I. INTRODUCTION

Today, the powers and responsibilities of federal Administrative Law Judges (ALJ or Administrative Law Judge) are defined in the Administrative Procedure Act[1] (APA) and in the enabling acts and procedural rules of the various agencies[2]. Their powers, duties, and status have been considered on several occasions by the federal courts.[3]

Historically, however, the need for administrative hearing

---

[1] Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, 1305, 1306, 3105, 3344, 5372, and 7521 (1994 and Supp. V 1999), originally enacted as ch. 324, 60 Stat. 237 (1946). The APA is printed in an Appendix to this Manual.

The source of the federal Administrative Law Judge's authority and independence have been succinctly described at the website of the Federal Administrative Law Judges Conference, http://www.faljc.org/faljc1.html

> Administrative Law Judge powers and decisional independence come directly from the Administrative Procedure Act "without the necessity of express agency delegation," and "an agency is without the power to withhold such powers" from its Administrative Law Judges. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 74 (1947), reprinted in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK 140 (2d ed. 1992); In the Matter of Bilello [Current Transfer Binder] Comm. Fut. L. Rep.(CCH) 26,032 (Mar. 25, 1994) (citing S. REP. NO. 752, 79th Cong., 1st Sess. 21 (1945)); Tourist Enterprises Corporation"ORBIS", CAB Docket No. 27914, Recommended Decision served October 7, 1977, p. 11, n.9, adopted by CAB Order 78-5-11, dated May 8, 1978, p. 2; "Judicial Response to Misconduct," p. 114 (ABA Center for Professional Responsibility 1995).

[2] A list of citations to the procedural rules of many federal agencies that conduct adjudicative hearings is set forth in Appendix IV.

[3] *See, e.g.,* Butz v. Economou, 438 U.S. 478 (1978); Ramspeck v. Federal Trial Examiners Conference, 345 U.S.128 (1953); Riss & Co. v. United States, 341 U.S. 907 (1951); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); Benton v. United States, 488 F. 2d 1017 (Ct. Cl. 1973).

officers was recognized well before the APA[4]. The large number of cases where an agency was required, statutorily or constitutionally, to afford a hearing impelled federal agency heads to delegate responsibility for conducting those hearings to subordinates[5]. However, these subordinates were subject to the direction and control of the agency, and thus perceived as being prone to make findings favorable to the agency. Considerations of fairness led to granting these hearing officers increasing degrees of independence, culminating in the provisions of section 11 of the APA,[6] which accords the Administrative Law Judge (ALJ)[7] a unique status.[8]

Although an employee of the agency, the ALJ is responsible for conducting formal proceedings, interpreting the law, applying agency regulations, and carrying out the policies of the agency

---

[4] *See* Morgan v. United States, 298 U.S. 468 (1936). For an article summarizing the historical background of administrative adjudication and ALJs in the United States, see Michael Asimow, *The Administrative Judiciary: ALJs in Historical Perspective*, 19 J. NAALJ 25 (1999). For another historical account, which unfortunately is no longer widely available, see The Federal Administrative Judiciary, 1992 ACUS 771, 798-303. This is a report prepared by the Administrative Conference of the United States, a government organization which is not longer in operation. *See supra,* Preface to 2001 Interim (Internet) edition of this Manual.

[5] *See* Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1953).

[6] The original section 11 has, of course, been amended and its successor provisions are now found mainly in 5 U.S.C. §§ 3105 (1994), 5372 (1994 and Supp. V 1999), and 7521 (1994).

[7] The title was changed to Administrative Law Judge by United States Civil Service Commission regulation on Aug. 19, 1972, 37 Fed. Reg. 16787, and by statute on March 27, 1978, 5 U.S.C. § 3105 (1994).

[8] *See* Ramspeck v. Federal Trial Examiners Conf., 345 U.S. 128, 132 ("a special class of semi-independent subordinate hearing officers"). See also, Local 134, IBEW v. NLRB, 486 F.2d 863, 867 (7th Cir. 1973).

in the course of administrative adjudications[9]. To insure independent exercise of these functions, the ALJ's appointment is absolute. The ALJ is not subject to most of the managerial controls which can be applied to other employees of a federal agency. For example, ALJ's are not subject to performance appraisals, and compensation is established by the Office of Personnel Management, independent of agency recommendations.[10] Furthermore, the agency can take disciplinary action against the Judge only when good cause is established in proceedings before the Merit Systems Protection Board.[11]

---

[9] The discussion in this Manual assumes that the Administrative Law Judge is an employee of an agency charged with enforcement and policy making responsibilities for a substantive program. However, a few Administrative Law Judges are employed by agencies which adjudicate cases originating in the enforcement programs of other agencies. For example, the Occupational Safety and Health Review Commission (OSHRC) (29 U.S.C. § 661 (1994)) and the Mine Safety and Health Review Commission (MSHRC) (30 U.S.C. § 823 (1994) are independent agencies which conduct hearings in enforcement cases brought by the Department of Labor. Therefore, some of the discussion in the text dealing with the relationship of the Judge to his agency is not directly applicable to OSHRC, MSHRC, or similar agencies.

[10] See 5 U.S.C. § 4301(2)(D) (1994)(exempting ALJs from the definition of "employee" in context of performance appraisals) Basic grades and pay levels of ALJs are addressed in 5 U.S.C. § 5372(1994 and Supp. V 1999), which also provides that OPM shall determine levels of ALJ positions by regulation. For an article summarizing many aspects of performance evaluation of ALJs and proposals to modify the current system, see James P. Timony, *Performance Evaluation of Federal Administrative Law Judges*, 7 ADMIN. L.J. AM. U. 629 (1994). An earlier student note on the topic also provides background on this topic. L. Hope O'Keeffe, *Note, Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 GEO. WASH. L. REV. 591(1986). For an article which also deals with state ALJs, see Ann Marshall Young, *Evaluation of Administrative Law Judges*, 17 J. NAALJ 1 (1997).

