Interagency Alternate Dispute Resolution
Civil Enforcement and Regulatory Section
Newsletter

Volume 3, Issue 2, March 2006

NEWS FROM CERS

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

"When do I know if a case is appropriate for ADR?" Scholars and practitioners have prepared articles and lists identifying case screening factors to help answer this question. These lists often focus on factors such as whether: maintaining a relationship is desired, there are underlying business or environmental resource interests that need to be met, the parties want to exercise control over the outcome, communications between the parties have broken down, a trial will be costly, or whether a swift resolution of the matter is needed.

An alternative approach might involve looking at your view of the case. Have you ever in frustration thought that if only the other side was reasonable, your case could settle? Have you in drafting an order for a regulatory agency asked, "Why am I wasting my time on this case? Why can't the parties agree to a settlement?" If you have asked yourself any of these questions, then the case may be a good candidate for ADR.

The Civil Enforcement and Regulatory Section of the ADR Interagency Working Group can assist you in addressing the above questions. We could share with you case screening lists or provide examples of how ADR was successfully used in civil enforcement and regulatory disputes. We could also share with you examples of when ADR might be inappropriate. If you are interested in learning more about these issues, please contact Richard Miles, Chair of the Civil Enforcement and Regulatory Section, 202 502-8702 or by email at **richard.miles@ferc.gov**.

SEC V. PENNY STOCK FRAUDSTERS

The Securities and Exchange Commission brought a civil injunctive action in federal district court alleging that the defendants perpetrated two fraudulent schemes involving several penny stock companies whose stock is traded in the over-the-counter market.

The complaint alleged that, in the first scheme, defendants inflated the price of the stock of a penny stock company, and in the second scheme, defendants evaded the registration requirements by issuing unregistered securities of four penny stock companies, disseminated false and misleading information about those companies and manipulated the market in the stock of three of those companies.

The Commission obtained default judgments against nine of the twelve defendants.
The district court judge then ordered the remaining parties into mediation with a mutually acceptable mediator, Hon. Lourdes G. Baird (Ret.). The matter ultimately settled and the district court entered judgments with the consent of the defendants that:

- permanently enjoined two of the remaining defendants from violating registration provisions of the Securities Act and antifraud provisions of the Securities and Exchange Act; permanently barred them from participating in any penny stock offering; ordered one of them to pay $99,354.77 and ordered the other to pay $357,034.25; and

- permanently enjoined the other remaining defendant from violating registration provisions of the Securities Act and ordered it to pay $35,000.

The case against the three remaining defendants was well suited to mediation. All parties were interested in settling. In particular, the litigation risk

for the three defendants was extremely high because the Commission's case was so strong. The Commission was interested in resolving the case as efficiently as possible to avoid unnecessary expenditure of resources.

Judge Baird's considerable experience enabled her to fully comprehend the most complex issues in the case as well as each party's negotiation parameters. Using this knowledge, she assisted the parties in reaching a mutually acceptable settlement. One of the most effective techniques she used was to help the remaining defendants understand the weaknesses of their legal case. Although the SEC attorneys had pointed out these weaknesses during prior negotiations, the result was not as effective as when the evaluation came from a neutral, retired judge. Additionally, the mediation, with Judge Baird at the helm, focused the discussions in a way that unassisted negotiations had not.

ADR ON MY MIND IN GEORGIA

The 8th Annual ABA Section of Dispute Resolution Conference - **ADR on My Mind in Georgia** - is April 5-8, 2006.

The core of the conference features 86 sessions over two and a half days covering the diverse world of dispute resolution. Organized into 15 subject and practice areas tracks, you'll receive an entire year's worth of CLE in just a few days. For detailed session titles, times and faculty information, go to **http://www.abanet.org/dispute/conference/2006/mainsession.doc**

In addition, the Conference offers a

- **Thursday Morning Skills Training.** For more information, go to **http://www.abanet.org/dispute/conference/2006/RptWebSkills.pdf**
- **National Court Conference.** For more information, go to **http://www.abanet.org/dispute/conference/2006/DR_BrochureAtlanta_NCCA.pdf**
- **The Legal Educators' Colloquium.** For more information, go to **http://www.abanet.org/dispute/conference/2006/DR_BrochureAtlanta_LEC.pdf**
- **The Forum on Expanding Opportunities.** For more information, go to **http://www.abanet.org/dispute/conference/2006/DR_BrochureAtlanta_FEO.pdf**

To register online, or learn more information about the conference, go to **http://www.abanet.org/dispute/conference/**

NRC EVALUATES PILOT ADR PROGRAM

In October, 2004, the Nuclear Regulatory Commission (NRC) began a pilot program using mediation in its enforcement programs.

