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Federal Dispute Resolution

Federal Dispute Resolution

Using ADR with the
United States Government

Jeffrey M. Senger

Foreword by Frank E. A. Sander



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Published by Jossey-Bass

A Wiley Imprint

989 Market Street, San Francisco, CA 94103-1741 www.josseybass.com

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Library of Congress Cataloging-in-Publication Data

Senger, Jeffrey M., date.

Federal dispute resolution: using ADR with the United States government

/Jeffrey M. Senger.—1st ed.

p. cm.

Includes bibliographical references and index.

ISBN 0-7879-6858-7 (alk. paper)

1. Administrative procedure—United States. 2. Dispute resolution

(Law)—United States. I. Title.

KF5417.S46 2003

342.73'066—dc21

2003013874

Printed in the United States of America

FIRST EDITION

HB Printing

10 9 8 7 6 5 4 3 2 1

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Foreword

The publication of this book is eloquent testimony to the increasing sophistication of the alternative dispute resolution (ADR) field. Who would have thought twenty-five years ago that an entire book could be devoted to so specific a subject as federal ADR? Yet, stimulated by several key federal statutes and executive orders, along with extensive implementation at a number of federal agencies, the subject has gradually proliferated, so that now a sophisticated guide to the field is very much needed.

Of course, federal ADR is, above all, ADR. Thus, it is not surprising—indeed, it is most welcome—that this book deals usefully with a number of generic ADR questions, such as matching disputes to particular mechanisms and how to prepare for and conduct a mediation. These materials should therefore be of interest to anyone who seeks a form of dispute resolution other than litigation.

Some of these points raise nice questions for debate. For example, the author says that a counterindication for mediation is where a party claims not to have sufficient information to assess the case's worth and that therefore more discovery is needed. Others might argue—and Jeffrey Senger does so in this book—that this is a key role for skilled mediators: to examine precisely the asserted need for further discovery (that is, to mediate first the need for further discovery).

There are, of course, some questions unique to governmental ADR. If there is one paramount complaint voiced by individuals who are engaged in mediations with the federal government—or indeed with any government—it is the maddening difficulty of getting officials with sufficient authority—in law as well as in spirit. Sometimes particular statutes or regulations explicitly restrict the settlement authority of lower officials. The scope and wisdom of these laws ought to be reexamined. But equally exasperating is the tendency of some

government officials to pass the buck upstairs and refuse to take responsibility for innovative, creative settlements. This critical question, discussed in this book, needs continuing attention if federal government ADR is to thrive.

This book is of wide-ranging scope. Senger is to be particularly commended for including some important, but not often dealt with, topics such as evaluation of programs. Increasingly, in a tight economy, legislators and other funders are demanding proof of effectiveness. This suggests the need for careful clarification of goals at the outset, plus well-thought-out collection of data in the implementation.

In conclusion, it must be remembered that this is but a first effort on this subject. I hope that some topics (like negotiated regulations) that were not addressed in this book for space reasons will be added to future editions.

Cambridge, Massachusetts

FRANK E. A. SANDER
*Bussey Professor
Harvard Law School*

Preface

Alternative dispute resolution (ADR) has the potential to change fundamentally the way the federal government does business with its citizens. People both inside and outside the government have found it has substantial advantages over more traditional adversarial processes. Participants report that ADR is often quicker and cheaper than administrative adjudication and federal litigation. Perhaps even more important, people find that ADR gives them greater control over how they resolve their disputes, more opportunities to be creative, increased feelings of satisfaction, and improved relationships with each other.

The field has grown dramatically in recent years, creating the need for a comprehensive guide to using ADR in matters involving the federal government. This book is designed for those who are interested in learning more about how ADR can help parties resolve government disputes. It does not require special knowledge of ADR or the law, and it is designed to be useful for both beginners and experienced ADR practitioners. It is written for both public and private sector audiences. Thus, it should be helpful to those who have disputes with the government as well as those who represent the government in these matters. Neutrals who participate in ADR with the government (or would like to) should find it valuable. Finally, teachers and students will find materials that can be useful in ADR courses.

Each chapter is self-contained, allowing readers to move through the book in any order they wish. Chapter One introduces the subject with a discussion of the benefits of ADR in the government, the history of federal dispute resolution, and the laws and regulations that govern the field. The next four chapters provide a detailed, practical guide to the use of ADR in disputes involving the federal government. Chapter Two covers how to select disputes for ADR,

discussing those cases where it is most and least effective. It also addresses the advantages and disadvantages of each of the ADR processes used in the government. Chapter Three discusses how to select the best possible neutrals to lead ADR processes, covering the factors to consider in this regard. It also provides a guide to how federal government practitioners select and hire neutrals. Chapter Four provides a step-by-step description of how to prepare for ADR. It covers considerations for both clients and attorneys. Chapter Five explores ideas on how to advocate effectively in ADR. It describes how to be persuasive at each stage of the ADR process.