[11] 5 U.S.C. § 7521 (1994). An important early decision of a Merit Systems Protection Board (MPSB) ALJ stated that discipline or discharge for good cause should not normally be based on the content of an ALJ's opinions or the ALJ's conduct of his/her

cases, unless there were "serious improprieties, flagrant abuses, or repeated breaches of acceptable standards of judicial behavior." In re Chocallo, 1 M.S.P.R. 605, 632 (1980), aff'd, 2 M.S.P.B. 20, aff'd w/o opinion, 716 F. 2d 889 (3d Cir. 1983), cert. den. 464 U.S. 983 (1983). Another significant, relatively early decision was Social Security Adm. v Burris (11/3/88, MSPB) Docket No. HQ752186100023, 39 MSPR 51, aff'd w/o opinion, 878 F.2d 1445 (Fed. Cir. 1989)(stating that good cause was shown by proof of insubordination, but as to another charge, agency did not establish good cause for disciplining ALJ for ALJ's including in his decisions statements that the agency was attempting to influence his decisions) Some other significant cases interpreting or applying this provision are Benton v. U.S., 203 Ct. Cl. 263, 488 F.2d 1017 (Ct. Cl. 1973); Association of Administrative Law Judges v. Heckler, 594 F. Supp. 1132 (D. D.C. 1984); Goodman v. Svahn, 614 F. Supp. 726 (D. D.C. 1985); Brennan v. Department of Health & Human Services, 787 F.2d 1559, 1563 (Fed. Cir. 1986)(stating that charges based on reasons which constitute improper interference with administrative law judge's performance of quasi-judicial functions cannot constitute "good cause."), cert. den. 479 U.S. 985 (1986); McEachern v. Macy, 233 F. Supp. 516 (D. S.C. 1964), aff'd, 341 F.2d 895 (4th Cir. 1965)(involving failure to pay financial obligations).

There also have been several relevant cases decided since the 3rd edition of this Manual was published. SSA v Dantoni, 77 MSPR 516 (1998), aff'd 173 F. 3d 435 (Fed. Cir. 1998) (decision without published opinion, full text available at 1998 U.S. App. LEXIS 24902)(MPSB opinion recounting discharged ALJ's conduct harassing and embarrassing Deputy Chief ALJ by, among other things, forging Deputy Chief ALJ's signature on order forms and other documents, resulting in Deputy Chief ALJ's receiving 1547 pieces of mail, including solicitations for a book entitled "How to Get the Women You Desire into Bed"); Carr v SSA 185 F3d 1318 (Fed. Cir. 1999)(stating that agency had carried its burden of establishing charges against whistle-blowing ALJ whom it sought to remove for, inter alia, reckless disregard for personal safety of others; even if ALJ had also engaged in protected activity, agency would have sought to remove her even in absence of that activity; noting also that there were charges which ALJ did not contest, such as persistent use of vulgar and profane language, demeaning comments, sexual harassment and ridicule, and interference with efficient and effective agency operations); Office of Hearings & Appeals, Social Sec. Admin. v. Whittlesley, 59 MSPR 684 (1993), aff'd w/o op, 39 F3d 1197 (Fed. Cir. 1994),

A. General Overview

Before considering some specific APA-recognized powers of the Administrative Law Judge, a general overview may be helpful. To begin with, the Administrative Law Judge is a common feature in formal agency adjudications. Whenever the APA applies to a matter which must be determined on the record of a trial-type hearing, the proceedings with some exceptions are likely to be conducted by an Administrative Law Judge. In fact, the APA is quite explicit. For proceedings required by statute to be determined on the record after notice and opportunity for an evidentiary hearing:

> (b) There shall preside at the taking of evidence --
> (1) the agency;
> (2) one or more members of the body which comprises the agency; or
> (3) one or more administrative law judges appointed under section 3105 of this title.
> This subchapter does not supersede the conduct of specified classes of proceedings . . . before boards or other employees specially provided for . . . under statute.[12]

Boards, Commissions or Administrators heading a federal agency do not routinely preside over hearings. However, as the language quoted above indicates, an Administrative Law Judge is not

---

cert den 514 U.S. 1063(1995)(stating that good cause to remove ALJ was shown by evidence that he violated agency rules and settlement agreement by engaging in unauthorized practice of law).

For some relevant articles, see Rosenblum, *Contexts and Contents of "For Good Cause" as the Criterion for Removal of Administrative Law Judges: Legal and Policy Factors*, 6 W. NEW ENG. L. REV. 593 (1984); Timony, *Disciplinary Proceedings Against Federal Administrative Law Judges*, 6 W. NEW ENG. L. REV. 807 (1984).

[12] 5 U.S.C. § 556(b)(1994)(emphasis added).

required if some statute specifically provides otherwise.[13]

An important study in the 1990's established that there are a significant number of proceedings where the hearing officer is not an Administrative Law Judge[14]. Still, the Administrative Law Judge seems to provide a "model," even in such cases. Especially noteworthy, this study pointed out that: (1) such hearing officers often are -- like Administrative Law Judges -- administratively "housed" in "independent" organizations separate from the rest of the agency;[15] and (2) agencies apparently are willing "to accord these presiding officers a fair degree of independence."[16] Moreover, whether the term ALJ or "hearing officer" is used, the essential function of conducting an adjudicative proceeding is basically the same. Most of this Manual, therefore, should be relevant to non-Administrative Law Judge hearing officers.

Several other general points regarding Administrative Law Judges should be made at this juncture. In most types of cases the ALJ issues either an initial or a recommended decision, orally or in writing[17]. The ALJ's decision is subject to review by the agency (a function sometimes delegated to an agency official or to a review board),[18] and the agency's decision is in

---

[13] *Id.*

[14] Frye, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 AD. L. REV. 261, 264 (1992).

[15] *Id.* at 341-43.

[16] *Id.* at 343. For another article describing the non-ALJ federal agency adjudicators, as of 1992, see Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, in *Symposium: Contemporary Issues in Administrative Adjudication,* 39 UCLA L. REV. 1341 (1992).

[17] 5 U.S.C. § 557(b) (1994). In cases involving rulemaking or initial licenses, the agency may direct that the Judge's decision be omitted and the formal record be certified directly to the agency for decision. *Id.*

[18] *See, e.g.,* Northeastern Broadcasting, Inc. v. FCC, 400 F.2d 749 (D.C. Cir. 1968)(FCC Review Board); McDaniel v. Celebrezze, 331 F.2d 426 (4th Cir. 1964) (Social Security & Appeals Council); 9 CFR § 317.369 (2000) (Department of Agriculture nutrition labeling; hearing before an ALJ with appeal

turn usually subject to review by the courts[19]. The ALJ's decision can become final agency action if review is not directed by the head of the agency or other official designated to entertain appeals from the ALJ's decision.[20]

The Administrative Law Judge is the person primarily responsible for developing an accurate and complete record and a fair and equitable decision in a formal administrative proceeding. The parties to the proceeding, including agency staff, are all subject to pressures and preconceptions which may inhibit objective presentation of facts and policies. The reviewing agencies and the courts, though independent and objective, have heavy work loads and other obligations. They simply do not have the time and the facilities to investigate all aspects of each formal proceeding. This function has come to be the responsibility of the Administrative Law Judge. Consequently, an Administrative Law Judge has a strong affirmative duty not only to try a case fairly and to write a sound decision but to insure that an accurate and complete record is developed.

