected personnel can strengthen understanding of all types of ADR, as well as how and where it might profitably be used. Furthermore, having a cadre of trained mediators can be useful for the agency. They can be used to mediate certain disputes in their agency (if there are no conflicts of interest that exist or are perceived), as well as disputes in other agencies. The availability of a corps of trained mediators among government agencies could ultimately reduce the costs for federal agency implementation of some ADR programs by providing low-cost mediation services. Finally, mediation training can have beneficial effects even within an office in resolving internal disputes.

More intensive, complementary training in a variety of other ADR-related topics can also be extremely useful. Other topics to consider include:

- Basic ADR processes;
- Analyzing potential disputes;
- Conflict management;
- Selecting ADR neutrals;
- Getting parties to the table;
- Designing ADR systems;
- Negotiated rulemaking; and
- Resolving particular types of disputes, *e.g.*, with mediation of personnel grievances or mini-trials in contract claims.

▪ The ADR Act expressly provides that each agency must provide training on a regular basis for the DRS, as well as for other employees involved in implementing the agency's ADR program. It also requires the DRS periodically to recommend to the head of the agency those employees who would benefit from additional training. Thus, the DRS should be thinking in terms of planning long-term training agendas and setting training priorities. One possible useful long-term investment is training certain agency employees or training components to be trainers, so that they can provide in-house training in the gamut of ADR and negotiation skills.

- A useful part of training efforts can be developing agency-specific materials. Such materials can explain how the ADR process works in the agency, as well as providing more general background. Among possible materials are manuals for agency personnel describing the possible ADR options, model procedures, and when they can best be used. Model forms and agreements can also be helpful.

- Training generally does not come free, of course, but it is extremely important. A few agencies have, or are developing, a substantial in-house training capacity. Other agencies may be able to work together to hire trainers to serve their mutual needs. The Administrative Conference has been providing a series of roundtables addressing various aspects of ADR, which are available to DRSs (and in some cases to additional agency staff). Several are being videotaped and edited for wider dissemination. The Conference will be continuing these efforts, and assisting complementary efforts by the Society of Professionals in Dispute Resolution, the American Bar Association, the National Contract Management Association and others. The FMCS also provides training on a reimbursable basis. There are also a variety of excellent individuals and organizations in the private sector that provide training. The Conference maintains a roster of trainers and ADR neutrals, and is available for consultation on development of educational activities and available training programs.

4. Educating the public

Many disputes the agency is involved in also involve some part of the public. In fact, most disputes that would reach a formal adjudication mechanism affect parties or interests outside the agency. Because all of the ADR processes authorized by the ADR Act are voluntary, it is crucial to educate the relevant public to the benefits of participating in ADR processes. Meetings with relevant interest groups (e.g., trade associations or bar groups) explaining the agency's program, as well as materials that can be distributed at the beginning of formal adjudication procedures, can help to promote and enhance effective use of the ADR program.

Moreover, in cases involving multiple parties, particularly large-scale cases, providing some initial negotiation training for disputants can make an ADR process more effective, by increasing the

likelihood that all parties will be sharing similar premises about the process of negotiating, even if they have different premises concerning the substance.

I. Ensuring that ADR is Considered in Appropriate Cases

Some parts of an agency are particularly well-suited to ensuring that the ADR potential of cases is regularly considered. While other parts of the agency should also retain responsibility for analyzing ADR potential, these particular components discussed below can play a special role in the process because of their close connection to the litigation and formal adjudication process.

1. Offices of general counsel

Offices of general counsel, or their equivalent in a particular agency, are involved in a large portion of disputes that can be expected to end up in formal dispute resolution (e.g., formal adjudication). It is especially useful, therefore, to implement a procedure that encourages or requires agency attorneys to consider the appropriateness of ADR for each of their cases. Among the simpler means some agencies and other organizations have used to do this is to have case intake forms include a section that requires consideration of ADR potential. Performance appraisals can also be used to encourage staff to consider the appropriateness of ADR.

2. Offices of administrative law judges and other presiding officers

There are many different stages of a dispute where there is potential for using ADR. When a dispute reaches an administrative law judge, the dispute has crystalized at least to the extent that it must be taken very seriously by the parties. ALJs can be extremely useful in encouraging parties to use ADR as a way of resolving all or parts of their disputes. Agencies should strongly encourage their ALJs to advocate ADR use, including providing settlement judges.¹⁷ OALJs should routinely include in docketing notices information about available ADR methods, and ALJs should regularly review their cases to consider whether ADR might be appropriate. (Some courts, like the federal district court for

¹⁷See Conference Recommendation 88-5, 1 CFR §305.88-5 (1991).

D.C., have retained private dispute resolution services to evaluate ADR potential.) The periodic use of someone expert in analyzing ADR potential for docket review should be considered, as should suitable training for agency ALJs. Chief judges would be the appropriate "point persons" to ensure that ALJs take steps to institutionalize ADR within their offices.

Other agency adjudicators, including boards of contract appeals, should function similarly in promoting ADR in their dockets.¹⁸

3. Other parts of the agency

It is useful, in programs where ADR can be used in a sizable number of disputes, to have a central person designated to receive requests for considering ADR in particular cases.

¹⁸See Conference Recommendation 87-11, 1 CFR § 305.87-11 (1991).

V. Finding and Hiring Neutrals

Once an agency has decided to use ADR, it will need to consider how to obtain or develop in-house services for dispute resolution, training, and systems design. The "neutral" is a key figure in the effective working of most ADR processes, including negotiated rulemaking. Neutrals (except in the case of arbitrators) usually serve at the will of the parties. Their functions include presiding over and managing the process by which parties seek to reach a resolution of their dispute. Neutrals are often highly skilled professionals with considerable training in techniques of dispute resolution. Their skills can be crucial to successful use of ADR methods.

For agencies to use ADR most effectively, they should develop routines for deciding when and how neutrals can be employed. Section 4 of the ADR Act, adding 5 U.S.C. §583, provides that an arbitrator, mediator, convenor, facilitator, settlement judge, or other ADR neutral may be an employee of the federal government or any other person acceptable to both parties. Section 583 authorizes the Administrative Conference to develop standards for neutrals to which agencies may refer and provides for the maintenance of a Conference roster of neutrals. Services of a neutral may be obtained by parties or agencies from their own personnel; via interagency agreements; or through conventional contracts, basic ordering agreements, purchase orders, and, under some circumstances, requirements contracts. The Conference's roster of neutrals contains several hundred names of groups and individuals along with biographical information addressed to those factors, such as experience, that the Conference believes are important. The Conference does not license mediators or certify their qualifications.

The prospect facing anyone interested in finding a mediator, arbitrator, or trainer, is stated well by Linda Singer, who writes:

For good reasons and bad, dispute resolution has attracted practitioners of a wide variety of backgrounds. The movement's antilegal implications, coupled with the enthusiasm of the early pioneers, have attracted dissatisfied practitioners from related professions--primarily law and mental health--and people with no particular professional background. Hardly a day goes by when I do not get a call from someone seeking advice on how to break into the field.

