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ADR at the Environmental Protection Agency

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Federal Administrative Dispute Resolution Deskbook

Marshall J. Breger, editor
Gerald S. Schatz and Deborah Schick Laufer, co-editors

Section of Administrative Law and Regulatory Practice

Defending Liberty Pursuing Justice
Federal Administrative Dispute Resolution Deskbook

Contents

Preface ................................................................................. i

About the Contributors ...................................................... iii

Federal Administrative Dispute Resolution: An Overview ...................... vii

Section I - Administrative Dispute Resolution

Chapter 1

The Administrative Dispute Resolution Act of 1996 and the Private Practitioner .......... 1

I. The 1990 Act .............................................................. 1
   A. Institutionalization of ADR ................................ 2
   B. Agency Authority to Use ADR .................... 2
   C. When Agencies Will Not Use ADR .......... 2
   D. Arbitration ...................................................... 3
   E. Confidentiality ............................................. 4
   F. Contracts ....................................................... 5
   G. Tort Claims .................................................... 5

II. The 1996 Act ........................................................... 6
   A. Scope ............................................................ 6
   B. Enhanced Confidentiality Protections ...... 7
   C. Binding Arbitration ................................. 9
   D. Contract Claims ................................. 9
Chapter 2
The Administrative Dispute Resolution Act of 1996:
Text and Section-by-Section Commentary ..........35
I. Overview ...................................................35
   A. Definition ............................................35
   B. Statute ...............................................35
   C. Coverage .............................................36
   D. Confidentiality .....................................37
   E. Binding Arbitration ...............................38
   F. Federal Consulting and Coordinating ..........38
   G. Expedited Acquisition of Neutrals ............38
II. Legislative History ....................................39
III. Statute and Section-by-Section Commentary ....41

Chapter 3
No Fear: Confidentiality Day-to-Day
in Federal Dispute Resolution ........................75
I. The Act’s Goal: Candor without Fear ...............75
II. Implementation of the
   Act’s Confidentiality Provisions ....................77
III. Recent Uncertainties: The Fifth Circuit’s Decision
   in Texas Agricultural Mediation Case ............84
   A. Fifth Circuit Decision
      Breaching Confidentiality .......................85
   B. ADR Act’s Applicability: The Details ..........86
Chapter 4
Labor Arbitration Services Provided by the Federal Mediation and Conciliation Service

I. The FMCS Arbitration Procedures
II. Who Are the Arbitrators?
   A. How Arbitrators Are Selected for the FMCS Roster
   B. Removal of Arbitrators from the Roster
III. Procedures for Requesting Arbitrators and Arbitration
IV. FMCS Expedited Procedures
V. FMCS Efforts for Improvement

Section II - Negotiated Rulemaking

Chapter 5
Using Negotiated Rulemaking Effectively

I. Introduction
II. A Brief Overview of Negotiated Rulemaking
III. Potential Benefits of Negotiated Rulemaking
IV. Relevant Legislative Guidance and Policy Initiatives
V. Using Reg-Neg: Identifying Regulations That Are Good Candidates
VI. Using Reg-Neg: The Negotiating Process
   A. Developing Ground Rules for the Negotiating Committee
   B. Role of the Facilitator or Mediator
   C. Defining Participation in the Negotiating Process
   D. Memorializing Negotiating Sessions
   E. Defining Consensus: When Has an “Agreement” Been Reached?
VII. Roles for Parties in Regulatory Negotiations .......125
   A. Selecting a Neutral ........................................ 125
   B. What an Agency Should Expect
to Do in a Reg-Neg ........................................ 127
      1. Shape Public Expectations ......................127
      2. Participate Appropriately ......................127
      3. Define the Issues on the Table .............128
      4. Provide for an Appropriate Agency
         Representative at the Table ...............129
   C. What Other Participants Should Expect
to Do in a Reg-Neg ...................................... 129
      1. Participate Effectively ......................129
      2. Represent Constituents ......................130