In *Scenic Hudson Preservation Conference v. Federal Power Commission*, the Second Circuit stated:

> [T]he Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly

---

to the Department's "Judicial Officer"; 43 CFR § 4.1 (2000)(various Department of the Interior appeals boards, e.g., Board of Indian Appeals, Board of Land Appeals; 40 CFR § 1.25(e)(2000)(Environmental Appeals Board)).

[19] 5 U.S.C. §§ 701-706 (1994). However, judicial review can be statutorily precluded, at least in certain kinds of cases. Lindahl v. OPM, 470 U.S. 768 (1985); Webster v. Doe, 486 U.S. 592 (1988).

[20] 5 U.S.C. § 557(b)(1994)("When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within the time provided by rule.") For examples of implementing regulations, see 24 CFR § 1720.605 (2000)(HUD); 29 CFR § 580.13 (2000) (civil penalties for violations of federal child labor laws).

> calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission. . ..
>
> The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts.[21]

Although the court was referring to an administrative agency and not directly to Administrative Law Judges, the net result is the same. Because the agency itself does not preside over the taking of evidence, the ALJ, as presiding officer on behalf of an agency, has the initial responsibility for developing an accurate and complete record[22]. This may require affirmative measures at several stages of a proceeding. The ALJ certainly should call the attention of the parties to gaps in the record and insist that they be filled. The ALJ also may need to question or cross-examine a party's witnesses,[23] and may even call witnesses or raise issues *sua sponte* upon essential matters not covered adequately by the parties[24]. The ALJ may direct the parties to

---

[21] 354 F.2d, 608, 620 (2d Cir. 1965),later quoted in Confederated Tribes and Bands of the Yakima Indian Nation v. FERC, 746 F.2d 466, 472 (9th Cir. 1984) (as amended)

[22] *See* Marsh v. Harris, 632 F.2d 296 (4th Cir. 1980).

[23] *See, e.g.*, Beck v. Mathews, 601 F.2d 376 (9th Cir. 1979); Holland Furnace Co. v. FTC, 295 F.2d 302 (7th Cir. 1961); NLRB v. International Brotherhood of Electrical Workers, 432 F.2d 965 (8th Cir. 1970).

[24] Examples of this necessary zeal in developing a complete record may be found in the opinions of Judge Seymour Wenner in *The Permian Basin Rate Case*, 34 FPC 159 (1965), and Judge Stephen Gross in the *Continental-Western Merger Case*, CAB Docket 33465 (served April 16, 1979), in calling their own witnesses when they found the record inadequate. For examples of cases recognizing a hearing officer's authority, zeal or no zeal, to protect and develop the record in a fair manner, see also, e.g., NLRB v. Staten Island Hotel, 103 F. 3d 858, 860 (2d Cir. 1996)(ALJ's authority to reopen a record sua sponte judicially reviewed under

discuss in oral argument, in brief, or in special memoranda, any issues or points which are germane, and he may direct counsel to research a question of law and policy at any time.[25]

If the agency or a court finds omissions in the record, inappropriate procedures, insufficient evidence, or other inadequacies, frequently the case must be returned to the Administrative Law Judge for correction or supplemental action[26]. This, of course, involves additional work, expense and further delay.

B. Specific APA Powers of the Administrative Law Judge

Section 556(c) of the APA furnishes a convenient point of departure by listing some of the powers and functions which an agency may be authorized to delegate to Administrative Law Judges[27]. Specifically, and in the order listed in § 556(c)

---

an abuse of discretion standard); Freeman United Coal Mining Co. v. Director, OWCP, 94 F. 3d 384, 388 n.2 (7th Cir. 1996)(ALJ sua sponte inquiry into earlier application necessary in order to determine which regulations applied to claim); Poulin v. Bowen, 817 F.2d 865 (D.C. Cir. 1987); Fernandez v. Schweiker, 650 F.2d 5 (2d Cir. 1981); Busey v. St. Hilaire, 1990 NTSB Lexis 20, Order EA-3073, Docket SE-8606 (1990) (recognizing that ALJs may address, sua sponte, relevant matters which the parties may have overlooked, or deliberately ignored).

For a recent ALJ decision recognizing this duty and power, see In the Matter of Pepperell Associates, Respondent, 1999 EPA ALJ LEXIS 16 (February 26, 1999).

For recent article related to this topic, see Allen E. Schoenberger, *The Active Administrative Law Judge: Is There Harm in an ALJ Asking?*, 18 J. NAALJ 399 (1998); Jeffrey Wolfe Jeffrey and Lisa B. Proszek, *Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer*, 33 Tulsa L. J. 293 (1997).

[25]Form 8-a in Appendix I is a sample order directing the parties to research a question of law.

[26] See, Marsh v. Harris, 632 F.2d 296 (4th Cir. 1980).

[27] However, § 556(c) is not limited expressly to Administrative Law Judges. By its own terms, § 556(c) extends to "employees presiding at hearings" which are subject to § 556 of the APA. For examples of implementing procedural regulations, see

itself, an Administrative Law Judge may: (1) administer oaths and affirmations; (2) issue subpoenas authorized by law; (3) rule on offers of proof and receive relevant evidence; (4) take depositions or have depositions taken when the ends of justice would be served; (5) regulate the course of the hearing; (6) hold conferences for the settlement or simplification of the issues by the consent of the parties, or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter; (7) inform the parties about the availability of one or more alternative means of dispute resolution, and encourage use of such methods; (8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy; (9) dispose of procedural requests or similar matters; (10) make or recommend decisions in accordance with section 557 of the APA; and (11) take other action authorized by agency rule consistent with the APA.

Two important points should be emphasized with respect to this list. First, the Administrative Law Judge obviously is in many ways the functional equivalent of a trial judge in federal or state court. Receiving relevant evidence, ruling on offers of proof, holding conferences, disposing of procedural matters, and regulating the course of hearings obviously involve the very essence of the judicial function. (Equally obvious, many of the functions enumerated in § 556(c) require Administrative Law Judges to exercise judicial-type discretion and judgment.)

