



Interagency Alternate Dispute Resolution Civil Enforcement and Regulatory Section Newsletter

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ABA, FBA AND CERS HOSTING BROWN BAG

In partnership with the American Bar Association, and the Federal Bar Association, the Civil Enforcement and Regulatory Section will sponsor a series of brown bag seminars. The first brown bag will focus on ADR and the Law of the Sea. Participating agencies include the U.S. Coast Guard, the U.S. Maritime Commission and the National Marine Fisheries Service. Representatives from these agencies will discuss recent successes they have had using ADR.

Following this presentation, ADR experts who have implemented successful ADR programs will discuss the keys to developing and implementing a worthwhile and meaningful ADR program in their agencies. Opportunities for discussion and/or questions will be provided.

Future brown bags may focus on the use of ADR at small agencies and on environmental/energy disputes. If you have a topic that you would like addressed at a future brown bag, please contact us.

The "ADR and the Law of the Sea" session will be held on May 11, 2004, from 1:00 – 2:45 p.m., location to be determined. For further information, please contact Steven Shapiro at (202) 502-8894 or steven.shapiro@ferc.gov.

ATTORNEY GENERAL ENCOURAGES USE OF ADR

On March 17, 2004, Attorney General John Ashcroft delivered a letter to the Steering Committee of the Interagency ADR Working Group. In that letter he encouraged "using ADR as an effective mechanism to maximize our resources and further our goal of good government."

Further, he stated that:

...ADR helps makes the government more results-oriented, citizen-centered, and market-driven. It provides a forum that allows parties to avoid costly litigation and resolve their disputes effectively and

efficiently while addressing their business or resource interests. ADR provides for effective public participation in government decisions, encourages respect for affected parties, and nurtures good relationships for the future. Every ADR proceeding that reduces time or litigation costs, or narrows issues, or averts future complaints enables us to conserve our limited resources which must accomplish so much.

Following delivery of the letter, Robert McCallum, Jr., the Associate Attorney General, presented a report issued by his office recognizing the contributions that federal ADR is making to the President's vision of good government.

The complete text of the Attorney General's letter and the Associate Attorney General's report may be found, respectively at www.adr.gov/adrwgagltrtochair031204.htm and www.adr.gov/asgreport0304.htm.

FTC SETTLES UNFAIR PRACTICE CASE

The Federal Trade Commission ("FTC") issued an administrative injunctive order prohibiting a private corporation from making unsubstantiated claims about a device they produced. A few years later and in violation of the FTC's order, FTC investigations revealed that the corporation was continuing to make the unsubstantiated claims for the device. The United States Department of Justice brought suit for injunctive relief and civil penalties. The parties participated in unassisted settlement discussions but failed to reach agreement.

A private neutral mediated the dispute to resolution. Both sides agreed to a consent decree which provided that: (1) the defendant would stop making the unsubstantiated claims about the device; (2) the defendant could attempt to substantiate the claims through testing approved by the FTC; and (3) if the claims were substantiated, defendant could move to modify the FTC's administrative order. In addition, the decree imposed a suspended \$100,000 penalty subject to the accuracy of defendant's financial records. The mediator provided useful reality-testing and helped the defendant appreciate the magnitude of trial costs. Direct dialogue between the mediator and the corporation's representatives helped foster the resolution. From the

government's perspective, the settlement saved the Department six weeks of trial preparation, a week and a half of trial time, as well as the work associated with any appeal.

Department of Labor ADR Enforcement Pilot

In FY 2001, the Department of Labor earmarked funds to test the use of ADR in administrative and federal court enforcement actions brought under a variety of statutes. DOL awarded a research grant to an outside vendor to train and provide outside neutrals to mediate select DOL enforcement cases. The pilot had an 86% settlement rate.

Given limited funds, the pilot cases were carefully selected from a variety of programs, alleging violations under a variety of statutes, in both administrative and federal judicial venues, and at various stages of litigation. All of the cases, however, involved filed litigation that had resisted initial settlement attempts. Of the twenty-five cases selected for mediation, four were withdrawn for various reasons (the program was strictly voluntary for outside parties). Eighteen of the twenty-one cases that went through the entire mediation process, were fully resolved. Again, the factor that made this a notably high success rate was that these were all cases in litigation where prior settlement efforts had failed.

At the conclusion of the pilot, an outside evaluator sent surveys to all participants (including mediators) and directly interviewed some participants to assess reactions and identify strengths and weaknesses of the program. Almost all responders indicated they were "highly satisfied" with both the process and the results. Moreover, DOL learned that the outside professional mediators, with only a basic substantive background, were able to resolve a high percentage of enforcement cases regardless of the statutory allegations, litigation venue, stage of litigation, or initiating DOL program.

Overall, while somewhat limited in scope, the project proved to be useful, and quite successful as an additional means of resolving cases before trial. Unfortunately, the grant funds ran out in early 2003, and the pilot was terminated. The experience and knowledge in mediation gained by the attorneys in the Office of the Solicitor, however, will continue to be useful as more and more Administrative Law Judges and U.S. District Courts turn to required mediation efforts as part of the litigation process.

If you would like more information, you can e-mail Ronald G. Whiting, Deputy Solicitor for Regional Operations, at whiting.ronald@dol.gov.

Ask CERS and Answers

Dear CERS,

Thanks for the information so far. We've decided to mediate our enforcement case. Now, we have to find a neutral. Any suggestions?

Confused Advocate

Dear Confused Advocate,

The challenge is to find a neutral with a mediation approach, skills, personality, knowledge and experience to meet the needs of your case. All neutrals are not the same!

Here are some factors you should explore in selecting the appropriate neutral for your case:

- **Approach** - The approach taken by different mediators can vary from facilitative to evaluative. Most good mediators are able to use a range of approaches. Consider what type of approach and style is best for the needs of your case and the personalities of the parties.
- **Knowledge/Experience** - Generally, the more evaluative you want the neutral to be, the more specific legal/technical expertise the neutral should have regarding the substance of your case. However, it is always helpful if s/he has prior experience mediating your type of case.
- **Cost** - Parties generally split the mediator's fees and expenses. Sometimes a neutral will be willing to discount his/her fees for government cases.
- **Adherence to Codes of Professional Responsibility** ° Ensure that the neutral adheres to the codes of professional responsibility applicable to mediators, e.g., <http://acrnet.org/about/initiatives/QualityAssurance/standards-conduct.htm>
- **References** - Most established mediators are happy to provide references. Follow up and ask questions from the references and your colleagues about the mediator's reputation and prior work, particularly how s/he handled problems you anticipate arising in your case.

It is not unusual to interview a prospective neutral. For more information and assistance, be sure to talk with your agency's ADR Specialist.

Sincerely,
CERS

If you have any comments about this newsletter, would like to submit an article, or have any questions for "ASK CERS AND ANSWERS", please email Leah Meltzer at meltzerd@sec.gov or Elly Cleaver at elly.cleaver@usda.gov. The editors would like to thank the following people for their contribution to this issue: David Batson, Linda Cinciotta, Ron Whiting, Deborah Kant, and Rick Miles