Many of the new additions are talented, sincere people, disillusioned with the monotony or adversarial nature of their existing jobs. Some seek entry into a new field because they have been unable to succeed elsewhere. A few see ADR as a way to make a fast buck.

Until now, dispute resolution has been virtually unregulated. Anyone, regardless of lack of knowledge or skill, can hang out a shingle and offer to mediate or even arbitrate anyone's dispute. Furthermore, poorly trained and inexperienced neutrals may (for a fee) offer to train others.

In some settings, such as offering to mediate between neighbors or friends, this situation may be perfectly appropriate. In others, such as labor-management or commercial disputes, the parties themselves may be sufficiently sophisticated and knowledgeable about various practitioners not to need the outside imposition of standards. In still others, such as court-imposed settlement procedures, there may be no substitute for regulation.¹⁹

Here is some advice that may help a few agencies become more "informed consumers," capable of specifying the characteristics they desire in a prospective neutral, locating candidates, and retaining them expeditiously.

The diversity of roles neutrals play presents complications for agencies considering ADR. Some agency employees may be apt neutrals for many controversies; in other disputes parties may not be comfortable with a government employee in this role. Neutrals may have been specially trained and accredited, or as Singer notes, may simply hold themselves out as having certain expertise, experience or credibility. Some arbitrators may be called on to make binding decisions, consistent with applicable statutory and regulatory requirements, when opposing positions cannot be reconciled; most neutrals will simply render aid or advice to the parties, who retain final say. Time may be of the essence in finding neutrals in some situations, as in many mediations and arbitrations, but in some instances may be a minor consideration. Costs of using outside neutrals may range from several hundred dollars (for the services of a mediator or ministerial advisor in a small case) to six figures (for convening and facilitating a few lengthy, large-scale negotiated rulemakings).

¹⁹Singer, *Settling Disputes*, p. 168.

These differences, as well as widely varying levels of the parties' sophistication in an agency's proceedings, may render specific advice or routines difficult to develop in advance.²⁰ Still, agencies should observe certain guidelines²¹ intended to accomplish the following goals:

Supply. Broadening the base of qualified, acceptable individuals or organizations, inside and outside the government, to provide ADR services, while recognizing that the skills required to perform the services of a dispute resolution neutral will vary greatly depending on the nature and complexity of the issues, the ADR method employed, and the importance of the dispute.

Qualifications. Ensuring that neutrals have adequate skills, technical expertise, experience or other competence necessary to promote settlement, while avoiding being too exclusive in the selection process.

Acquisition. Identifying existing methods, or developing new techniques, for expeditiously funding and acquiring the services of neutrals at a reasonable cost and in a manner that (a) ensures a full and open opportunity to compete and (b) enables agencies to select -- or agree with other parties as to -- the most qualified person to serve as a neutral, given that the protracted nature of the government procurement process is often inconsistent with the goals of ADR and the need to avoid delays.

Skill or experience in the relevant process of resolving disputes, such as that possessed by mediators and arbitrators, is usually an important criterion in the selection of neutrals. Knowledge of the applicable statutory and regulatory schemes may at times be important. Other specific qualifications (e.g., backgrounds, degrees, certifications, job experience) should be required *only* when necessary for resolution of the dispute. For example:

- Agencies should not necessarily disqualify persons who have mediation, arbitration, ministerial, or judicial experience but no specific experience in the particular ADR process being pursued.

²⁰A forthcoming publication entitled *A Consumer's Guide to Selecting Third Parties to Help Resolve Public Disputes*, by the Ohio Commission on Dispute Resolution and Conflict Management, should help DRSs to determine what kinds of services are appropriate and to choose between various interested neutrals.

²¹Much of this general guidance is drawn from Conference Recommendation 86-8, 1 CFR §305.86-8 (1991).

- Agencies should insist upon technical expertise in the substantive issues underlying the dispute or negotiated rulemaking *only* in early neutral evaluation or similar methods or when the technical issues are so complex that the neutral could not effectively understand and communicate the parties' positions without it.

A variety of approaches to meeting agencies' requirements are possible. A few agencies, like OSHRC, FERC, and the Armed Services Board of Contract Appeals, have looked to the Administrative Conference or others for systematic training of ALJs or administrative judges in mediation and related skills. The Department of Labor and other agencies are training selected personnel in mediation techniques. EPA and the Army Corps of Engineers have each developed fairly elaborate "indefinite quantities contracts" with a private group that maintains and administers a small, select roster of experienced neutrals. These approaches make contracting for services more realistic than the standard procedure. Many agencies have begun to use the Conference's roster. The FDIC, in a recent experiment, is developing its own roster and is providing mandatory orientation in regulatory and substantive issues for listed neutrals. The Farmers Home Administration (in USDA), in order to implement the mediation provisions of the Agricultural Credit Act, relies on state-level mediation agencies for services in about 15 states and has contracted with private groups to provide mediators in most other states. The Office of ALJs at the Department of Education generally goes to FMCS to obtain mediators for its program via an interagency agreement, and EEOC has developed a roster of mediators drawn largely from other agencies (HHS, FMCS, the Conference, National Labor Relations Board, and others) to help resolve certain personnel grievances. The U.S. District Court for the District of Columbia has selected a small number of D.C. Bar members, trained them intensively for 2 days, and offered them the continuing assistance of a knowledgeable staff when they serve as mediators or neutral evaluators.

In deciding what kinds of persons to employ or train as neutrals (or list on rosters), agencies, courts, legislatures, and other bodies have taken a variety of approaches. Much depends on the nature of disputes that arise and the processes likely to be employed. Early neutral evaluators and arbitrators,

typically, have relatively more substantive expertise than would mediators or facilitators. The most effective neutrals often will combine both substantive and process knowledge, though at times a mediator's lack of the former may even be an advantage if one party prefers a neutral who has not developed fixed views on key issues.

Locating neutrals to convene and facilitate negotiated rulemaking and other large scale policy processes will often involve different needs. It may be important for neutrals in those cases to have a firm grasp on APA rulemaking procedures, judicial and executive branch regulatory review requirements, basic legal questions, and similar issues. Moreover, neutrals in these disputes may need some familiarity with the convening process and methods of building consensus among large, diverse groups. The Conference, in cooperation with EPA and other interested agencies, hopes to offer training for a limited number of federal personnel in mediation fundamentals, in convening, and in facilitating multi-party processes.