Second, the underlined passages in the list above emphasize a less obvious, but important, aspect of the administrative Law Judge's role. Recent changes in federal law,[28] and § 556(c) in

---

24 CFR § 26.1, et seq.(2000) (HUD)(24 CFR § 26.2 specifically sets out the powers of administrative law judges and hearing officers); for another set of implementing procedural regulations, which are apparently limited to proceedings under one federal statute, see 24 CFR § 1720.105, *et seq.* (2000) (HUD)(hearings under Interstate Land Sales Full Disclosure Act).

[28] Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990) (with changes to section numbering in Title 5 made by the Administrative Procedure Technical Amendments Act, Pub. L. No. 102-354, 106 Stat. 944 (1992)) (codified mainly at 5 U.S.C. §§ 571-83, with codification of miscellaneous provisions in various sections of titles 9, 28, 29, and 41). Further amendments were made by the Administrative Dispute

particular,[29] remove any doubt that Administrative Law Judges can be authorized to go beyond a narrow or rigid version of the judicial role. In a phrase, the changes involve "alternative dispute resolution," a topic which warrants separate treatment in this Manual.

C. Alternative Dispute Resolution and Administrative Law

1. General Background

One of the most significant legal developments during the past three decades has been a strong movement toward using alternatives to formal adjudication in the resolution of disputes. A term frequently employed to describe this movement is "alternative dispute resolution" (ADR or dispute resolution). The term itself, ADR, actually is a short-hand label which covers a lot of territory. It denotes an open-ended, evolving set of techniques and concepts. It is an "inclusive"[30] and elastic term, which embraces not only established concepts such as negotiation, arbitration and mediation, but also a growing variety of innovations and hybrids[31]. As the words themselves imply, perhaps the most important common denominator linking various ADR techniques is their nature as alternatives -- alternatives to formal litigation as a means of resolving disputes.

The term "ADR" eludes precise definition. A wide assortment of procedural devices -- some of which have not yet been invented -- could fairly be classified as ADR. As a concept, ADR is still

---

Resolution Act of 1996, Act Oct. 1996, P.L. 104-320, 110 Stat. 3870 (amending, *inter alia*, 5 U.S.C. §§ 569, 571, 571 note, 573, 574, 575, 580, and 28 U.S.C. § 1491, and 41 U.S. § 605).

[29] 5 U.S.C. § 556(c) was amended by §4 of the Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736, 2737 (1990).

[30] Administrative Conference of the U.S., THE ADMINISTRATIVE DISPUTE RESOLUTION ACT: GUIDANCE FOR AGENCY DISPUTE RESOLUTION SPECIALISTS 3 (1992) (hereafter, GUIDANCE FOR AGENCY DISPUTE RESOLUTION SPECIALISTS).

[31] See L. Ray, *Emerging Options in Dispute Resolution*, 75 A.B.A. JOURNAL 66 (June, 1989). Among the standard publications on ADR in the 1990's, there are ALI-ABA, ALTERNATIVE DISPUTE RESOLUTION: HOW TO USE IT TO YOUR ADVANTAGE: ALI-ABA COURSE OF STUDY MATERIALS (1996); Jay Grenig, Alternative Dispute Resolution with Forms (2d ed 1997).

evolving. The main qualification for being classified as ADR seems to be that the technique or process offers a substitute for formal adjudication.

Despite the open-ended quality of ADR as a concept, ADR still is susceptible to classification and organizing principles of one kind or another. One of the typical ways of classifying ADR techniques is to conceive of them in terms of a spectrum or continuum of methods, arranged according to the degree of control remaining in the hands of the parties[32]. At one end of the spectrum are procedures where the parties retain virtually complete control, with no input from neutrals or non-parties. Here, we would find the very traditional concept of voluntary, unstructured negotiation between (or among) the parties. At the other end of the spectrum are procedures where the parties surrender control over resolution of the dispute to some third party. There, we would find another traditional concept, binding arbitration. With binding arbitration, the result of the arbitrator's decision is indistinguishable, as a practical matter, from adjudication by a court. Between the extremes is a wide range of techniques and devices which, for the most part, share one feature -- the intervention of some third party who plays variations on the theme of mediation.

2. Relevance of ADR to Administrative Law Judges.

Familiarity with ADR, as a concept and process, is likely to become an important part of the competent ALJ's professional qualifications. Even without the Administrative Dispute Resolution Act,[33] ADR would be a topic of considerable significance to Administrative Law Judges. If nothing else, familiarity with ADR techniques and concepts can help avoid time-consuming litigation by enhancing the judge's ability to foster negotiations and settlements between parties. Many ADR approaches are quite adaptable and fully consistent with agency rules and the organic acts governing particular agencies. Certainly, almost all agencies have a policy of favoring appropriate settlements as an alternative to formal adjudications.

An ALJ therefore may be able to borrow ideas from ADR, adapt them to pending cases, and encourage resolution of disputed matters without formal adjudication. In a sense, ADR is not just

---

[32] See Ray, *supra* note 31, at 67, and GUIDANCE FOR AGENCY DISPUTE RESOLUTION *Specialists, supra* note 30 at 4-7.

[33] See text *supra* accompanying note 28, and *infra* accompanying notes 70-76.

an important and evolving assortment of techniques for avoiding formal litigation. It is a state of mind -- a willingness to entertain alternatives and to re-examine assumptions about formal litigation.

In any event, ADR has become a part of administrative law and a fact of life for administrative law judges. However, before discussing the extension of ADR into administrative law, it is advisable to discuss some ADR techniques and devices. Although the following list is far from complete, and does not purport to be exhaustive, it summarizes a number of ADR techniques and devices which should be relevant to Judges.

(1). *Informal, unstructured settlement negotiations*[34]. Negotiated agreements always have been, and probably always will be, an alternative to formal adjudication. No citation is needed to support the fact that most cases (upwards of 90% or more) are settled without going to trial.

(2). *Structured case management devices*.[35] Although not commonly included in ADR taxonomies, and although an extremely broad concept, structured case management devices can be used as ADR tools. Within the concept of structured case management are such devices as court or agency rules which systematically regulate the parties' pre-trial preparation. As one study has indicated, negotiations and settlements can be facilitated (and formal litigation therefore avoided) if the parties are forced, by rule or judge's order, to evaluate their own cases.

> [S]ome lawyers . . . seem to find it difficult to squarely face their own situations early in the life of a lawsuit. Sometimes counsel have difficulty developing at the outset a coherent theory of their own case . . . . Sometimes [they] are so pressed

---

[34] Ray, *supra* note 31 at 67.