The second half of the book addresses specific topics of interest in the field.¹ Chapters Five and Six cover the two types of cases where ADR is used most frequently in the government: workplace and contracting disputes. These chapters describe the special laws, policies, and practices in these areas. Chapter Eight addresses confidentiality, a subject of considerable interest and some controversy. It describes the law in this area and provides practical advice for handling confidentiality concerns. The final two chapters examine ADR programs in the government. Chapter Nine addresses design, management, and training concerns. It will be useful for those who lead ADR programs, as well as those who want to understand how ADR programs work in the government. Chapter Ten provides guidance on how to evaluate the effectiveness of ADR programs, a topic of importance as the field seeks to become even more established in the government.

The book also contains six appendixes. Appendix A sets out the Administrative Resolution Act of 1996, which calls for federal agencies to promote the use of ADR and promulgates laws governing the field (this is the amended version of the original act passed in 1990). Appendix B is the order from the attorney general that established the ADR program at the U.S. Department of Justice. Appendix C contains the Alternate Dispute Resolution Act of 1998, which provides for ADR in the federal district courts. Appendix D is the presidential order that requires federal agencies to promote the use of ADR. Appendix E is a document that gives advice on confidentiality in administrative ADR that was drafted by the Federal ADR Council, a group of high-level agency officials. Finally, Appendix F is a report to the president from the Interagency ADR Working Group that describes the ADR activities of the federal government.

Acknowledgments

Many people both inside and outside the federal government have contributed to this book. I am particularly grateful for the assistance of Pete Steenland, with whom I worked closely for four years on most of the topics discussed in the book. My colleagues from the Department of Justice have been very helpful, including Steve Altman, Loretta Argrett, Linda Cinciotta, Rachel Cramer, Janice Hebert, Virginia Howard, Deborah Kant, Aloma Shaw, and Ron Silver.

The federal Interagency ADR Working Group, an organization of ADR specialists throughout the federal government, has developed materials that have informed a number of parts of this work. Members of the group who have provided specific comments on this book are David Batson, Rob Burton, Andrew Colsky, Cathy Costantino, Deborah Dalton, John Dietrich, Geoff Drucker, Kirk Emerson, Howard Gadlin, Doug Gallegos, Elena Gonzales, Will Hall, Phyllis Hanfling, Martin Harty, Eileen Hoffman, Judy Kaleta, Chris Kopocis, Jody Lee, Martha McClellan, Joseph McDade, Leah Meltzer, Rick Miles, Linda Myers, Patricia Orr, Tony Palladino, Daniel Rainey, Cherie Shanteau, Pat Sheridan, Rick Southern, and Rich Walters.

People from other branches of the government, academia, and the private sector who have contributed are Lisa Bingham, Frank Carr, Jack Cooley, Jon Gould, Phil Harter, Chris Honeyman, Tony Lofaro, Bobbi McAdoo, Joe McMahon, Wallace Meissner, Carrie Menkel-Meadow, Michael Moffitt, Charles Pou, Karen Powell, Richard Reuben, Frank Sander, Andrea Schneider, Donna Stienstra, and Mark Umbreit. The Dispute Resolution Section of the American Bar Association has been helpful, particularly John Bickerman, Gina Brown, Jack Hanna, Sameena Sabir, and Kyo Suh. I also am grateful for the assistance of my publisher, particularly Rachel Anderson, Beverly Miller, and Alan Rinzler.

Washington, D.C.

JEFFREY M. SENGER

*For my mother and father,
whose love and support I have cherished all my life*

Chapter One

| Introduction

Disputes with the federal government may be inevitable, but litigation is not. Traditional government methods of dispute resolution, including adversarial processes such as trials, have inherent limitations. They are expensive, sapping resources from both citizens and their government. These methods are time-consuming, demanding participants' attention and energy for months and even years. They often force people who need to work together to engage in combat instead, driving them further apart rather than bringing them together. Even when parties prevail in these processes, they can find the victory has come too late or at too high a price. Moreover, controversy may not end just because one side has won and the other has lost. Court rulings often fail to resolve the underlying problems that caused the complaints to be filed in the first place. It is no wonder that citizens and government officials alike are increasingly searching for other ways to resolve conflict.