VIII. Practical Advice on
Making Reg-Negs Successful ................................ 130
   A. Define Procedures and
      Expectations in Advance ......................130
   B. Undertake a Thorough Convening
      before Deciding to Negotiate ..............131
   C. Define the Rules of Engagement ............132
   D. Define Expectations as to
      Any “Consensus” Result ......................132
   E. The Importance of Advance Preparation ......133

Chapter 6
Negotiated Rulemaking Changes EPA Culture.........135
I. EPA Negotiated Rulemaking Efforts ..................135
   A. Small Non-Road Engines
      Emissions Controls............................135
   B. Revision of the Hazardous
      Waste Manifest ................................136
   C. Wood Furniture Manufacturing
      Industry VOC Emission Controls .............137
   D. Architectural and
      Industrial Maintenance Coatings ...........138
   E. Disinfection By-Products ......................138
F. National Emission Standards for Coke Oven Batteries ................. 139
G. Oxygenated and Reformulated Fuels ......................... 140
H. Recycling of Lead Acid Batteries ......................... 141
I. Fugitive Emissions from Equipment Leaks ......................... 141
J. Asbestos in Schools ........................................ 142
K. Underground Injections .................................... 142
L. RCRA Minor Permit Modifications ......................... 143
M. Woodburning Stoves ..................................... 143
N. Farmworker Protection Standards ......................... 144
O. Emergency Pesticide Exemptions ........................................ 145
P. Nonconformance Penalties for Heavy-Duty Trucks ................. 145
II. The Impetus for Negotiated Rules ........................................ 146
III. Negotiated Rulemaking Evolves ........................................ 150

Section III - Where the Federal Government Uses ADR

Chapter 7
United States Department of Agriculture, Farm Service Agency, Agricultural Mediation Program .... 155
I. Introduction ........................................ 155
II. History of the USDA Mediation Program ......................... 156
A. Certification of State Mediation Programs ......................... 157
B. Matching State Grants ........................................ 157
III. What Is Mediation? ........................................ 158
A. Rights and Responsibilities ........................................ 159
B. Decisions That Can Be Mediated ........................................ 159
C. Decisions That Cannot Be Mediated ........................................ 160
IV. Requesting Mediation ........................................ 161
V. Mediation Process ........................................ 161
A. Location and Facilities for Mediation ........................................ 162
B. Mediator’s Role ........................................ 162
### Chapter 9

**Private Perspectives on ADR in Federal Contract Disputes**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>193</td>
</tr>
<tr>
<td>The Use of ADR</td>
<td>195</td>
</tr>
<tr>
<td>Suitability of Cases for ADR</td>
<td>195</td>
</tr>
<tr>
<td>Suitability of Particular ADR Modes</td>
<td>196</td>
</tr>
<tr>
<td>Partnering</td>
<td>197</td>
</tr>
<tr>
<td>Neutral Evaluation</td>
<td>198</td>
</tr>
<tr>
<td>Mediation</td>
<td>198</td>
</tr>
<tr>
<td>Settlement Judge</td>
<td>199</td>
</tr>
<tr>
<td>Mintrial/Summary Trials</td>
<td>199</td>
</tr>
<tr>
<td>Arbitration</td>
<td>199</td>
</tr>
<tr>
<td>Ombudsmen</td>
<td>200</td>
</tr>
<tr>
<td>The Continuum</td>
<td>200</td>
</tr>
<tr>
<td>A Caution for Claims Involving Criminal Matters</td>
<td>200</td>
</tr>
<tr>
<td>The Court of Claims and Armed Services Board of Contract Appeals</td>
<td>201</td>
</tr>
<tr>
<td>Practical ADR Clauses</td>
<td>202</td>
</tr>
<tr>
<td>Confidentiality</td>
<td>203</td>
</tr>
<tr>
<td>Settlement Discussion</td>
<td>203</td>
</tr>
<tr>
<td>Discovery</td>
<td>204</td>
</tr>
<tr>
<td>Work Product</td>
<td>204</td>
</tr>
<tr>
<td>Nondisclosure</td>
<td>204</td>
</tr>
<tr>
<td>Mediation</td>
<td>205</td>
</tr>
<tr>
<td>Participants in the Mediation Process</td>
<td>205</td>
</tr>
<tr>
<td>Mediator</td>
<td>206</td>
</tr>
<tr>
<td>Negotiating Sessions</td>
<td>206</td>
</tr>
<tr>
<td>Confidentiality and the Use of Information</td>
<td>206</td>
</tr>
<tr>
<td>Mintrial</td>
<td>208</td>
</tr>
<tr>
<td>Process</td>
<td>208</td>
</tr>
<tr>
<td>Neutral ASBCA Judge</td>
<td>209</td>
</tr>
</tbody>
</table>
3. Participants ............................................. 211
4. Posthearing Procedures ......................... 211
D. Safeguards for the Parties ..................... 212
E. Termination of Agreement ...................... 212
V. Conclusion ............................................... 213