[35] *Cf.*, Administrative Conference of the United States, *Recommendation 86-7, Case Management as a Tool for Improving Agency Adjudication*, 1 C.F.R. § 305.86-7 (1993). (As discussed in the Preface and elsewhere in this Manual, the termination of the Administrative Conference (ACUS) was statutorily recognized under Public Law 104-52, title IV, 109 Stat. 480 (Nov. 19, 1995). The last CFR to reproduce the ACUS Recommendations in full appears to be the 1993 edition. After ACUS was dismantled, the chapter of the CFR relevant to ACUS recommendations was removed pursuant to 61 Fed. Reg. 3539 (Feb. 1, 1996).

> by other responsibilities that they . . . systematically analyze their own cause only when some external event forces them to do so.[36]

As one example of ways to force parties to analyze their cases early on, rules governing pleadings might require the parties to be specific about the factual bases of the allegations contained in the complaint and answer. The parties, or at least their lawyers, would then need to examine the case more closely, instead of making broad, general assertions in their pleadings which could cover almost any conceivable state of facts. In other words, an agency might impose a kind of hybrid fact-pleading on the parties[37]. Or, by rule or a judge's order, parties may be required to file a report with the judge summarizing their settlement efforts. These types of techniques differ from various types of mediation because no judge or third party has personally intervened in an effort to mediate directly between the parties. The rules or orders themselves impel the parties to focus on their cases, and may even force the parties to begin negotiating because they must report to the judge.

(3). *Mediation*. Mediation generically is the use of a neutral to help the parties reconcile their differences[38]. Put

---

[36] Brazil, Kahn, Newman, & Gold, *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279 (1986) (emphasis added).

[37] Mullins, *Alternative Dispute Resolution and the Occupational Safety and Health Review Commission*, 5 AD. L. J. 555, 568-69 (1991). (The Occupational Safety and Health Review Commission, however, amended its rules to eliminate fact-pleading in 1992. 57 FR 41676 (Sept. 11, 1992). However, with respect to the FCC, see 63 FR 690, at 1002, 1007, 10022 (January 7, 1998) (referring to requirement imposed for fact-pleading in formal complaints against common carriers.)

[38] GUIDANCE FOR AGENCY DISPUTE RESOLUTION SPECIALISTS, *supra* note 36 at 5, and Ray, *supra* note 31 at 67; Administrative Conference of the United States, RECOMMENDATION 86-3: AGENCIES' USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION, 1 CFR § 305.86-3 (1993) (at Appendix--Lexicon of Alternative Means of Dispute Resolution)[hereafter, AGENCIES' USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION], *reprinted* in ADMINISTRATIVE CONFERENCE, SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS

colloquially, the mediator is a neutral go-between, ideally the proverbial "honest broker." The classic mediator has no power at all to impose an outcome or render a decision. In fact, one set of standards for professional conduct of mediators expressly states, "Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement."[39] Nor is the mediator ordinarily bound to follow any set procedures, rules of evidence, agenda, or approach. Indeed, an important advantage of mediation is its inherent flexibility of form and approach. Unless there are constraints to the contrary, a mediator can meet with all parties together, or separately, or at some times together and at other times separately. Techniques and tactics can vary[40]. The mediator in one dispute may engage in the equivalent of shuttle diplomacy, going back and forth between the parties, communicating offers and counter-offers and the mediator's own views. In another dispute, the same mediator may insist that all parties sit down together with the mediator and engage in some genuine communication with each other. Whatever the procedures and tactics may be, the mediator's goal is to help the parties reach an agreement acceptable to all of them.

(4). *Conciliation*. The distinctions between conciliation and mediation may be fuzzy, but at least one lexicon of ADR terminology implies that there is a difference in degree between the two concepts. The word "conciliation" is used to

---

OF DISPUTE RESOLUTION 113, 117-8 (1987).

[39]Standards of Conduct for Mediators, #I, adopted in 1994 by the American Arbitration Association and the Society for Professionals in Dispute Resolution, *reprinted in* Sara A. Cole, Nancy H. Rogers, and Craig A. McCain, 2 MEDIATION: LAW POLICY AND PRACTICE, Appendix D, p. 2 (1994). (Emphasis added.) Another Code for mediators states: "It is the mediator's responsibility to assist the disputants in reaching a settlement. At no time should a mediator coerce a party into agreement." Code of Professional Conduct developed by the Center for Dispute Resolution, Denver, Colorado, #1, *reprinted in* Edward A. Dauer, et al., 2 Manual of Dispute Resolution: ADR Law & Practice, Appendix G-1, Art. 1 (1996)(noting that the code was drafted by Christopher Moore, PhD, CDR Associates).

[40]*See generally*, Sara A. Cole, Nancy H. Rogers, and Craig A. McCain, MEDIATION: LAW POLICY AND PRACTICE (1994).

refer to situations where the neutral must reduce tensions and improve communication among the parties "in volatile conflicts where the parties are unable, unwilling, or unprepared to come to the table to negotiate their differences."[41]

(5). *Facilitating*. Another first cousin to mediation, facilitating (or facilitation) seems to refer to neutrals who intervene procedurally (e.g., to conduct meetings and coordinate discussions), but who avoid becoming involved in resolving disputed substantive issues. In other words, a facilitator concentrates on promoting negotiation and settlement by using procedural devices to bring the parties together, but does not intervene actively in the substance of the parties' positions or negotiations.[42]

(6). *Neutral evaluation, or early neutral evaluation*. This process, often employed early in the course of a dispute, generally entails a neutral factfinder, possessed of substantive expertise if needed, who evaluates the merits of the parties' cases. The evaluation, often in writing, is non-binding, but it gives the parties an idea of how an objective decision maker might perceive the strengths and weaknesses of their respective positions. Several courts and the Departmental Appeals Board of the U.S. Department of Health and Human Services have established early neutral evaluation programs of one sort or another.[43]

(7). *Factfinding.* This process involves a neutral or a

---

[41] Ad Hoc Panel on Dispute Resolution and Public Policy, National Institute for Dispute Resolution, *Paths to Justice: Major Public Policy Issues of Dispute Resolution* 36-37 (1983), *reprinted in* Administrative Conference of the U.S., SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION 44-45 (1987).

[42] See AGENCIES' USE OF ALTERNATIVE DISPUTE RESOLUTION, *supra* note 38, in Appendix; *Paths to Justice*, *supra* note 41 at 37, *reprint* at 45.