It is best to be cautious in developing standards for neutrals, especially before considerable experience has been obtained. The Act places authority for developing nonbinding standards for neutrals in federal administrative proceedings with the Administrative Conference (which is directed to consult with FMCS and other professional organizations). In developing its roster, the Conference has taken the least restrictive approach possible to this task. This is consistent with the Act's emphasis (§583) on acceptability to the parties as a prime criterion for neutrals in administrative ADR. With the roster, the Conference will encourage potential users of neutrals services to determine the appropriate qualifications of a neutral, rather than have that decision made by a qualifying body or by the Conference as administrator of the roster. Among the factors agencies and other parties may wish to take into account in evaluating a potential neutral are experience in the process under consideration (e.g. mediation, minitrial, early neutral evaluation), subject expertise (e.g., contracting, environmental, personnel), geographic service area, training, occupation, degrees, references, fees, and the views of parties in other proceedings concerning the neutral's performance. Mediation and other ADR techniques are still evolving, and rigid barriers to entry may not serve the needs of users.

Theoretically, major sources of ADR neutrals include board of contract appeals members, ALJs, other active judges, current government employees, retired judges and government employees, academics, private practitioners, and practicing mediators or other ADR experts. Dipping into any of these potential pools has ramifications, many obvious and others fairly subtle. A variety of approaches to selecting and evaluating these persons has been put forward. Many successful neutrals have no legal or other special training; they say the critical determinant is the neutral's acceptability to the parties. They point out that many cases turn on engineering, accounting, or other technical or scientific questions. Some suggest that mediation training or experience is useful, or even necessary, allowing the neutral to respond perceptively to the principals' wishes and help further negotiations if asked. A few go so far as to suggest that *only* mediators (or similar experts) can serve effectively as neutrals or make credentials decisions. Others maintain legal expertise to be a *sine qua non*. They note that the principals and their staffs will likely have the background to weigh technical issues, but would frequently benefit from independent legal advice, on often-arcane matters, that will let them better assess risks, reach a decision, and "sell" or defend a settlement within their organizations. Some agencies, like the Corps of Engineers and the Navy, have required government contracting and litigation experience for neutrals in contract cases.

Most agencies' present ability to find meaningful, consistent qualifications criteria relevant to every situation maybe doubtful. What standards of education, or experience, or performance, or third-party recommendations should be used? Is hands-on evaluation of individual neutrals practicable, or desirable? If so, by whom? Should agencies seek a small, elite group, on the theory that this will enhance the credibility of the nascent process and tend to cause those on the list to view their role as a public service? If so, what should the review and appeal processes be? Should any particular groups, such as government personnel or private attorneys, be wholly excluded on grounds that one side or the other likely will strike them for possible bias or conflict of interest?

It is true that there are persons with marginal professional credentials who now call themselves mediators and trainers; some will prove talented and effective, a few will not. Agencies desiring

greater selectivity (such as the FDIC and Farmers Home Administration) select and train their own personnel,²² develop their own qualifications and listings of outside neutrals, or contract to have it done.

Here are some additional suggestions:

- Agencies are encouraged to work to develop in-house neutrals both to serve as dispute resolvers and to examine potential neutrals' various qualifications and to help select neutrals according to agency needs.
- Agencies should take advantage of opportunities to make use of their own and other government personnel as neutrals in resolving disputes. These persons may include FMCS mediators, agency officials not otherwise involved in the dispute, employees from other agencies with appropriate skills, administrative law judges, members of boards of contract appeals, and other responsible officials. Agencies should encourage their personnel with mediation skills to register on the Conference's roster, and share these persons' services with other agencies.
- Agencies should take advantage of the services of the Administrative Conference in identifying neutrals and acquiring their services. We have established a roster containing hundreds of neutral advisors, arbitrators, convenors, facilitators, mediators, trainers, systems designers, and other experts. The roster has data on education, experience, skills, fees, possible bias, and the like. Agencies should also consider using rosters of private groups.
- Agencies should take advantage of opportunities to train, or at least to expose, their employees to mediation and similar ADR skills. This can make it easier for agencies to know what to look for in hiring, and employees trained in ADR could be listed on the Conference's or other rosters and their services made available to other agencies.

Hiring private neutrals may not always fit neatly with the FAR acquisition process, partly due to the need for all parties -- including the agency -- to agree on a particular neutral for their case. In

²²See Honeyman, *On Evaluating Mediators*, as to possible approaches to selecting potential mediators.

situations where it is necessary or desirable to acquire dispute resolution services from outside the government, agencies should explore the following methods:

- Agencies authorized to employ consultants or experts on a temporary basis (e.g., under 5 U.S.C. §3109) should consider using that authorization in furtherance of their ADR or negotiated rulemaking endeavors.
- Agencies contemplating ADR or negotiated rulemaking projects involving private neutrals should, as part of their acquisition planning process pursuant to the Federal Acquisition Regulation Part 7, periodically give notice in the *Commerce Business Daily* and in professional publications of their needs and intentions, so as to allow interested organizations and individual ADR neutrals to inform the agency of their interest and qualifications.
- Where speed is important and the amount of the contract is expected to be less than \$25,000, agencies should use the streamlined small purchase procedures of Subpart 13.1 of the FAR to acquire the services of outside neutrals, particularly ministerial neutral advisors, mediators and arbitrators.
- Agencies that foresee the need to hire private neutrals for numerous proceedings should consider the use of indefinite quantity contracts as vehicles for identifying and competitively acquiring the services of interested and qualified neutrals who can then be engaged on an expedited basis as the need arises. EPA and the Army Corps of Engineers have taken this approach. Agencies should seek contracts with more than one supplier to ensure a diversity of available resources.
- Agencies should also consider: (1) entering into joint projects for acquiring neutrals' services by using other agencies' contractual vehicles; (2) using other contracting techniques, such as basic ordering agreements and schedule contracts, where appropriate to meet their needs for neutrals' services; and (3) proposing a deviation from the FAR or amending their FAR supplements, where appropriate.
- Agencies should evaluate contract proposals for ADR neutrals' services on the qualifications of the offerer, and cost alone should not be the controlling factor.

The Conference plans to work with interested agencies to explore possible ways to simplify and expedite contracting with neutrals and to develop umbrella contracts and model contracts with neutrals. The Conference's roster is now available to help agencies find neutrals promptly by providing agencies and other parties with basic data on available neutrals regionally and nationwide. The Conference generally can provide a focused list of likely candidates, relying on the disputing parties' specifications. This removes the Conference from most of the subjective decisionmaking in the selection process, while at the same time encouraging parties to become capable of specifying the characteristics they desire in a prospective neutral. This underscores the need for guidance to the uninitiated; the Conference provides an explanatory brochure on the roster's use, offers telephone advice when requested on appropriate use of the roster, and refers parties to volunteer neutrals for further information if desired. Reliance on the roster does not, of course, allow agencies to ignore required acquisition procedures.

The roster rules require neutrals to submit certain basic information, and make additional submissions optional. Required information includes the depth and type of neutral experience, training, subject-matter expertise, educational degrees, present organizational affiliation, and fee schedule. Additional information that may be helpful in making a final selection may be submitted, but is not necessary for listing. All neutrals who supply the basic data are listed.