Attachment A:
Amended General Order No. 13 .................... 217
Notice to Counsel .......................................... 219

Attachment B:
Notice Regarding Alternative Methods of
Dispute Resolution ........................................ 225

Attachment C:
14 December 1993 (Sample Agreement) ........ 229
14 May 1994 (Sample Agreement) .................. 233
25 October 1996 (Sample Agreement) ............ 237

Chapter 10
Alternative Means of Dispute Resolution
in Federal Contract Disputes
I. Contract Claims and Appeals .................... 243
   A. The Need for Change in
      Government Contract Disputes .............. 243
   B. ADR Amendments to the
      Contract Disputes Act of 1978 .............. 245
   C. Executive Branch Commitment to ADR ... 250
   D. The Federal Acquisition
      Regulation (FAR) .............................. 251
II. Bid Protests ............................................. 252
III. ADR Continuum for Contract Disputes ....... 254
IV. Individual Methods ................................. 256
   A. Positional Negotiation ....................... 256
   B. Interest-based Bargaining .................. 256
V. Third-Party Assisted Methods .................. 257
   A. Mediation ....................................... 257
   B. Fact-Finding .................................... 257
Chapter 11
Using ADR to Resolve Contract Disputes Between Government Contractors and the Air Force

I. Introduction ............................................................ 285
II. Background ............................................................ 286
   A. Initial Legal and Regulatory Authority for Federal Agency ADR ............... 286
   B. DoD and Air Force Implementation of the ADR Act of 1990 ................. 288
   C. Ramifications of the ADR Act of 1996 ..................................... 290
   D. Executive Orders and Regulatory Developments ............................ 293
   E. Air Force ADR Developments through April 1999 .............................. 294
III. Recent Air Force ADR Initiatives ............................................. 299
IV. Is This the Right Case for ADR? ............................................... 304
   A. Factors Favoring the Use of ADR ............................................ 305
   B. Factors Weighing Against the Use of ADR ................................. 310
V. Selecting an ADR Method .................................................... 313
   A. Mediation ............................................................................. 314
   B. Fact-Finding ........................................................................ 316
   C. Settlement Judge .................................................................... 316
   D. Minitrial ................................................................................. 318
   E. Arbitration ............................................................................. 319
   F. Summary Trial with Binding Decision ........................................... 319
VI. Implementing ADR ............................................................ 321
   A. Drafting the ADR Agreement ................................................... 323
      1. Agreeing Upon and Obtaining a Neutral .................................... 323
      2. Scheduling ........................................................................... 326
      3. Outstanding Discovery ......................................................... 326
      4. Exchange of Information ....................................................... 327
      5. Confidentiality ...................................................................... 327
   B. Conducting the Actual ADR .................................................... 329
      1. Be Prepared ........................................................................ 329
# Acquisition ADR at the Federal Aviation Administration

## Chapter 12

### I. Background

#### ADR Implementation

ADR Act of 1996

### II. The ODRA Dispute Resolution Process

### III. ADR Resources of the ODRA

### IV. ADR Techniques Available

- **A. Mediation**
- **B. Arbitration**
- **C. Neutral Evaluation**
- **D. Use of Experts**
- **E. Conferences**