These programs enforce NRC regulations that protect whistleblowers by prohibiting licensees from retaliating against its employees who raise safety concerns. NRC's primary concern in whistleblower protection is to ensure that workers feel free to raise safety concerns.

In the pilot program, NRC offers mediation in two different situations:

- Pre-investigation, between the whistleblower and the employer licensee or licensee contractor. The NRC is not a party to the mediation. NRC's interest is to resolve the issue without necessitating a formal NRC investigation. Early resolution would result in resource savings as well as minimizing negative impact to the work environment.
- Post-investigation, between NRC and a licensee whom the staff believes has willfully retaliated against a whistleblower. The NRC is a party to the mediation. Any settlement agreement is documented in an order. The NRC anticipates that, compared to the traditional enforcement process, mediation will reduce the amount of NRC resources required. In addition, mediation's flexibility may result in resolutions outlining more effective corrective action by the licensee than could be achieved from the traditional enforcement process.

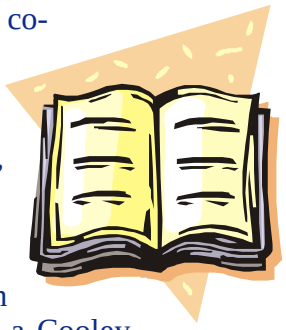
The program is voluntary for all parties; when the NRC is a party, however, it will automatically offer ADR, except in a few limited instances.

The Institute on Conflict Resolution at Cornell University (Cornell) provides administrative neutral services and the roster of mediators for the program. Although Cornell is the pilot program administrator, the NRC maintains substantial involvement and oversight.

The NRC plans to evaluate the program in spring 2006, providing information to enable the Commission to decide whether to continue the pilot as it is currently structured.

BOOK REVIEW

John Cooley, **Creative Problem Solver's Handbook for Negotiators and Mediators : a Pracademic Approach, Vols. I and II** (American Bar Association Section of Dispute Resolution 2005), ISBN 1-59031-381-X.



This two-volume handbook, co-sponsored by the American Bar Association and the Association for Conflict Resolution, guides practitioners, academics, and students in practical creative problem solving methods, tools, and techniques for use in negotiation and mediation. "Pracademics", a Cooley-coined term, is the "art and science of translating the theory of creative problem solving into practice and conversely, converting the practice of creative problem solving into theory." He is especially interested in using an interdisciplinary approach.

Volume One contains generic concepts and strategies in both problem solving and alternative dispute resolution (ADR), including topics such as strategies for creative problem solving, sample applications, creative approaches to process design and overcoming impasse. According to the handbook, Volume One is directed toward practitioners, academics and students of creative problem solving.

Volume Two, directed more toward practitioners, is focused on specific creative problem solving techniques and tools, prefaced by charts clearly outlining where and under which circumstances to apply each technique.

Substantively, Cooley presents an array of information in an impartial manner, describing both adversarial models and collaborative models of negotiations without a stated preference for either.

Unfortunately, the volumes suffer from two problems: the quality of the contributing authors and approaches is uneven; and the volumes' structure makes it difficult to use. For example, articles in Volume II are sorted alphabetically by author, rather than topic.

A paramount question is, why would a government employee engaged in enforcement or regulatory work be interested in such a book - especially given that there are few articles that directly relate to federal practice? While the volumes would most likely be immediately relevant to academics and others interested in theory underpinning the use of creativity in negotiation and mediation, the volumes offer an opportunity to be challenged. Anecdotal evidence suggests that government employees, who have negotiation or mediation responsibilities in their jobs, often tend to work within a box of tried and true techniques and acceptable outcomes. To some extent, this is necessary to support enforcement and regulatory programs. Many of us, however, have lost or not been encouraged to exercise our creative problem solving spark. Browsing through this book, selectively reading some of the articles may unearth long hidden approaches and etch new patterns that we can apply both in our day to day jobs and in our personal lives.