Once parties have received names and background information from a roster or another source, they will probably want to interview those neutrals whose assistance they are considering enlisting. In selecting a neutral, one might appropriately consider a neutral's style, character, and experience with alternative dispute resolution processes relevant to the dispute.

During an interview with a candidate neutral, one should be sure to discuss potential scheduling conflicts and conflicts of interest that might arise if the neutral were selected. The Act requires neutrals, at a minimum, to disclose any such conflicts before beginning dispute resolution efforts.

If parties are considering retaining a neutral, they may wish to contact, as references, parties to disputes the candidate neutral has helped resolve in the past. These parties should be able to provide

insights regarding the character, style, and professional skill of the neutrals. The Conference roster, for instance, generally supplies the names, addresses, and telephone numbers of such parties when it supplies a set of neutrals' names to a requesting agency or party.

If the parties to the dispute cannot agree on a neutral after reviewing the names provided, they may jointly request a second list of names. The parties may also jointly ask the administrator of the roster (whether the Conference or another entity) to select a neutral for them if they are unable to do so, or devise a process for striking names until only one or two remain.

If parties have a complaint about the ethical performance of a neutral whose name was obtained from a roster, they should inform the administrator of the roster. Ethical complaints registered concerning neutrals referred from the Conference roster will be investigated and, if validated, are the only complaints that will be kept in a neutral's file.²³ Serious ethical breaches will result in removal from the roster.

²³See 1 CFR §316; 54 Fed. Reg. 39721 (1989).

VI. Evaluating ADR Programs

Although it might seem premature to think about evaluating the success of ADR initiatives before they are even up and running, advance planning is critical to ensuring that the necessary information is available when—as is often the case—an agency wants to evaluate its use of ADR.

A. Why Evaluate?

Program evaluation can serve a number of purposes. Evaluation data can be useful in determining whether a program is worth continuing, how it might achieve better results, and how it might be made more efficient. Among those potentially interested in having information concerning how a program is working and/or whether its goals are being accomplished, are Congress, senior agency management, agency line managers, and the public.

There are two major types of evaluations. "Process evaluations" are aimed at determining whether a program is functioning in the way it was designed to function; for example, whether ADR is being used in appropriate cases. "Outcome evaluations" are aimed at determining whether the goals of a program are being met: for example, whether cases resolved through ADR are being resolved more quickly than cases in more traditional processes. The two are not mutually exclusive; process evaluations can be done once the program is underway; outcome evaluations are undertaken when there are results to measure.

B. What to Evaluate

The first step in evaluating whether a program is accomplishing its objectives is to determine what the program's objectives are. Figuring out the goals of your agency's ADR program is part of developing an ADR policy. (See section III -- Developing Agency ADR Policies.) There are a variety of goals an ADR program can seek to further, including resolving disputes more efficiently, more effectively, or in a way that satisfies a larger number of interests. Goals can be either objective or comparative. For example, an agency may have as a goal of its ADR program that a specific

percentage of the litigants involved in the agency's ADR program will be satisfied with their experience. Alternatively (or in addition), a goal might be to decrease the time between when a case is filed and when it is resolved, compared to existing adjudication processes.

Setting goals for a new program is important for a variety of reasons, but it is crucial to a successful and useful evaluation. Unless concrete and quantifiable goals exist, against which to measure what actually happens in an ADR program, there is nothing to evaluate.

C. How to Evaluate

The next step is to figure out how to measure whether the goals are being achieved. This step can be a combination of the agency policymakers determining what they consider to be indicators of success, and evaluators (from inside or outside the agency) determining how best to measure them. For example, if you want to measure participant satisfaction with the ADR process, you might use the percentage of parties that express satisfaction with their experience as an indicator. If you are measuring whether cases are resolved more quickly using ADR than using more formal processes, you could measure the elapsed time between when cases are filed and when they are resolved under each system. Depending on what you seek to measure and how you seek to measure it, data collection can be more or less complicated.

Once indicators have been determined, data collection begins. In some cases, this may require compilation of historical data, such as how long previous cases took to be resolved. It may require developing evaluation "instruments" (surveys) that can be used during the research phase of the program (for example, to determine how participants feel about their participation in various processes).²⁴ It may require development of control groups, such as persons with similar disputes who use the non-ADR process. Other data collection mechanisms include interviews and review of case files. It is important to think about what kind of information you will want or need to collect as your

²⁴The provisions of the Paperwork Reduction Act, 44 U.S.C. §§3501 et seq., must be considered in connection with the use of surveys or questionnaires.

agency begins to set up its ADR program, in order to ensure that program operations include data collection mechanisms; waiting until you need to evaluate is likely to be too late.

Some kinds of data are harder to collect in a meaningful way than others. For example, cost data, which are relevant to evaluating whether a goal of reducing costs (either to the agency, to the parties, or to both) has been met, can be complicated to assemble. There is no single answer to the question of what kinds of costs should be included, or how to measure them. In doing evaluations involving cost data, it is important to consider carefully, for example, such issues as what types of overhead costs should be allocated to a particular process, and how. Cost data are, however, of substantial value and agencies are encouraged to obtain them.

The collected data must, of course, ultimately be analyzed. The data can then be used by decisionmakers to determine whether the program's goals are being met. This is not necessarily a straightforward process. The significance of data is often open to differences of opinion. The conclusions are also subject to differing interpretations. The best way to avoid these kinds of problems is to get those who will be using the data to agree before the evaluation is undertaken about what constitutes success in the program, and what are the proper measures of that success.

There are a number of bases on which ADR programs have been evaluated in the past. Among these are:

- Comparison of the levels of "customer satisfaction" between parties whose disputes were resolved through use of the agency's ADR program and parties whose disputes were resolved in more traditional ways;
- Comparison of the length of time to resolve disputes;
- Comparison of the costs to parties;
- Comparison of compliance with orders over time.

These evaluations have generally been done in the context of court-annexed ADR programs.

As with many ADR-related issues, a few agencies have in-house evaluation expertise, and private experts are available with whom agencies can consult. The Administrative Conference is developing some expertise, and may be able to provide guidance as to further assistance.

D. Conclusion

Evaluation is not a simple matter, and it may require assistance from experts. Evaluations come in varying degrees of sophistication and complexity; the more rigorous, generally the more resource intensive. How you intend to use an evaluation of agency ADR programs will largely determine the type of evaluation you may wish to undertake. Moreover, it is worth considering the appropriate timing for data analysis. A program evaluated too early may reflect only the problems associated with starting to implement a new program. On the other hand, evaluating a program early may highlight difficulties that could easily be overcome to improve the program's operation. Because it requires advance planning, the Conference urges agencies setting up ADR programs to consider issues relating to program evaluation at the beginning of the process. That way, an agency is more likely to achieve the best possible evaluation, taking into account practicality and feasibility.