### V. Examples of ADR Settlement Outcomes

- **A. Bid Protests**
- **B. Contract Disputes**
- **C. Procedural Matters**

### VI. Conclusion

## Chapter 13

### ADR at the Environmental Protection Agency

### I. Introduction

### II. Environmental ADR

### III. Statutes and Policies Promoting Environmental Enforcement ADR

- **A. The 1987 Guidance Memo**
- **B. Federal Statutes and Policies Encouraging the Use of ADR**
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>C. Other Federal Government Policies Promoting ADR</td>
<td>375</td>
</tr>
<tr>
<td>IV. The EPA's Environmental Enforcement ADR Program</td>
<td>376</td>
</tr>
<tr>
<td>A. The Enforcement Program</td>
<td>376</td>
</tr>
<tr>
<td>B. Current Uses of Environmental ADR</td>
<td>376</td>
</tr>
<tr>
<td>V. CERCLA Enforcement Mediation</td>
<td>377</td>
</tr>
<tr>
<td>A. The Importance of Mediation in CERCLA Cases</td>
<td>377</td>
</tr>
<tr>
<td>B. Pilot Projects and CERCLA ADR Initiatives</td>
<td>379</td>
</tr>
<tr>
<td>C. CERCLA Enforcement Mediation Today</td>
<td>379</td>
</tr>
<tr>
<td>D. The CERCLA Enforcement ADR Process</td>
<td>382</td>
</tr>
<tr>
<td>VI. Conclusion</td>
<td>385</td>
</tr>
</tbody>
</table>

Chapter 14
Use of Consensus Building at the Department of the Interior: Applications of Informal Administrative Consensus Building .......... 389
I. Wild Horse and Burro Act Mediation ...................................... 390
II. Facilitating a Solution for National Park Air Tour Flights .......... 393
III. Resource Advisory Councils: Institutionalized Use of Consensus Building .... 397
IV. Conclusion .............................................................................. 401

Chapter 15
ADR in the Federal Workplace: Why It Is Needed, How It Can Help, and Some Cautions to Observe ................................................... 405
I. Factors That Underlie the Need for ADR .................................... 406
A. A Complex, Lengthy, and Adversarial Process ............................ 406
B. Increasing Numbers of Complaints .......................................... 407
C. Many Cases Do Not Involve Discrimination ................................ 409
Chapter 16

Mediation of Federal Employment Discrimination Charges

I. Introduction

II. History of Mediation at EEOC

III. EEOC Principles of Mediation

IV. The Mediation Process

A. How Cases Are Selected for Mediation

B. To Mediate or Not to Mediate

C. Participants in the Mediation Process

1. The Mediators

2. The Parties

D. How Is the Mediation Kept Confidential?

E. How the Mediation Works

F. Advantages and Disadvantages of Mediation

V. Conclusion

Section IV - Federal Alternative Dispute Resolution Techniques

Chapter 17

A Procedure for the Voluntary Mediation of Disputes Involving Government Administrative Agencies

I. Introduction

II. The Mediation Process Itself
A. Phase I: Retaining a Mediator to Resolve the Dispute .................. 435
B. Phase II: Familiarizing the Mediator with the Facts of the Dispute ... 437
C. Phase III: The Mediator's Presentation of Settlement Terms and the Initial Reaction of the Parties ... 440
D. Phase IV: Shuttle Diplomacy ........................................ 441

III. Conclusion .............................................................. 443

Chapter 18
Mediation Bookends:
Getting Into and Out of Mediation ...................... 445

I. Convening ............................................................ 445
   A. Understand All the Major Issues of Your Side ................. 446
   B. Understand the Process .......................................... 447
   C. Identify the Participants for Your Side ....................... 447
   D. Propose the Mediation ........................................... 448
   E. Work Out Details .................................................. 449
   F. Jointly Agree to the Mediator .................................. 450
   G. Schedule the First Session ..................................... 451
   H. Prepare Your Side for the Mediation ......................... 451
   I. Persuade the Other Side ......................................... 452

II. Writing Durable Settlement Agreements ................. 452

III. Samples of Agreements to Mediate ....................... 454

IV. Sample Documents Used to Convene Workplace Mediations ....... 459

Chapter 19
Labor-Management Partnership:
A 12-Step Program for Change ......................... 477