[43] See GUIDANCE FOR AGENCY DISPUTE RESOLUTION EXPERTS, *supra* note 30 at 6, and Brazil, Kahn, Newman, & Gold, *supra* note 31. Two federal regulations expressly referring to early neutral evaluation are 14 CFR § 17.17 and 17.31 (2000) (FAA, Procedures for Protests and Contract Disputes). Reference to "neutral evaluation" in the ADR context are found at 45 CFR § 74.91 (2000) (Department of Health & Human Services, Awards and Subawards to Institutions of Higher Education, Hospitals, etc.) and 45 CFR § 2540.230 (2000) (Department of Health & Human Services, grievance procedures re: Corporation for National and Community Service).

panel of neutrals, typically with relevant technical expertise, who make advisory findings of facts on disputed matters. Factfinding often involves informal presentation by each party of its case to the factfinder(s). After the factfinder(s) render their findings, the parties can continue to negotiate[44]. As one textbook on dispute resolution has noted, factfinding by neutral experts has the potential to become particularly important in cases where the disputes orbit around complex technological, scientific, or other data from specialized fields[45]. Rule 706 of the Federal Rules of Evidence already allows a federal court to appoint expert witnesses on its own motion or on the motion of a party.[46]

(8). *Settlement Judge*. The settlement judge is a fairly recent hybrid of special interest to administrative law judges. The settlement judge basically is a mediator or neutral evaluator[47]. What distinguishes the settlement judge from other types of mediators and neutrals is the fact that the settlement judge is typically an administrative law judge from the agency which is adjudicating the dispute[48]. The settlement judge, simply put, is (usually) an agency administrative law judge who is specially assigned to undertake mediation-type efforts in an appropriate case, but who is not assigned to decide that case. The settlement judge has been described as "an ingenious device,"[49] because it preserves the very real advantages of

---

[44] See GUIDANCE FOR AGENCY DISPUTE RESOLUTION SPECIALISTS, *supra* note 30 at 6; AGENCIES' USE OF ALTERNATIVE DISPUTE RESOLUTION, *supra* note 38, in Appendix. Rules of the National Credit Union Administration expressly refer to possible authorization of early neutral factfinding. 12 CFR § 709.8(c)(2) (2000).

[45] See Dauer, *supra* note 39 at 5.01, p. 5-5.

[46] Federal Rules of Evidence, Rule 706 (a)(2000).

[47] GUIDANCE FOR AGENCY DISPUTE RESOLUTION SPECIALISTS, *supra* note 36 at 6-7.

[48] *Id.* See also Administrative Conference of the U.S., AGENCY USE OF SETTLEMENT JUDGES, RECOMMENDATION 88-5, 1 C.F.R. § 305.88-5 (1993).

[49] Joseph & Gilbert, *Breaking the Settlement Ice: The Use of Settlement Judges in Administrative Proceedings*, 3 ADMIN. L. J. 571, 573 (1989-90).

having a judge actively involved in the settlement process, while simultaneously avoiding the problems which could arise if the judge who is to decide the case becomes too actively involved in settlement negotiations[50]. Among other advantages, an agency administrative law judge appointed to serve as a settlement judge: (1) is free of constraints such as the APA's prohibitions on ex parte contacts;[51] (2) brings to the negotiation process authority which stems from being a judge; (3) has a familiarity with the subject-matter which is born of experience in presiding over the agency's cases; and (4) has the flexibility of a mediator as to the tactics and strategies which can be employed[52]. Among the agencies using settlement judges are the Federal Labor Relations Authority (FLRA), Department of Housing and Urban Development (HUD), the Federal Energy Regulatory Commission (FERC), the U.S. Department of Labor, the Occupational Safety and Health Review Commission (OSHRC), and the Federal Communications Commission (FCC).[53]

(9). *Minitrial*. The word "minitrial" is somewhat misleading. A minitrial does involve presentations by each party in a hearing-type setting. However, the presentations are given before senior officials, of each party, who are authorized to settle the case. Thus, a minitrial actually is a structured settlement process. Each side, after agreeing on details of the procedure, presents a highly abbreviated version of its case to the senior officials, who are sometimes aided by a neutral. These senior officials, authorized to settle the dispute, can see

---

[50] See Mullins, *supra* note 37 at 560.

[51] 5 U.S.C. §§ 554(d), 557(d)(1994). See also, Joseph & Gilbert, *supra* note 49 at 582-84.

[52] *See,* Joseph & Gilbert, *supra* note 49 at 585-86; Mullins, *supra* note 37 at 560-61, 591-99.

[53] 5 CFR § 2423.25 (2000) (FLRA); 18 CFR § 385.603 (2000) (FERC); 24 CFR § 180.620 (2000) (HUD); 29 CFR § 18.9 (2000)(Department of Labor, general rules of practice and procedure); 29 CFR § 2200.101 (2000) (Occupational Safety & Health Review Commission); 47 CFR § 1.244 (2000) (FCC); 48 CFR § 6302.30 (1991)(DOT Board of Contract Appeals).

For an interesting critique of a proposal that the NLRB use settlement judges, see Erin Parkin Huss, *Note: Response to the Experimental Role of Settlement Judges in Unfair Labor Practice Proceedings*, 37 ARIZ. L. REV. 895 (1995).

for themselves how their case and that of the other party (or parties) could be perceived at a full-fledged trial, thus providing a basis for more realistic negotiations[54]. Agencies which have used minitrials include the Army Corps of Engineers (contract and environmental disputes), NASA; the Department of the Interior; the Department of Energy, and FERC.[55]

(10). *Conference*. Although omitted from some lists of ADR techniques, the good old-fashioned pre-hearing or other conference, presided over by a Judge (or other hearing official), has substantial ADR potential and should not be ignored. Unless there are some very good reasons to the contrary, a Judge holding a conference with the parties should, almost as a matter of routine, explore the possibilities for settlement. The APA expressly authorizes conferences for the settlement or simplification of issues,[56] and agency procedural rules typically contain virtual boiler-plate language authorizing ALJs and other hearing officers to hold conferences for the settlement or simplification of issues[57]. Moreover, several agencies have regulations explicitly providing, in various contexts, for settlement conferences.[58]

---

[54] See e.g., AGENCIES' USE OF ALTERNATIVE DISPUTE RESOLUTION, *supra* note 38 in Appendix -- Lexicon of Alternative Means of Dispute Resolution; GUIDANCE FOR AGENCY DISPUTE RESOLUTION SPECIALISTS, *supra* note 30 at 7.

[55] GUIDANCE FOR AGENCY DISPUTE RESOLUTION SPECIALISTS, *supra* note 36 at 7. Agency regulations expressly referring to minitrials in the ADR context include the FAA, 14 CFR § 17.31 (2000); the Federal Energy Regulatory Commission (FERC), 18 CFR § 385.604 (2000); and the Department of Justice, 28 CFR § 35.176 (2000) (nondiscrimination on the basis of disability in state and local government services).