The Administrative Conference is charged with reporting to Congress periodically concerning agency implementation of the ADR Act. The Conference will be interested in obtaining agency evaluation data and reports for use in such reports.

VII. Legislative History of the ADR Act

The Act reflects numerous Conference recommendations (see Bibliography). Recommendation 86-3, "Agencies' Use of Alternative Means of Dispute Resolution," 1 CFR §305.86-3 (1991), urged Congress to authorize agencies to use ADR processes, including arbitration, to resolve matters that would otherwise be decided more formally. The recommendation also set out other features that became part of the final legislation, including the criteria for appropriate use of ADR, judicial review, enforcement standards, and suggestions related to the general nature of congressional action designed to foster, rather than inhibit, the use of ADR. Other recommendations reflected in the legislation include Recommendation 88-11, "Encouraging Settlements by Protecting Mediator Confidentiality," 1 CFR §305.88-11 (1991); Recommendation 86-8, "Acquiring the Services of 'Neutrals' for Alternative Means of Dispute Resolution," 1 CFR §305.86-8 (1991); and Recommendation 87-5, "Arbitration in Federal Programs," 1 CFR §305.87-5 (1991).

On April 12, 1988, S. 2274, the Administrative Dispute Resolution Act of 1988, was introduced in the Senate by Senator Charles Grassley and referred to the Committee on Governmental Affairs. Introductory information is found at 134 Cong. Rec. S 3803 (daily ed. April 12, 1988). Hearings were held on May 25, 1988, before the Judiciary Subcommittee on Courts and Administrative Practice. A virtually identical bill was introduced in the House of Representatives by Representative Donald Pease on July 27, 1988. The House bill, H.R. 5101, was referred to the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary. Introductory information is found at 134 Cong. Rec. H 5990 (daily ed. July 27, 1988). Hearings were held before the subcommittee on June 16, 1988. Neither bill was reported to the floor for House or Senate action.

The bill that became the Administrative Dispute Resolution Act was again introduced by Senator Grassley on May 11, 1989, as S. 971 and referred to the Senate Committee on Governmental Affairs. 135 Cong. Rec. S 5166 (daily ed. May 11, 1989). The bill was the subject of hearings by the Subcommittee on Oversight of Government Management on September 19, 1989. The Senate

Committee on Governmental Affairs reported the bill to the floor of the Senate for action on October 19, 1990. S. Rep. No. 1005, 101st Cong., 2d Sess. (1990). The Senate passed the bill by voice vote on October 24, 1990. 136 Cong. Rec. S18082-18091 (daily ed. October 24, 1990). Several of the Act's provisions were discussed at that time, including the meaning of the confidentiality protections, their relation to FOIA disclosure provisions, operation of the administrative arbitration attorneys fee section, and exemption of certain federal personnel appeals from the Act. The Senate bill was reported to the House on October 24, 1990.

On May 25, 1989, a comparable bill was introduced in the House by Congressmen Glickman and Pease as H.R. 2497. The bill was referred to the House Committee on the Judiciary. 135 Cong. Rec. H 2206 (daily ed. May 25, 1989). Hearings were held by the Subcommittee on Administrative Law and Governmental Relations on January 31, 1990. On April 25, 1990, Subcommittee mark-up was completed and the bill, as amended, was forwarded to the full committee. *Administrative Dispute Resolution Act, 1990: Hearings on H.R. 2497 Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary*, 101st Cong., 2d Sess. (1990). The Judiciary Committee completed consideration and mark-up on May 22, 1990, and the amended bill was reported to the House floor on June 1, 1990. See H. R. Rep. No. 101-513, 101st Cong., 2d Sess. (1990). The bill passed by voice vote on June 5, 1990. 136 Cong. Rec. H 3152 (daily ed. June 5, 1990). Following Senate passage of H.R. 2497 in comparable form, the House passed the Senate version on October 26, 1990. The President signed the bill, Pub. L. No. 101-552, on November 15, 1990.

Several changes were made to resolve differences in the House and Senate bills and to deal with concerns raised, including those mentioned above. One major change made to both bills prior to passage involved arbitration awards. At the urging of the respective House and Senate Committees, the Department of Justice, the Administrative Conference, and the American Bar Association developed amendments to permit arbitration in federal programs under the unique 30-day delayed

finality provision that requires payment of attorneys fees in most cases where an award is vacated by the agency head.

VIII. Bibliography

A. Source Note

Literature on ADR is extensive, and this annotated bibliography focuses on a small selection of items likely to be helpful to agencies implementing the ADR Act. Those likely to be of particular interest are starred. It also includes all relevant Administrative Conference reports and recommendations. A much more extensive list of additional references on dispute resolution in the federal government is available from the Conference, along with its *Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution* (1987) and *Negotiated Rulemaking Sourcebook* (1990). The U.S. Army Corps of Engineers has developed a series of brochures on using minitrials and other ADR methods. The Corps, FMCS, and the Administrative Conference have also prepared educational and training materials on ADR in federal agencies.

Several useful sources regularly publish short news articles relevant to federal agencies. These include the *BNA World Arbitration and Mediation Report, Dispute Resolution* (published by the American Bar Association), *Alternatives to the High Cost of Litigation* (published by the Center for Public Resources), *Consensus* (published by the Harvard Project on Negotiation), and the *Administrative Conference News*.

B. Selected Books and Articles

* Administrative Conference of the United States (Millhauser, Marguerite S. and Charles Pou, Jr., eds.). *Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution*. Washington, DC: 1987.

A collection of articles on ADR including the experience of agencies, specific processes, model ADR procedures, and implementation considerations.

* Administrative Conference of the United States (Pritzker, David M. and Deborah S. Dalton, eds.). *Negotiated Rulemaking Sourcebook*. Washington, DC: 1990.

A how-to-do-it manual for federal agencies and others needing information about the conduct of negotiated rulemaking procedures. This step-by-step guide is supplemented with sample documents, collected articles, and sources of assistance.

American Bar Association, Standing Committee on Dispute Resolution. *Alternative Dispute Resolution: An ADR Primer*, 3rd edition. Washington, DC: ABA Standing Committee on Dispute Resolution, 1989.

Answers twenty basic questions on ADR including a brief exposition on ADR and the basic processes. It addresses such issues as fees, discovery, power disparity, and confidentiality. It is concise (38 pages) and to the point.

Bingham, Gail. *Resolving Environmental Disputes: A Decade of Experience*. Washington, DC: The Conservation Foundation, 1986.

A review of the growth of environmental mediation. Factors that can enhance or hinder mediation are addressed, as are the relative costs and efficiencies of litigation and mediation. The appendix includes analyses of environmental cases.

Brazil, Wayne D. "Institutionalizing ADR Programs in Courts." Paper for the National Conference on Emerging ADR Issues in State and Federal Courts, April 19, 1991.

Although written for the court system, it gives an insightful outline for ADR institutionalization that can be applied to other systems. See especially "A List of Issues to Consider."