I. Labor and Management
   Do Strange Bedfellows Make ...................................... 477
II. In the Ideal Sense .................................................. 477
III. 12 Steps to Successful Partnerships ....................... 478
III. The Antecedents for Workplace Culture:
   A Brief History of the USPS ........................................ 510
IV. Research on REDRESS and Workplace Culture ................... 511
V. A Brief History of the REDRESS Program ......................... 513
VI. How Mediation Might Affect Workplace Culture: Preliminary Evidence from the REDRESS Pilot Project ....... 517
VII. REDRESS and the Transformative Model of Mediation .......... 519
VIII. Mediation as a Tool for Workplace Cultural Change ............. 521
IX. Comparing Transformative and Evaluative Mediation ............. 522
X. Conclusion ............................................................. 524

Chapter 23
Can a Federal Ombuds Help You? ....................................... 527
I. What Is an Ombuds? .................................................. 528
II. What Can You Expect If You Contact an Ombuds? ................. 529
   A. Be Advised! ....................................................... 530
   B. Confidentiality .................................................. 531
   C. Disclosure of Agency Nonpublic Information ................. 533
   D. Statutes of Limitation .......................................... 533
   E. Advocacy ......................................................... 533
   F. Inability to Mandate Change .................................. 534
III. Should I Seek the Ombuds’ Assistance? ......................... 534
   A. Case One ......................................................... 534
   B. Case Two ......................................................... 536
   C. Case Three ....................................................... 537
   D. Case Four ......................................................... 538
IV. When Is a Federal Ombuds Most Likely to Be Helpful? ............ 539
Chapter 26
Alternative Dispute Resolution at the
General Services Board of Contract Appeals............597

I. Introduction......................................................597
   A. The Evolution of Alternative Dispute
      Resolution at the GSBCA.........................597
   B. Expansion of ADR
      Services at the GSBCA...........................598

II. ADR for CDA Appeals and Other
    Disputes ......599
   A. ADR in Contract Dispute Act Appeals ........599
   B. ADR in Disputes Not
      Involving CDA Appeals .........................599

III. Initial Procedures ............................................600
    A. Initiation of ADR.................................600
    B. Appointing the Board Neutral.................601

IV. ADR Procedures ................................................601
    A. Selection of Procedures .......................601
       1. Neutral Case Evaluation......................602
       2. Mediation ......................................603
       3. Combined ADR Procedures ..................603
       4. MiniTrial ......................................604
       5. Binding Decision .............................605
    B. Additional Procedures .........................606
       1. Initial Conference with the Clients ......606
       2. ADR Prior to Issuance of a
          Contracting Officer's Final Decision ....606
       3. Limited Discovery Prior to ADR ...........607
       4. Avoiding Discovery Disputes by
          Immediate Judicial Intervention .........607
       5. Confidentiality of
          Materials Submitted .........................608
       6. Judicial Intervention .........................608
       7. Motions for Summary Relief as a
          Basis for ADR ..................................610
8. Using Discovery as a Prelude to a
   Neutral Case Evaluation ....................... 611
9. Telephonic Hearings ............................ 612
10. Standing Neutrals on
    Specified Projects ............................ 612
11. Interagency Agreement with the
    Federal Aviation Administration .......... 612

V. Making ADR Work .................................. 613
   A. The Reality of ADR ............................ 613
   B. Why the Parties Choose ADR ............... 613
   C. Advantages of ADR ............................ 614
   D. The Danger of Formalization ............... 616

VI. Conclusion ........................................... 616

Attachment A:
Rule 204 Alternative Dispute Resolution ....... 619

Chapter 27
Recruiting and Training Outside Neutrals .......... 623
I. Background ......................................... 623
II. Qualifications ..................................... 624
III. Exclusions ......................................... 625
IV. Recruitment ........................................ 625
V. Training ............................................. 625
VI. Roster Management ................................ 627
VII. Cost ................................................ 628
VIII. Program Evaluation ............................ 628