Alternative dispute resolution (ADR) often is a better way to solve problems in a wide variety of government matters.¹ In ADR, the parties meet with a neutral professional who is trained and experienced in handling disputes. With the guidance of the neutral party, they talk directly with each other about the problems that caused the dispute and ideas for resolving their differences. The neutral party assists them in identifying their underlying interests, developing creative options for meeting their needs, and crafting a resolution that will work for the future. Experience has shown that this approach is frequently quicker, cheaper, and more satisfying for everyone involved than adjudication.

These ideas have gained bipartisan support in all branches of the federal government. The U.S. Congress has noted, “Administrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes; [ADR] can lead to more creative, efficient, and sensible outcomes; . . . the availability of a wide range of dispute resolution procedures, and an increased understanding of the most effective use of such procedures, will enhance the operation of the Government and better serve the public.”²

Former Chief Justice Warren Burger commented, “The notion that ordinary people want black-robed judges, well dressed lawyers and fine courtrooms as settings to resolve their disputes is incorrect. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible.”³

Former attorney general Janet Reno has said of ADR, “We have an extraordinary opportunity. The legal profession has an opportunity to help bring this Nation together; to build understanding, rather than to divide it; to build community, rather than to fragment it; to be the peacemaker and the problem solver, as never before in the history of the profession. . . . In this next millennium of the practice of law, we may know a more peaceful Nation and a more peaceful world.”⁴

Because of ADR’s success, the government’s use of it has grown greatly. At the Justice Department, for example, parties used ADR in five hundred cases in 1995. Seven years later, annual ADR use had grown to close to three thousand cases. The Equal Employment Opportunity Commission (EEOC) now uses mediation in about five thousand workplace cases annually, and the U.S. Postal Service mediates twice that many each year. The Environmental Protection Agency has eight full-time ADR staff members and pays private mediators millions of dollars in mediator fees each year. All told, more than four hundred people now work on ADR full time in the federal government, and agency ADR programs are funded by more than \$36 million in dedicated budgets.⁵ The government’s total commitment to ADR is even higher than these figures. Many agencies operate programs that are funded from other budgetary sources and staffed by employees who have part-time ADR responsibilities in addition to other duties.⁶

Benefits of ADR

The government and private parties have found many benefits from the use of ADR. Among them are time savings, money savings, greater predictability and self-determination, greater creativity, improved relationships, and increased satisfaction.

Time Savings

One of the greatest problems with traditional federal government dispute resolution is delay, much of it caused by an explosion of complaint filings. In U.S. district courts nationwide, annual filings of new cases have increased from about 35,000 to more than 250,000 over the past sixty years—that is, by a factor of seven times—while U.S. population during this period only doubled. At the appellate level, annual case filings grew from 2,800 to more than 57,000 over the past fifty years, a twenty-fold increase.⁷

This huge growth in litigation has had a major impact on the way the government operates, because the United States and its agencies are parties in nearly one-third of all federal district court civil cases.⁸ The government simply does not have the resources to take all of these cases to trial. Indeed, less than 2 percent of federal lawsuits where the government is a party go to trial.⁹ Given this reality, “alternative” dispute resolution in the government is actually trial adjudication, because trials are so rare.

The situation is similar in the administrative arena. Federal administrative equal employment opportunity (EEO) complaints rose by more than 50 percent over a recent eight-year period.¹⁰ Over about the past ten years, agency EEO case backlogs have doubled, hearing backlogs at the EEOC have tripled, and appellate backlogs have increased sevenfold.¹¹

ADR reduces these delays by sidestepping the adjudicative process and its backlogs. For example, in workplace cases involving the Office of Special Counsel, ADR resolved complaints in an average of 115 days, while the traditional adjudicatory process required an average of 465 days.¹² In disputes with the Federal Aviation Administration, parties using ADR resolved bid protests in an average of 25 days, while those seeking a final agency decision typically waited 61 days.¹³ In federal court civil cases (mostly torts and employment

discrimination actions), Justice Department attorneys estimated time savings averaging six months per case where ADR was used.¹⁴ At the Department of the Air Force, the amount of time required to process an Armed Services Board of Contract Appeals contract case dropped by 50 percent after the agency began using an ADR program.¹⁵

ADR processes require less time from participants than litigation, which demands many hours for preparation and adversarial proceedings. For example, Justice Department lawyers estimated that using ADR saved 89 hours of staff and attorney time on average in each case.¹⁶ Similarly, at the administrative level, the Office of Special Counsel found that the average workplace case using ADR required 24 hours of agency staff time; in contrast, the average case that did not use ADR required 260 hours.¹⁷

Money Savings

ADR also saves money for parties involved in federal government disputes. First, the time savings already described directly correlate with money savings. When private parties and government officials resolve disputes more quickly, they can spend the time they save on other important matters. Quicker settlements can result in lower attorney fees for private parties. When more cases settle, the government saves money as well because fewer courtrooms, judges, administrative hearing officers, docket clerks, and the like are required.