Cameron, Chip, Philip J. Harter, Gail Bingham, and Neil R. Eisner. "Alternative Dispute Resolution with Emphasis on Rulemaking Negotiations." *The Administrative Law Journal* 4, no. 1 (Spring 1990): 83-111.

The report of a discussion among the authors at the First Annual Review of the Administrative Process of the Federal Bar Association and the Washington College of Law. It includes comments on how negotiated rulemaking works, a list of criteria for a successful rulemaking, some pitfalls in managing the process, and comments and suggestions from practical experience.

* Carpenter, Susan L. and W.J.D. Kennedy. *Managing Public Disputes: A Practical Guide to Handling and Reaching Agreements*. San Francisco: Jossey-Bass Publishers, 1988.

A step-by-step guide to building a collaborative process in public policy disputes that is addressed to the decisionmakers in the public and private sectors. It offers explicit suggestions for conflict analysis and assessment that can be applied to other types of disputes. It is well-organized and practical.

Carr, Frank. "Alternative Dispute Resolution in an Agency Program." *Boards of Contract Appeals Bar Association Quarterly Magazine* 1, no. 2 (Winter 1990): 11-15.

An examination of the implementation of the U.S. Army Corps of Engineers ADR program. The Corps' chief trial attorney comments on the decision to experiment with ADR and the development of ADR into a formal program for dispute resolution. The paper addresses some of the problems encountered and how they were resolved.

Cochrane, Michael G. ed. *Attorneys General and New Methods of Dispute Resolution*. Washington, D.C.: the American Bar Association, Standing Committee on Dispute Resolution and the National Association of Attorneys General, 1990.

A collection of articles on various issues in alternative dispute resolution from different perspectives. The articles are organized under the division headings "Background to Dispute Resolution," "New Methods of Dispute Resolution at Work," and "The Cutting Edge of Dispute Resolution: New Developments." Excellent articles include those on regulatory negotiation, "Alternative Dispute Resolution in Environmental Cases," and "Alternative Dispute Resolution and Transportation: Mediating Peace at the Battle of Peters Creek."

Coombe, George W. Jr., "Anatomy of a Business Dispute: Successful ADR Analysis by the Office of the General Counsel." *Arbitration Journal* 45, no. 3 (September 1990): 3-14.

An analysis of the nature of business disputes. It presents considerations in using an ADR approach in a business situation and lists steps to enhance institutional ADR commitment and factors to consider in ADR selection. Two case problems are analyzed.

CPR Legal Program, *CPR Practice Guide: Confidentiality in ADR*. New York: Center for Public Resources, 1989.

Offers a selection of articles, proposals, and case studies for understanding the issues of confidentiality relating to ADR processes. It also includes sample agreements.

_____. *CPR Practice Guide, Mainstreaming: Corporate Strategies for Systematic ADR Use*. New York: Center for Public Resources, 1989.

A practical outline offering a step-by-step program for incorporating systematic ADR use into an organization.

Creighton, James, Jerry Delli Priscoli, and C. Mark Dunning eds. *Public Involvement Techniques: A Reader of Ten Years' Experience at the Institute for Water Resources*. IWR Research Report 82-R1. Fort Belvoir, VA: U.S. Army Corps of Engineers Institute for Water Resources, May 1983.

A collection of articles from IWR training programs. These are significant for institutionalization, as IWR was the agent for change within a larger organization. See especially Section V: "Public Meetings" and Section VI: "Public Involvement Techniques and Methods (Non-Meeting)."

*Crowell, Eldon H. and Charles Pou, Jr. *Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques*. 1987 Recommendations and Reports of the Administrative Conference ("ACUS") 1139, reprinted in *Maryland Law Review* 49 no. 1: 183-254.

It sets forth basic issues concerning ADR in government contract disputes and discusses experiences of agencies that have used minitrials and related processes in contract disputes. It also addresses the roles of neutrals, principals, and attorneys, and steps for implementing ADR in contracting agencies.

Denver University Law Review 66, no. 3 (1989).

The whole issue is devoted to ADR Symposium papers.

* Edelman, Lester, Frank Carr, and James L. Creighton. *The Mini-Trial*, Alternative Dispute Resolution Series, IWR Pamphlet-89-ADR-P-1. Fort Belvoir, VA.: U.S. Army Corps of Engineers Institute for Water Resources, 1989.

A practical guide to using the minitrial from the experience of the U.S. Army Corps of Engineers. This monograph describes what the technique is and how it has been used and provides guidance on conducting the process. The appendix includes a sample agreement.

* Edelman, Lester, Frank Carr, Charles Lancaster, and James L. Creighton. *Non-Binding Arbitration*. Alternative Dispute Resolution Series IWR Pamphlet 90-ADR-P-2. Fort Belvoir, VA: U.S. Army Corps of Engineers Institute for Water Resources, 1990.

A companion to the minitrial paper, with a similar format. In addition to relating the Corps' experience, there is a step-by-step outline for using this process. The appendix includes a sample agreement.

Fine, Erika S. and Elizabeth S. Plapinger, eds. for the CPR Legal Program. *Containing Legal Costs: ADR Strategies for Corporations, Law Firms, and Government*. Butterworth Legal Publishers, 1988.

A collection of articles on implementation by experienced attorneys and practitioners. It covers specific types of disputes such as employment and technology disputes. Case problems are analyzed. See especially "Corporate Responses: Institutionalizing ADR," "Litigation Management," and "The Federal Government's Use of ADR."

* Fisher, Roger and William Ury. *Getting to YES: Negotiating Agreement without Giving In*. New York: Penguin Books, 1981.

A concise primer on effective negotiation. It offers a concise, step-by-step strategy for reaching mutually acceptable agreements. The emphasis is on interest-based collaboration, on using objective criteria in analyzing problems, and on developing parties' Best Alternative to a Negotiated Agreement (BATNA).

Folberg, Jay and Alison Taylor. *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation*. San Francisco: Jossey-Bass Publishers, 1984.

Presents a framework for effective mediation for professionals and others who desire to integrate mediation into existing roles. This work presents the various stages of mediation and concepts for skill-building.

Goldberg, Stephen B., Eric D. Green, and Frank E.A. Sander. *Dispute Resolution*. Boston: Little, Brown and Company, 1985.

Intended for use in a basic course on dispute resolution, it includes an overview and examines the processes. The case studies and examples of dispute resolution application give insight into practical use of ADR.

* Gray, Barbara. *Collaborating: Finding Common Ground for Multiparty Problems*. San Francisco: Jossey-Bass Publishers, 1989.

An approach to confronting problems and polarized legal or political issues. Describes problem sharing and conflict resolution as collaboration and offers well-organized and specific information for understanding and evaluating the resolution process. Includes case studies and covers such issues as when not to collaborate, how to ensure compliance, and how to determine the mediator's role.

Harter, Philip J. *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, Report to the Administrative Conference of the U.S., 1988 ACUS 839, reprinted in 41 Admin. L.J. 315 (1989).