RECENT INITIATIVES IN THE TRIBAL CONSULTATION PROCESS

Recently, the Council on Environmental Quality (CEQ), the Department of the Interior's (DOI's) Office of Environmental Policy and Compliance, and DOI's Office of Collaborative Action and Dispute Resolution (CADR) co-sponsored a presentation on "Tribal Involvement in Federal Decision Making and NEPA" (the National Environmental Policy Act). This session was part of an ongoing federal Dialogue Series on government-to-government consultation which CADR sponsors.

Previous sessions in the Dialogue Series were 1) "Beginning the Dialogue: Government-to-Government Consultation, Coordinating the Lessons Learned and Looking to the Future," a 2-day workshop which included presentations on the legal and historical bases for consultation, federal and tribal perspectives on consultation, and a discussion with Native federal employees; 2) "The Law Behind Government-to-Government Consultation," and 3) "Best Practices in Consultation under Section 106 of the National Historic Preservation Act." Agency

personnel and guest speakers from tribes and academia were past presenters.

Agencies have an obligation to consult with tribal governments before making decisions that could impact the tribe. Horst Greczmiel, Associate Director for NEPA Oversight, CEQ, noted that tribal involvement in the NEPA process can occur on three different levels: (1) Tribal governments can be cooperating agencies; (2) Tribal governments, organizations, and nongovernmental organizations can join the Federal agencies preparing the NEPA analyses and documents by mutual agreement to establish a regular exchange of information; and (3) Native individuals may participate in the NEPA process as interested stakeholders. He explained that when an environmental review is conducted under NEPA, the agency must also address the question of what additional responsibilities it has under the consultation process.

Cheryl Wasserman, Associate Director for Policy Analysis, Office of Federal Activities, Environmental Protection Agency, and Chair of the CEQ Work Group on Stakeholder Training, explained work that is being done to develop training modules for NEPA decision-makers and others. She particularly discussed the "Tribes and NEPA" module on tribal involvement in NEPA, which is under development with input from tribes, tribal organizations and federal agencies. This module will be thoroughly vetted before it is generally distributed. For information or questions on the training initiative and the "Tribes and NEPA" module, please contact Cheryl at **wasserman.cheryl@epa.gov** or 202-564-7129.

You can find information from Dialogue Series events, including this session, along with topics of further interest to Series participants, on CADR's website at **http://www.doi.gov/cadr**. For more information, or if your agency would be interested in co-sponsoring an event in the Series on a topic listed or another consultation topic, please contact Kathryn Lynn, Native ADR Program Coordinator, CADR, at 202-327-5315 or **kathryn_lynn@ios.doi.gov.**

ASK CERS AND ANSWERS

Dear CERS,

The mediator in my administrative penalty action has asked that each party begin the mediation session with an opening statement. Should I do this differently than an opening statement I would make before the judge?

Dedicated Advocate

Dear Dedicated Advocate,

Thank you for raising this important practical consideration. YES, you will want to use this opportunity differently than a statement before the court. You should remember that unlike a judge, the mediator will not be rendering a decision; rather he/she will be helping you reach a settlement with the complainant. Your opening statement provides you the chance to signal to both the mediator and your opponent and his/her client, important information about what is important to your client and how you will negotiate.

Consider using your opening statement to:

- Educate the mediator and your opponent about the reasons behind the positions you will take in the mediation;
- Express your willingness to negotiate but explain any limits on your negotiation flexibility;
- Express & provide a justification for your opening negotiating position; and
- Identify and explain any perceived challenges you see to reaching a settlement.

Additionally, since you are trying to elicit the support of your opponent in coming to resolution, consider the tone and word choice of your opening remarks.

Taking this type of an approach in your opening statement will not only set the table for an effective negotiation; it will also provide the mediator with information on how to most effectively assist you and your opponent in that effort.

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 co-editors Leah Meltzer at **meltzerd@sec.gov** or Francis ("Chip") Cameron **FXC@nrc.gov.** The co-editors would like to thank the following people for their contributions to this issue: David Batson, Nick Hilton, Jason Howard, Kathryn Lynn, Rick Miles, Ellen Miller, Deborah Osborne, and Sarah Stanton.