Adjudication is expensive. Estimates of the administrative costs for processing an EEO case range from \$5,000 for an informal dispute to up to \$77,000 for a formal dispute that goes all the way through to an appeal.¹⁸ Federal employees contact an EEO counselor about fifty thousand times a year, so these expenses are substantial.¹⁹ In many types of litigation, both the government and private parties must pay for deposition transcripts, expert witness consultations, expert testimony, travel costs, and other expenses.

Use of ADR can reduce these costs by resolving matters without the need for adjudication. Justice Department attorneys estimated that ADR saved an average of \$10,700 in litigation expenses in each case.²⁰ The Office of Special Counsel estimated an average cost of \$1,000 to process a case where ADR is used, compared with an average cost of \$10,500 for a case that does not go to ADR.²¹ The U.S. Air

Force examined travel and staff costs for base engineers, inspectors, contracting officers, pricers, auditors, and experts, and determined that ADR saved \$40,000 per case for contract cases involving less than \$1 million and \$250,000 for cases over \$1 million.²²

Greater Predictability and Self-Determination

ADR benefits parties because it allows them to decide how to resolve their dispute. The only way a case will settle in a voluntary ADR process is if both parties agree to an outcome they created themselves. In contrast, parties relinquish this control whenever they turn their case over to a judge or jury. Once a court process begins, the results are unpredictable.

Adjudication can be surprisingly uncertain. In one study of civil cases, judges who had presided over jury trials were asked whether they would have ruled the same way the jury did. These judges had heard the same witnesses the jury had, seen the same evidence, and listened to the same arguments from counsel. Nonetheless, the judges disagreed with the jury verdicts in half of the cases.²³ One possible reason for this unpredictability, revealed in the study, is that jurors appear not always to understand the law. For example, they were asked at the end of trial what the burden of proof was for the civil plaintiff. These jurors had listened to lawyers for both sides discuss the burden of proof, and they had listened to the judge's instructions that the burden in civil cases requires the plaintiffs to tip the scales of evidence only slightly in their favor. Nonetheless, 38 percent of these jurors stated that the plaintiffs' burden was to prove their case beyond a reasonable doubt.²⁴

Many individuals who have important government cases do not want to hand over control of their dispute to such unpredictable outside parties. ADR gives them the opportunity to resolve their conflict on terms they choose for themselves.

Greater Creativity

Courts are limited in the relief they can award. In many disputes, a court can offer a party only money. When plaintiffs can get only money from a case, they simply ask for as much as possible, and more creative options are not explored. In contrast, the parties in

ADR are not constrained by the need to put a monetary value on every situation, so they have the freedom to fashion their own solutions. Furthermore, they understand their needs better than anyone else, and they know what would satisfy them best. They are free to develop options that may be worth much more to one party than they cost the other to provide. Sometimes they even create solutions that make both parties better off.

Improved Relationships

Litigation destroys relationships. The litigation process forces people to attack each other's positions and prove that they are right and the other side is wrong. It is no wonder that almost all parties leave trials with negative feelings toward each other.

In many government cases, this result is particularly harmful. For example, because more people work for the government by far than any other employer in the country, there are a large number of government workplace disputes. Parties to these disputes often must continue to work together while their complaints are processed, a situation that creates awkwardness and tension that can make the workplace very uncomfortable. Many times, others in the office are affected as well. People often choose up sides in a dispute, and entire workplaces can be infected by a single conflict.

ADR allows parties to preserve their relationships by working together to resolve their disputes. The process fosters a collaborative atmosphere because the goal is agreement, not victory or defeat. Many times, parties find that participation in ADR is the start of a significant improvement in their relationship.²⁵

Research has shown long-lasting relationship improvements as a result of ADR. At the U.S. Postal Service, for example, ADR appears to have helped employees and managers understand each other better. In the first full year after ADR was introduced at the agency, the number of new formal workplace complaints dropped by 24 percent from the previous year.²⁶ Complaints continued to drop during the following year by an additional 20 percent.²⁷ The agency believes this decline is due to increased communication between employees and supervisors as a result of ADR. Similarly, during a three-year period at the U.S. Air Force, the number of EEO

complaints that were mediated increased by 36 percent, and the number of total complaints dropped by 39 percent.²⁸

Increased Satisfaction

Parties find ADR to be a more satisfying process than litigation, which silences the parties with rigid processes that require their attorneys to take the lead. ADR, in contrast, gives the parties a voice in resolving their own disputes. Litigation forces parties into combat with each other, while ADR allows them to work collaboratively. Not surprisingly, it is the dispute resolution method parties prefer.