Good overview of confidentiality, legal and policy issues for government agencies, including FOIA.

Hinchcliff, Carole L. *Dispute Resolution: A Selected Bibliography, 1987-1988*. Washington, DC: American Bar Association, Standing Committee on Dispute Resolution.

An extensive annotated bibliography that includes books and articles.

Honeyman, Christopher. "On Evaluating Mediators." *Negotiation Journal* 6, no. 1 (January 1990): 23-36.

Helpful for evaluating providers and selecting candidates for further training. Lists "Seven Parameters of Effectiveness" with commentary. A thoughtful introduction to of a complex topic for which criteria are often subjective.

Kanowitz, Leo. *Cases and Materials on Alternative Dispute Resolution*. St. Paul, MN: West Publishing Co., 1986.

Designed as a law school textbook, it includes sections on the various processes. The appendices include some pertinent federal and state statutes and regulations.

Kolb, Deborah M. and Susan S. Silbey. "Enhancing the Capacity of Organizations to Deal with Disputes." *Negotiation Journal* 6, no. 4 (October 1990): 297-305.

How to integrate dispute methods into the system informally. The article considers the "enhanced capacity" for tolerating disputes instead of promoting dispute prevention.

Lancaster, Charles L., *ADR Round Table: U.S. Army Corps of Engineers*. Alternative Dispute Resolution Series, IWR Working Paper 90-ADR-WP-1. Fort Belvoir, VA.: U.S. Army Corps of Engineers Institute for Water Resources, 1990.

This report addresses major perceived obstacles to implementing ADR and strategies to overcome them. It also lists practical suggestions for implementing ADR.

Laue, James H., ed. "Using Mediation to Shape Public Policy". *Mediation Quarterly* 20 (Summer 1988).

An entire issue devoted to the subject. Included is a bibliography and a chapter on negotiated rulemaking. Other chapters range from getting to the table to applying public policy mediation.

* Lax, David and James K. Sebenius. *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain*. New York: The Free Press, 1986.

\\ Makes the connection between negotiation and management in accepting negotiation as a way of life. Written from the perspective of the manager in the middle, it encompasses dispute resolution from negotiations to systems change.

Madigan, Denise, Gerard McMahon, Lawrence Susskind, and Stephanie Rolly. *New Approaches to Resolving Local Public Disputes*. Cambridge, MA: Harvard University Press, 1986.

A general handbook on "mediated negotiations." Presents six case studies and selected readings.

Millhauser, Marguerite S. "The Next Step in Alternative Dispute Resolution: Building an Effective Dispute Handling System within the Corporation." *Corporate Counsel's Quarterly*. 72-80.

Gives a comprehensive plan of action for institutionalizing ADR in a corporation. The same principles can be applied to agencies.

Miller, Jeffrey G. and Thomas R. Colosi. *Fundamentals of Negotiation: A Guide for Environmental Professionals*. Washington, DC: The Environmental Law Institute, 1989.

Uses examples of environmental issues to illustrate the resolution of disputes between organizations. Gives specific guidelines for "managed negotiation". Advocates careful preparation and definition of management tasks for the team leaders.

* Moore, Christopher and Jerome Delli Priscoli. *The Executive Seminar on Alternative Dispute Resolution (ADR) Procedures: The U.S. Corps of Engineers*. Boulder, CO: CDR Associates, 1989.

Designed as part of an intensive training course for agency executives, this material presents the spectrum of ADR processes, theoretical concepts, and skills as adjuncts to general management techniques.

Moore, Christopher W. *The Mediation Process: Practical Strategies for Resolving Conflict*. San Francisco: Jossey-Bass, Inc., 1986.

Written to assist lawyers and managers in understanding and implementing the stages of mediation. For professionals who wish to use collaborative problem-solving techniques. It treats mediation as an extension of negotiation. Included are addenda with forms and agreements.

_____. *Negotiating, Bargaining, and Dispute Resolution*. Boulder, CO: CDR Associates, 1989.

A resource designed for the U.S. Army Corps of Engineers for training in natural resource and public dispute resolution, this work gives an overview of conflict and an extensive analysis of values and communication as a background for negotiation and problem-solving. A complement to the *Executive Seminar* material.

* Patterson, Roger J. "Dispute Resolution in a World of Alternatives." *Catholic University Law Review* 37, no. 3 (Spring 1988): 591-604.

A concise introduction to ADR. It describes the concept, offers pertinent explanations of a range of alternatives and their uses, and concludes with a discussion on the choices of alternatives in dispute resolution. The author sees ADR as an alternative to, not a displacement of, litigation.

* Potapchuk, William R., James H. Laue, and John S. Murray. *Getting to the Table*. IWR Working Paper 90-ADR-WP-3. Fort Belvoir, VA: U.S. Army Corps of Engineers Institute for Water Resources, 1990.

A guide to designing a process for getting the parties of a dispute to an acceptable forum or "to the table" as a first step in an ADR procedure. It presents cases and guidance for step-by-step analysis and procedure and a variety of approaches to overcoming obstacles to initially getting parties together. The appendices include a Guide to Situation Assessment and Sample Protocols.

* Pritzker, David M. "Working Together for Better Regulations." *Natural Resources and Environment* 5, no. 2 (Fall 1990): 29-31, 51-53.

A description of the negotiated rulemaking process, reasons for using it, and potential costs and benefits. The article discusses when and how to use the process and reviews agency experience and relevant federal legislation.

Ruttinger, George D. "Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution and Negotiated Rulemaking". Report to the Administrative Conference of the U.S. 1986 ACUS 863, reprinted in *Negotiated Rulemaking Sourcebook* 246-288 and *Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution* 891-959.

Gives guidelines for finding and contracting with qualified mediators and other neutrals.

Seton Hall University Law Center, *Seton Hall Legislative Journal* 12 (1988).

Six papers from a Symposium on Critical Issues in Alternative Dispute Resolution. The sections address Mediation Confidentiality, Use of Court-Appointed Mediators and Special Masters, and Mediator Qualifications.

Singer, Linda R. *Settling Disputes: Conflict Resolution in Business, Families, and the Legal System*. San Francisco: Westview Press, 1990.

An effective overview of ADR in a variety of settings, this work discusses the advantages and disadvantages of ADR from the perspective of potential participants and others affected. See especially the chapters on "Settling Business Disputes" and "Settling Public Disputes," and "ADR and the Legal System."

Society of Professionals in Dispute Resolution. "Qualifying Neutrals: The Basic Principles." *Dispute Resolution Forum* (May 1989): 2-10.

An examination of the criteria for qualifying neutrals. It elaborates on central principles for parties and legislatures to use as guidelines.

Stulberg, Joseph B. and B. Ruth Montgomery. "Design Requirements for Mediator Development Programs." *Hofstra Law Review* 15, no. 3 (Spring 1987): 499-533.