Attachment A:
United States Postal Service ADR Provider Survey .... 631

Chapter 28
GSA's Schedule of Private Sector Providers ....... 635
Appendix A:
Administrative Dispute Resolution
Documents
Administrative Dispute Resolution Act of 1996 .............. 639
Alternative Means of Dispute Resolution, from Title 5, U.S. Code .................................................. 649
Presidential Memorandum, Interagency Committees on Use of Alternate Means of Dispute Resolution and Negotiated Rulemaking, May 1, 1998 .................... 677
Department of Justice, Attorney General:
  Guidance on Implementation of Litigation Reforms of Executive Order 12988 ...................... 681
Department of Justice, Policy on the Use of Alternative Dispute Resolution, and Case Identification Criteria for Alternative Dispute Resolution .................................. 689
Department of Justice, Authority to Compromise and Close Civil Claims ............................ 711
Negotiated Rulemaking Act ............................................. 717
Executive Order on Civil Justice Reform ....... 739
Environmental Policy and Conflict Resolution Act of 1998 ................................................ 747

Appendix B:
Additional Readings and Resources
Administrative Dispute Resolution ................................. 755
Negotiated Rulemaking ................................................... 755
Selected Federal ADR Policies ........................................ 755
Bid Protests, Contract Disputes, Procurement ................ 756
ADR In Workplace Disputes ........................................... 757
Neutrals and Training ...................................................... 757
Additional Reference Resources: Internet ...................... 758
Additional Reference Resources: Publications ............... 763
Chapter 13

ADR at the Environmental Protection Agency

by Joel B. Eisen

I. Introduction

This chapter examines how the U.S. Environmental Protection Agency (EPA) uses alternative dispute resolution (ADR) methods to help resolve complex environmental disputes. In recent years, the EPA's use of ADR has increased dramatically in a wide variety of settings. The EPA has made ADR a central feature of its environmental enforcement strategy, encouraged its use in Title VI and environmental justice conflict settings, and turned to negotiated rulemaking as an alternative to the cumbersome notice-and-comment process for the development of new federal regulations. Other EPA programs, such as the Brownfields Economic Redevelopment Initiative, promote nonadversarial methods for tackling complex environmental problems. This chapter focuses on environmental enforcement actions, where the EPA has made considerable progress toward a goal of making ADR a regular part of its enforcement strategy.

It is the EPA's official policy to consider ADR whenever it may result in a quicker, more efficient resolution of an enforcement action. The EPA has used ADR in civil enforcement actions initiated under seven major federal environmental statutes: the Clean Air Act (CAA); the Clean Water Act (CWA); the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, popularly known as Superfund); the Emergency Planning & Community Right-To-Know Act (EPCRA); the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); the Resource Conservation Recovery Act (RCRA); and the Toxic Substances
Control Act (TSCA). While the EPA has utilized several types of ADR, including convening, minitrials, and mediation, it most often employs mediation for resolution of enforcement cases. Mediation proceedings have varied widely in their scope and complexity; the EPA has used mediation in cases with as few as two parties and as many as 1,200 participants.

This chapter begins with a brief introduction to environmental ADR, including a description of the major ADR mechanisms, the advantages and disadvantages of using ADR to resolve environmental disputes, and the history of ADR's use in environmental disputes. It continues with an explanation of the growth of environmental enforcement ADR, including a summary of the statutes and policies encouraging the EPA to use ADR. Next it examines specific uses of ADR in enforcement cases, concentrating on the role of mediation in resolving CERCLA disputes. The chapter closes with a section that will be of particular interest to counsel for litigants in environmental cases: an ADR "road map" that summarizes the process from start to finish, from the EPA's decision to use ADR, to selection of an appropriate third-party neutral, to resolution of the dispute.

II. Environmental ADR

The types of ADR in environmental disputes include any techniques that parties employ to attempt to resolve their disputes voluntarily through the involvement of third-party neutrals. These include the following forms as well as lesser-known forms and variations and hybrids (for example, med-arb):

- *Mediation*, which is the dominant ADR method used in environmental enforcement disputes, involves a neutral third party (the mediator) who helps the parties reach an agreement to resolve their dispute, whether or not they in fact do so. Usually the parties voluntarily enter into mediation and choose the mediator. The