For example, the U.S. Postal Service has conducted satisfaction studies of tens of thousands of ADR participants. Close to 90 percent of these parties reported that they were highly satisfied or satisfied with their experience in ADR.²⁹ Both employees and managers were equally satisfied.³⁰ In contrast, parties who participated in adjudication in comparable cases reported satisfaction levels of about 45 percent.³¹ Similarly, the EEOC found that more than 90 percent of parties who used ADR said they would do so again.³²

Examples of Successful ADR

Several examples will show the wide range of government cases where ADR has been successful. One of the most important cases in which ADR was used is the Microsoft litigation. The Justice Department and a number of states sued the software maker in 1998 for alleged violations of antitrust laws. This case demanded enormous resources from all sides. A dozen Justice Department attorneys worked on the case full time, joined by another dozen who worked on the matter part time. Microsoft was represented by as many lawyers or more. Many lawyers from state attorney generals' offices also participated. All sides litigated the case through a trial, an unsuccessful attempt by a judge to settle the matter, and an appeal to the appellate court. After all of this work, the parties appeared to be little closer to reaching an agreement than when the lawsuit began three and a half years earlier.

At this point, the parties proceeded to mediation led by an experienced private mediator. All sides worked together under the

guidance of the mediator to explore possible settlement options. After about two weeks, they emerged with a settlement resolving the Justice Department's claim in the case (although some states objected), which the judge approved.

Without mediation, the parties might have proceeded to yet another trial, which probably would have led to another appeal, and an appeal to the Supreme Court after that. All sides would have continued to expend tremendous resources, the country's computer industry would have continued to operate under uncertainty, and it is possible we still would not have a decision to this day.

Another example of successful ADR took place in Cincinnati after a police officer shot and killed an unarmed nineteen-year-old African American man in 2001. Following the shooting, the city erupted in violence. Protestors set fires, looted stores, and pulled motorists from their cars to assault them.³³ After police had arrested dozens of people and the fire department had made more than fifty runs, the mayor instituted a dusk-to-dawn curfew and called in more than one hundred Ohio State Highway Patrol officers wearing riot gear. Community groups filed a lawsuit alleging discriminatory law enforcement by the Cincinnati police department, and the federal government began an investigation of a possible pattern or practice of civil rights violations.

All sides were concerned that a court battle would not solve these problems. No matter which side prevailed, anger and unrest in Cincinnati would likely continue. Instead, the parties decided to turn to mediation to foster increased communication among the people in the city. The mediator met with representatives of the police, civil rights groups, and other community members many times over a period of months. The parties discussed what had happened and how they wanted to move forward. At the end of the process, they agreed to a settlement designed to help reach the goals everyone shared: improving the quality of police services and rebuilding trust among all the members of the community. Although these problems are not easy to solve, most people agree that ADR has been a better way to work on them than litigation would be.

The U.S. Air Force has had tremendous success with ADR in resolving government contract controversies. One dispute with Boeing had been pending for more than ten years before ADR was

used. The parties had attempted to negotiate a settlement on their own during this time but were unable to do so. The claim involved \$785 million, and the interest charges also grew by thousands of dollars every day the dispute continued. ADR was successful in settling the case.³⁴ The air force also used ADR to settle a contract claim against the Northrop Grumman Corporation involving \$195 million.³⁵ Continuing to litigate either of these matters would have been extremely expensive for all parties and would have had unpredictable results. Litigation also could have damaged the government's relationship with some of its most important military suppliers. Following the air force's success with ADR in these matters, the secretary of the air force issued an order creating an official policy to use ADR "to the maximum extent practicable."³⁶

ADR is successful in lower-profile matters as well. For example, ADR helped resolve a suit filed by the family of a veteran who had died during surgery at a government hospital. A court would have been able to award only money, but the family members were not motivated solely, or even primarily, by money. During mediation, the parties arrived at a unique agreement: the government purchased a tree and a brass plaque to honor the veteran who had died. The tree was planted on the hospital grounds as a memorial in a ceremony attended by the family, the lawyer for the government, and the hospital director. The monetary portion of the claim was then settled for a relatively modest amount.

The plaintiffs were pleased with the settlement that they and the government had created together. More than just money, they were seeking closure to the situation, as well as an acknowledgment from the hospital of what had happened to their father. Furthermore, every time the hospital director and other doctors walk by this tree, they are reminded of the importance of being careful in what they do, which may reduce the likelihood of a similar tragic event.