This paper examines how an agency that administers an ADR program can train persons to serve as competent mediators. The authors use the neighborhood justice centers operating through the country as the basis of analysis in developing a framework for developing training. This article offers a practical, step-by-step analysis of the mediator's functions and considers in depth the dimensions of a mediator development program.

Susskind, Lawrence and Jeffrey Cruikshank. *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes*. New York: Basic Books, Inc., 1987.

Describes consensus-building strategies to effect solutions to conflicts. It is a practical guide on ADR procedures, from unassisted negotiation to assisted processes.

* Susskind, Lawrence E., Susan L. Podziba, and Eileen Babbitt. *IWR Case Studies 89-ADR-CSD-1,2,3,4, and 5*. Fort Belvoir, VA.: U.S. Army Corps of Engineers Institute for Water Resources, 1989.

These are five case studies of actual ADR proceedings to which the Corps of Engineers was a party. The minitrial was used in three of the cases and nonbinding arbitration in the other two. A history of each case is presented, the decisionmaking process for using ADR is analyzed, a presentation of the course of the proceeding is given, and the process is evaluated. In Case Study #5, "Goodyear Tire and Rubber Company" there are two analyses: one by the authors and another by the neutral. These studies present useful information on the procedures themselves, the decisions to use ADR, and criteria for evaluation.

Texas Bar Journal 51, no. 1 (January 1988).

The whole issue is devoted to ADR. Included are articles on confidentiality; insurance company claims; the minitrial, including a sample agreement; summary jury trial; and arbitration.

Ury, W.L., J.M. Brett, and S.B. Goldberg. *Getting Disputes Resolved: Designing Systems to Control the Cost of Conflict*. San Francisco: Jossey-Bass, 1988.

Presents a basic conceptual framework for dispute systems design in which the authors put forth basic design principles in a four-phase process. The aim is to design a dispute resolution system that will handle conflicts on a systematic basis. The book offers guidance on basic dispute resolution procedures and presents case studies on systems design.

C. Relevant Administrative Conference Recommendations

Recommendation 91-7, "Implementation of Farmer-Lender Mediation by the Farmers Home Administration." 1 CFR §305.91-7 (1992).

Recommendation 90-2, "The Ombudsman in Federal Agencies." 1 CFR §305.90-2 (1991).

Recommendation 89-2, "Contracting Officers' Management of Disputes." 1 CFR §305.89-2 (1991).

Recommendation 88-11, "Encouraging Settlements by Protecting Mediator Confidentiality." 1 CFR §305.88-11 (1991).

Recommendation 88-5, "Agency Use of Settlement Judges." 1 CFR §305.88-5 (1991).

Recommendation 87-11, "Alternatives for Resolving Government Contract Disputes." 1 CFR §305.87-11 (1991).

Recommendation 87-9, "Dispute Procedures in Federal Debt Collection." 1 CFR §305.87-9 (1991).

Recommendation 87-5, "Arbitration in Federal Programs." 1 CFR §305.87-5 (1991).

Recommendation 86-8, "Acquiring the Services of 'Neutrals' for Alternative Means of Dispute Resolution." 1 CFR §305.86-8 (1991).

Recommendation 86-7, "Case Management as a Tool for Improving Agency Adjudication." 1 CFR §305.86-7 (1991).

Recommendation 86-3, "Agencies' Use of Alternative Means of Dispute Resolution." 1 CFR §305.86-3 (1991).

Recommendation 86-1, "Nonlawyer Assistance and Representation." 1 CFR §305.86-1 (1991).

Recommendation 85-5, "Procedures for Negotiating Proposed Regulations." 1 CFR §305.85-5 (1991).

Recommendation 84-7, "Administrative Settlement of Tort and Other Monetary Claims Against the Government." 1 CFR §305.84-7 (1991).

Recommendation 84-4, "Negotiated Cleanup of Hazardous Waste Sites Under CERCLA." 1 CFR §305.84-4 (1991).

Recommendation 82-4, "Procedures for Negotiating Proposed Regulations." 1 CFR §305.82-4 (1991).

Recommendation 82-2, "Resolving Disputes Under Federal Grant Programs." 1 CFR §305.82-2 (1991).

D. Other Administrative Conference Publications

Administrative Conference of the U.S. *Agency Arbitration*. 1988.

Administrative Conference of the U.S. *The Ombudsman: A Primer for Federal Agencies*. 1991.

Anderson, David and Diane Stockton. *Ombudsmen in Federal Agencies: The Theory and the Practice*. Report to the Administrative Conference of the U.S., 1990 Recommendations and Reports of the Administrative Conference ("ACUS"), reprinted in 5 Admin. L.J. [] (1991).

Anderson, Frederick R. *Negotiation and Informal Agency Action: The Case of Superfund*. Report to the Administrative Conference of the U.S. 1984 ACUS 263, reprinted in 1985 Duke L.J. 261.

Bednar, Richard J. *Government Contracting Officers Should Make Greater Use of ADR Techniques in Resolving Contract Disputes*. Report to the Administrative Conference of the U.S. 1989 ACUS 149.

Bermann, George A. *Administrative Handling of Monetary Claims: Tort Claims at the Agency Level*. Report to the Administrative Conference of the U.S. 1984 ACUS 639, portions reprinted in *Federal Tort Claims at the Agency Level: The FTCA Administrative Process*, 35 Case W. Res. 509 (1984-85).

Bruff, Harold H. *Public Decisions, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, Report to the Administrative Conference of the U.S. 1987 ACUS 533, reprinted in 67 Tex. L. Rev. 441 (1989).

Cappalli, Richard B. *Model for Case Management: The Grant Appeals Board*, Report to the Administrative Conference of the U.S. 1986 ACUS 663.

Harter, Philip J. *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process*, Report to the Administrative Conference of the U.S. 1986 ACUS 165, reprinted in 1 Admin. L. J. 141 (1987).

Hostetler, Zona Fairbanks. *Nonlawyer Assistance to Individuals in Federal Mass Justice Agencies: The Need for Improved Guidelines*. Report to the Administrative Conference of the U.S. 1986 ACUS 47, reprinted in 2 Admin. L. J. 85 (1988).

Joseph, Daniel & Michelle L. Gilbert. *Breaking the Settlement Ice: The Use of Settlement Judges in Administrative Proceedings*. Report to the Administrative Conference of the U.S. 1988 ACUS 281, reprinted in 3 Admin. L. J. 571 (1990).

Mullins, Morell. *The Use of Settlement Judges and Simplified Proceedings before the Occupational Safety and Health Review Commission*. Report to the Administrative Conference of the U.S. 1990 ACUS 495.

Smythe, Marianne K. *The Reparations Program at the Commodity Futures Trading Commission: Reducing Formality in Agency Adjudication*. Report to the Administrative Conference of the U.S. 1988 ACUS 873, reprinted in 2 Admin. L. J. 39 (1988).