[56] 5 U.S.C. § 556(c)(1994).

[57] See for example, 16 C.F.R. § 3.42(c)(7) (2000)(Federal Trade Commission, Rules of Practice for Adjudicative Proceedings); 29 C.F.R. § 417.6 (2000) (Procedures for Removal of Local Labor Organization Officers); 49 C.F.R. § 386.54 (2000)(Motor Carrier Safety Regulations).

[58] For example, 14 C.F.R. § 1264.117(b)(3) (2000)(NASA, Implementation of the Program Fraud Civil Penalties Act of 1986, Authority of the presiding officer); 18 C.F.R. § 157.205

(11) *Arbitration*. In terms of its practical effect, arbitration is only a step or so removed from adjudication. The arbitrator, like a judge, is a neutral (supposedly) who is authorized to resolve a dispute between or among parties. Generally, the parties will make some kind of presentation to the arbitrator, in the equivalent of a hearing. (Also, there may be a panel of arbitrators, rather than a single arbitrator.) However, the arbitrator is not necessarily required to follow the lawbooks, either substantively or procedurally. The parties themselves may select the arbitrator, agree on the procedures to be followed, and even determine the criteria for the arbitrator's decision -- although much depends on the kind of arbitration being conducted. For example, at one extreme, the original negotiation of a commercial transaction between two parties may result in contractual provisions under which the parties agree to submit all (or certain) disputes arising under the contract[59]. At the other extreme, but quite rarely, one may find examples of mandatory arbitration being imposed by law on the parties[60]. In between, there are any number of possible variations on the theme of arbitration, but one key variable is whether the arbitration will result in a binding decision or have merely an advisory effect.[61]

3. Confidentiality.

There is one crucial aspect to mediation, variations on mediation, and ADR in general which must be emphasized, even in a summary treatment of the subject -- **confidentiality**. Mediators

---

(2000)(FERC, Interstate Pipeline Blanket Certificates, Notice Procedure); 33 CFR § 20.202(e) (2000) (Coast Guard, powers of administrative law judges).

[59] For one example of cases which enforce such contractual agreements, see Grigson v. Creative Artists Agency, LLC, 210 F. 3d 524 (5th Cir. 2000) (applying equitable estoppel against production company and actor alleging tortious interference with a distribution agreement).

[60] See, 7 U.S.C. § 136a(c)(2)(B)(iii) (1994) (regarding arbitration to determine compensation for development of government-required data); 29 U.S.C. § 1401 (1994) (arbitrating amount of liability for withdrawal from certain kinds of pension plans).

[61] See Ray, *supra* note 31 at 67.

and other ADR neutrals often communicate *ex parte* and obtain information on a confidential basis. The neutral or mediator may be told, in confidence, that a party's bargaining position is substantially different from what the party regards as an acceptable compromise. Without the possibility for confidentiality, the effectiveness of neutrals in ADR would be seriously jeopardized. The Administrative Conference has summarized this need for confidentiality in a way which hardly can be improved upon:

> Most ADR techniques, including mediation, non-binding arbitration, factfinding and minitrials, involve a neutral third party who aids the parties in reaching agreement. . . . A skillful mediator can speed negotiations and increase chances for agreement by holding separate confidential meetings with the parties, where each party may give the mediator a relatively full and candid account of its own interests (rather than its litigating position), discuss what it is willing to accept, and consider alternative approaches. The mediator, armed with this information but avoiding premature disclosure of its details, can then help to shape the negotiations in such a way that they will proceed most directly to their goal. The mediator may also carry messages between the parties, launch 'trial balloons,' and act as an agent of reality to reduce the likelihood of miscalculation. This structure can make it safe for the parties to talk candidly and to raise sensitive issues and creative ideas. . . .
>
> With all of these neutrals, many of the benefits of ADR can be achieved only if the proceedings are held confidential. Confidentiality assures the parties that what is said in the discussions will be limited to the negotiations alone so they can be free to be forthcoming. This need extends to the neutral's materials, such as notes and reports, which are produced solely to assist the neutral in the negotiation process and which others could misconstrue as indicating

> a bias against some party or interest. This is why many mediators routinely destroy their personal notes and drafts and return all other materials to the parties. . . .[62]

However, absolute confidentiality cannot be guaranteed, and there are situations where disclosure could be required. Of particular significance to federal agencies and ALJs are certain provisions of the Administrative Dispute Resolution Act which on the one hand prohibit disclosure of any "dispute resolution communication," but then allow disclosure under several exceptions contained that Act, including disclosures which are judicially determined to be necessary to prevent manifest injustice or public harm.[63]

Nevertheless, it is especially important, in this Manual for Administrative Law Judges, to emphasize the confidentiality aspects of much ADR. An ALJ accustomed to presiding over formal evidentiary hearings is likely to have developed a strong mind-set favoring placing everything on the record and avoiding even the appearance of secretive dealings. For formal adjudications this is highly appropriate. However, if appointed to serve as a settlement judge or as some other kind of neutral, the Judge must adapt -- sometimes quickly -- to the need for confidential, even ex parte, communications.

4. The Extension of ADR into Administrative Law

Although impetus for the ADR movement originally stemmed

---

[62] Administrative Conference of the U.S., ENCOURAGING SETTLEMENTS BY PROTECTING MEDIATOR CONFIDENTIALITY, RECOMMENDATION NO. 88-11, 1 C.F.R. § 305.88-11 (1993) (emphasis added) [hereinafter PROTECTING MEDIATOR CONFIDENTIALITY]. As noted elsewhere in this Manual, after ACUS was abolished, this C.F.R. chapter was removed, pursuant to 61 Fed. Reg. 3539 (1996)

[63] *See, e.g.*, 5 U.S.C. § 574 (1994 & Supp. V 1999), *formerly numbered as* 5 U.S.C. § 584, *but renumbered* pursuant to the Administrative Procedure Technical Correction Act, Pub. L. No. 102-354, 106 Stat. 944 (August 26, 1992). *See generally*, Administrative Conference, MEDIATION: A PRIMER FOR FEDERAL AGENCIES (1993).

from discontent with the judicial system,[64] extension of ADR into administrative law was both predictable and natural. For one thing, agency adjudications involving the right to a full evidentiary hearing are all but indistinguishable, functionally, from full evidentiary hearings before a state or federal court[65]. For another, such formal agency adjudications far outnumber the federal court caseload[66]. Quantitatively and qualitatively the net result has been considerable judicialization of our administrative law system[67]. As ADR gained momentum in state and federal court systems, it was almost inevitable that ADR would be transplanted into the federal agencies.