Barriers to Federal ADR

There are unique considerations in the federal government that can make ADR use more difficult. First, some government cases involve principles that are not subject to compromise. While private entities are free to settle disputes in whatever manner they choose, the

government does not always have that luxury. When enforcing the law, the government cannot concede certain principles even when that would make a matter easier to resolve.³⁷

Similarly, because the government is a public entity, it has a special duty to ensure that it makes decisions uniformly. This can make it more difficult to settle disputes on a case-by-case basis using ADR. While private parties can resolve complaints in different ways depending on the circumstances, the government has a responsibility to be consistent, and this can limit its flexibility in ADR processes.

Because the government is involved in so many disputes, it cannot afford to settle some claims the way private entities can. For example, private companies often pay small amounts of money to settle nuisance lawsuits that have little or no merit. The government has limited ability to do this, because it might be faced with thousands of copycat lawsuits were it to adopt a policy of making payments for frivolous claims.

The size and hierarchical structure of the government can make it difficult for officials with settlement authority to participate in ADR. Because agency officials with full settlement authority often must supervise hundreds of cases, they typically cannot participate in every ADR session. This can be a disadvantage for the government, because ADR is more effective when the people negotiating have the power to reach a final agreement. Fortunately, mechanisms exist to overcome this barrier, as discussed in Chapter Five of this book.

There also can be a conflict between the public's right to know about the activities of its government and the importance of confidentiality in ADR. As a general matter, citizens have an interest in understanding how the government transacts business, including how it settles cases. However, the ADR process is more effective when both sides can speak candidly about their goals for settlement, without having to be concerned that what they say will become public. When ADR involves private parties, they almost always agree to complete confidentiality. When the government is involved, however, these competing interests can require compromises. (Confidentiality is discussed in detail in Chapter Eight.)

While these barriers can make ADR use more difficult when the government is involved, they usually do not present insurmountable problems. The advantages of ADR have led parties to find ways to work around these issues.

Federal ADR Laws and Regulations

Congressional statutes, presidential orders, and agency regulations have helped increase the use of ADR in the government as well as guide its development. The origins of federal ADR can be traced to the late nineteenth century. The use of ADR has expanded considerably since then, with the greatest changes starting around 1990.

Historical Background

Mediation by respected community leaders and elders has been used in societies throughout history and existed in the United States among immigrant and religious groups as early as colonial New England.³⁸ Within the federal government, ADR began in the late nineteenth century. The Act of 1888 created the first federal ADR program: voluntary boards of arbitration that resolved controversies between railroads and their unions to avoid disrupting transportation.³⁹ Ten years later, Congress passed the Erdman Act, providing for mediation for these disputes.⁴⁰

The first federal mediation agencies began in the early twentieth century. The Newlands Act in 1913 established the Board of Mediation and Conciliation to handle railroad labor disputes.⁴¹ (This is the predecessor agency to the current National Mediation Board.⁴²) That same year, Congress created the U.S. Conciliation Service as part of the new Department of Labor to offer mediation and conciliation in labor disputes.⁴³ (This agency now exists as the Federal Mediation and Conciliation Service.⁴⁴)

The next phase of government ADR involved its application to disputes beyond the labor area. The Federal Arbitration Act, passed in 1925, declared a national policy favoring arbitration, establishing this ADR process in the commercial arena.⁴⁵ In 1937, the Federal Rules of Civil Procedure authorized judges to conduct settlement conferences in all federal civil lawsuits.⁴⁶ The Administrative Procedure Act in 1946 created agency administrative processes that can resolve certain cases without the need for federal court litigation.⁴⁷ The Civil Rights Act of 1964 created the Community Relations Service of the Justice Department to help facilitate the resolution of community conflicts caused by differences in race, color, and national origin.⁴⁸

The Pound Conference held in 1976 had an important effect on the development of ADR in the government. At this meeting of 250 judges, lawyers, court administrators, law professors, and others, Harvard Law School professor Frank Sander described a vision of a courthouse as a “Dispute Resolution Center.”⁴⁹ In this image of a multidoor courthouse, a screening clerk would channel litigants in one of six directions, comprising “a diverse panoply of dispute resolution processes.”⁵⁰ Sander issued a call to “reserve the courts for those activities for which they are best suited and to avoid swamping and paralyzing them with cases that do not require their unique abilities.”⁵¹

As a result of the Pound Conference, Attorney General Griffin Bell commented, “Traditional procedures of the courts are generally too slow and costly to be useful in resolving relatively minor disputes. . . . The adversary process is not always the best mechanism for resolving such disputes.”⁵² Putting these ideas into action, Bell funded the first neighborhood justice centers to provide for ADR on the community level.⁵³

At around the same time, Congress encouraged federal agencies to use mediation, conciliation, and arbitration to resolve federal employee workplace disputes by passing the Civil Service Reform Act of 1978.⁵⁴ Two years later, the Dispute Resolution Act of 1980 encouraged state and local government to experiment with ADR (although it provided no money for this purpose).⁵⁵ By this point, ADR was being used to resolve a wide range of disputes at federal agencies from the Army Corps of Engineers to the Federal Deposit Insurance Corporation.

Recent Congressional Legislation

ADR in the federal government took a major step forward starting in the 1990s. The Civil Justice Reform Act of 1990 called for the judicial branch to create plans to reduce cost and delay in civil litigation, explicitly mentioning ADR as a case management principle.⁵⁶ In recommending the legislation, the Senate Judiciary Committee commented, “The last 15 years have witnessed the burgeoning use of dispute resolution techniques other than formal adjudication by courts. . . . While the data is not yet complete, studies of various ADR programs have shown generally favorable results. . . . As the

Federal Courts Study Committee concluded, “Experience to date provides solid justification for allowing individual federal courts to institute ADR techniques in ways that best suit the preferences of bench, bar and interested public.”⁵⁷

The Administrative Dispute Resolution Act (see Appendix A, the amended version of this act), also passed in 1990, was watershed legislation for ADR programs in the federal executive branch.⁵⁸ The introductory language for this act shows Congress believed the time had come for the government to embrace ADR:

Administrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes; . . . alternative means of dispute resolution have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious; . . . such alternative means can lead to more creative, efficient, and sensible outcomes; . . . Federal agencies may not only receive the benefit of techniques that were developed in the private sector, but may also take the lead in the further development and refinement of such techniques; and . . . the availability of a wide range of dispute resolution procedures, and an increased understanding of the most effective use of such procedures, will enhance the operation of the Government and better serve the public.⁵⁹

This act has a number of key provisions. First, it requires each agency to adopt an ADR policy for its formal and informal adjudications, rulemakings, enforcement actions, permit decisions, contract administration, litigation, and other actions.⁶⁰ This language is comprehensive, covering much of what agencies do.

Second, each agency must designate a senior official to be its dispute resolution specialist, with responsibility to implement the act and the agency’s ADR policy.⁶¹ Some agencies have appointed senior career officials to serve in this function, and others have chosen presidentially appointed, Senate-confirmed political officials.

Third, each agency is required to provide regular training on the practice of negotiation, mediation, arbitration, and related techniques.⁶² The agency dispute resolution specialist is charged with periodically recommending to the agency head which employees would benefit from this training.⁶³

Fourth, each agency must review each of its contracts, grants, and related agreements and consider amending them to authorize and encourage the use of ADR.⁶⁴ This review process is designed to cover the full range of the agency's contractual activities with the public.

The act did have several limitations. Although it authorized arbitration, the government was permitted to withdraw from any arbitration award within thirty days.⁶⁵ In this sense, government binding arbitration was binding only on private parties, who were understandably reluctant to use it. Furthermore, the law provided no exception to the Freedom of Information Act, which allows public access to government documents.⁶⁶ This limited the confidentiality of the process. Finally, Congress made the law an experiment, setting it to expire after five years.

In 1996, Congress reenacted the law and removed these restrictions.⁶⁷ The government can no longer back out of an arbitration award.⁶⁸ There is now an exemption from the Freedom of Information Act that generally provides for confidentiality of ADR documents exchanged between a party and a neutral.⁶⁹ Finally, the law is now permanent, with no expiration date.

Congress passed legislation requiring the federal courts to implement ADR programs two years later. The introduction to the Alternative Dispute Resolution Act of 1998 (see Appendix C) notes how ADR can be valuable in the court setting: “[ADR] has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements; . . . [ADR] may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently.”⁷⁰

This act requires each district court to “devise and implement its own alternative dispute resolution program,” “encourage and promote the use of alternative dispute resolution in its district,” “require that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation,” and “provide litigants in all civil cases with at least one alternative dispute resolution process.”⁷¹ Courts can require that parties participate in mediation and early neutral evaluation (although they cannot order parties to use arbitration). Congress has not allocated additional funds to the courts to implement this act, however.