The extension of ADR to administrative law during the past twenty years or so can be summarized with three key words: experimentation, implementation, and legislation. During the 1980's various federal agencies experimented with ADR techniques and procedures. For example, one early development was the application of ADR to government contracting disputes[68]. Other

---

[64] See, Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARVARD L. REV. 668 (1986); Ray, *Emerging Options in Dispute Resolution*, 75 A.B.A.J. 66 (June, 1989); Riggs & Dorminey, *Federal Agencies' Use of Alternative Means of Dispute Resolution*, 1 ADMIN. L. J. 125, 126 (1987); Sander, *The Variety of Dispute Resolution*, 70 F.R.D. 111 (1976).

[65] For example, see the APA's provisions for formal adjudications: §§ 554, 556, 557 (1994).

[66] For example, see Bernard Schwartz, ADMINISTRATIVE LAW: A CASEBOOK 62-65(4th ed. 1994).

[67] Harter, *Dispute Resolution and Administrative Law*, 29 VILL. L. REV. 1393, 1403, n. 46 (1983-84). See generally, AGENCIES' USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION, *supra* note 38.

[68] Crowell & Pou, *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 1139; Crowell & Pou, *Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques*, 49 MD. L. REV. 183 (1990).

agencies and kinds of agency actions followed suit, experimenting and implementing[69]. Then came the legislation, starting in 1990.

In a sense, the first Administrative Dispute Resolution Act (ADR Act)[70] was a culmination of earlier experimentation and implementation, and a forerunner of more legislation[71]. The 1990

---

[69] *E.g.*, Edelman, Carr, & Simon, *ADR at the U.S. Army Corps of Engineers*, Pou, *Federal Agency Use of ADR: The Experience to Date*, and Robinson, *ADR in Enforcement Actions at the U.S. Environmental Protection Agency*, in CONTAINING LEGAL COSTS: ADR STRATEGIES FOR CORPORATIONS, LAW FIRMS, AND GOVERNMENT (Fein, ed. 1987); *A Colloquium on Improving Dispute Resolution: Options for the Federal Government*, 1 ADMIN. L. REV. 399 (1987) (entire issue devoted to this colloquium); Mullins, *supra* note 37, at 558-59.

[70] Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990) (with changes to section numbering in Title 5 made by the Administrative Procedure Technical Amendments Act, Pub. L. No. 102-354, 106 Stat. 944 (1992)) (codified mainly at 5 U.S.C. §§ 571-83, with codification of miscellaneous provisions in various sections of titles 9, 28, 29, and 41). Further amendments were made by the Administrative Dispute Resolution Act of 1996, Act Oct. 1996, P.L. 104-320, 110 Stat. 3870. These amendments modified several provisions of the 1990 Act, among them 5 U.S.C. §§ 571, 574 (confidentiality provisions), 580, and 583.

To convey a somewhat more precise picture of the scope of the original 1990 Act, it should be noted that its provisions adding to or amending the U.S. Code will be found at 5 U.S.C. §§ 571-83 (1994 & Supp. V 1999) (general provisions, definitions, confidentiality, arbitration); 5 U.S.C. § 556(c)(1994) (ALJ authority); 9 U.S.C. § 10 (arbitration, judicial review)(1994); 41 U.S.C. § 605 (public contract disputes)(1994); 29 U.S.C. § 173 (1994 & Supp IV 1998)(Federal Mediation & Conciliation Service authority); 28 U.S.C. § 2672 (1994) (tort claims); and 31 U.S.C. § 3711(a)(2) (1994) (government claims). Pub. L. No. 101-552, 104 Stat. 2736, as amended by Administrative Procedure Technical Amendments Act of 1991, Pub. L. No. 102-354, 106 Stat. 944 (1992).

[71] In addition to the 1996 amendments mentioned *supra* note 70, federal statutes dealing specifically today with

ADR Act still remains the most significant piece of federal legislation because, among other things, it required each federal agency to: (1) review its programs and adopt policies addressing the use of ADR;[72] and (2) designate a senior official as the agency's dispute resolution specialist, to be responsible for implementing the ADR Act and relevant agency policies[73]. The ADR Act also removed any doubt concerning a federal agency's authority to use ADR where the parties agree[74]. It also authorized administrative law judges to use or encourage the use of ADR and to require at settlement conferences the attendance of parties' representatives who are authorized to negotiate concerning disputed issues[75]. The ADR Act also added a new subchapter to Chapter 5 of title 5 of the U.S. Code entitled "ALTERNATIVE MEANS OF DISPUTE RESOLUTION IN THE ADMINISTRATIVE PROCESS."[76] Among other things, this new subchapter: (1) provided criteria for an agency's use in evaluating the appropriateness of ADR;[77] (2) stated that ADR procedures authorized under the ADR Act are voluntary and supplemental in nature;[78] (3) went into considerable detail regarding confidentiality and communications which are made during the course of ADR processes;[79] and (4) contained, again in

---

ADR and federal agencies include 12 U.S.C. § 4806(e)(1994)(requiring pilot program of ADR by federal agencies regulating banks and credit unions); 20 U.S.C. § 1415(e)(1994 & Supp. IV 1998)(expressly listing mediation of disputes involving children with disabilities in educational institutions receiving federal funding); and 26 U.S.C. § 7123 (1994 & Supp. IV 1998) (directing IRS to establish ADR procedures, added in 1998 by P.L. 105-206).

[72] Pub. L. No. 101-552, § 3(a).

[73] *Id.* at § 3(b)(see 5 U.S.C. § 581 note (1994).

[74] *Id.* at § 4 (see 5 U.S.C. § 581 note).

[75] *Id.* at § 4(a), codified at 5 U.S.C. § 556(c)(1994).

[76] *Id.* at § 4(b).

[77] 5 U.S.C. § 572(b)(1994).

[78] 5 U.S.C. § 572(c)(1994).

[79] 5 U.S.C. § 574 (1994 & Supp. V 1999).

considerable detail, provisions authorizing and governing agency arbitration procedures.[80]

For the foreseeable future, administrative law judges and other agency hearing officers will encounter more -- not less -- emphasis on ADR. Familiarity with ADR, as a concept and a process, is likely to become as much a part of the competent administrative law judge's professional qualifications as the ability to write a decision or substantive knowledge of the applicable law.

[80] 5 U.S.C. §§ 575-581 (1994 & Supp. V 1999).