Recent Executive Branch Orders

Several presidents have issued orders requiring the federal government to increase its use of ADR. In 1991, President George H. W. Bush promulgated an executive order calling for training of government attorneys in ADR, noting that ADR can “contribute to the prompt, fair, and efficient resolution of claims.”⁷² However, this order included a caveat: “Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal or structured Alternative Dispute Resolution (ADR) process.”⁷³

President Bill Clinton removed this caveat and endorsed ADR even more strongly in a 1996 executive order: “Where the benefits of Alternative Dispute Resolution (‘ADR’) may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the parties.”⁷⁴

In 1998, President Clinton issued a presidential memorandum (see Appendix D) stating, “As part of an effort to make the Federal Government operate in a more efficient and effective manner, and to encourage, where possible, consensual resolution of disputes and issues in controversy involving the United States, including the prevention and avoidance of disputes, I have determined that each Federal agency must take steps to . . . promote greater use of mediation, arbitration, early neutral evaluation, agency ombuds, and other alternative dispute resolution techniques.”⁷⁵

This order created the Interagency ADR Working Group and appointed the attorney general to act as its chair. The working group is ordered to “facilitate, encourage, and provide coordination for agencies in such areas as: 1. development of programs that employ alternative means of dispute resolution, 2. training of agency personnel to recognize when and how to use alternative means of dispute resolution, 3. development of procedures that permit agencies to obtain the services of neutrals on an expedited basis, and 4. recordkeeping to ascertain the benefits of alternative means of dispute resolution.”⁷⁶

This working group began on September 14, 1998, with a meeting hosted by the attorney general and the deputy director for management at the Office of Management and Budget. More than one hundred high-level representatives from nearly sixty federal agencies

attended the meeting. Since that time, the group has hosted training sessions, meetings, and colloquia on all aspects of ADR. The group has produced guidance documents in use throughout the federal government that are available on the following Web site: www.adr.gov. A steering committee for the group meets monthly and is composed of ADR leaders from several dozen agencies. (In 2000, the attorney general presented the president with a report describing the activities of the working group. See Appendix F.)

At the Justice Department, the attorney general created the Office of Dispute Resolution to coordinate the use of ADR (see Appendix B).⁷⁷ The order establishing the office states, "The purpose of this order is to promote the broader use of alternative dispute resolution (ADR) in appropriate cases to improve access to justice for all citizens and to lead to more effective resolution of disputes involving the government." The office develops ADR policies, and it provides assistance to government attorneys in their use of ADR.

All Justice Department civil litigating divisions and the Executive Office for United States Attorneys have published statements describing their policy for the use of ADR, including descriptions of the cases where it is most and least appropriate.⁷⁸ The attorney general wrote in the introduction to this guidance, "Our commitment to make greater use of ADR is long overdue. Clearly, our federal court system is in overload. Delays are all too common, depriving the public of swift, efficient, and just resolution of disputes. The Department of Justice is the biggest user of the federal courts and the nation's most prolific litigator. Therefore, it is incumbent upon those Department attorneys who handle civil litigation from Washington and throughout the country to consider alternatives to litigation. . . . If we are successful, the outcome will benefit litigants by producing better and quicker results, and will benefit the entire justice system by preserving the scarce resources of the courts for the disputes that only courts can decide."⁷⁹

Conclusion

One of the reasons ADR has been so successful in the U.S. government is that it is consistent with the values of the country. One example of this is provided by the Seal of the President of the United States. The seal depicts an eagle grasping an olive branch (symbol-

izing peace) in its right talons and arrows (symbolizing war) in its left talons. When the seal was created, the eagle's head turned toward its left, facing the arrows of war. After World War II, President Harry Truman issued an executive order requiring that the eagle's head be turned to face the olive branch, and it has remained that way ever since.⁸⁰ True to this symbol, the United States seeks to settle disputes with its citizens in the most harmonious ways possible, and ADR is playing an increasingly vital role in fulfilling this vision.

About the Author

JEFFREY M. SENGER is senior counsel in the Office of Dispute Resolution at the U.S. Department of Justice. He advises and trains federal lawyers around the country in alternative dispute resolution and negotiation. He has served as a federal mediator for the U.S. District Court; a civil, family, and criminal misdemeanor mediator for the Superior Court in Washington, D.C.; and an arbitrator for the Better Business Bureau and the District of Columbia Bar Association. In previous experience at the Justice Department, he directed civil and appellate training at the Attorney General's Advocacy Institute, litigated discrimination cases around the country as a senior trial attorney in the civil rights division, and prosecuted crimes as a special assistant U.S. Attorney. He began his career as a judicial law clerk for U.S. District Court Judge Earl B. Gilliam. A well-known educator in the field, he teaches with Harvard Law School's Program on Negotiation, the National Institute of Trial Advocacy, and Harvard's trial advocacy program. His international ADR experience includes trips to India, Turkey, Israel, Nigeria, Jordan, Egypt, and Argentina to speak to judges and political leaders. He has published numerous articles in the field, and the U.S. Congress has asked him to testify as an expert witness on ADR. He is a graduate of Harvard College and Harvard Law School.

