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Alternative Dispute Resolution in Agency Administrative Programs

Kristen Blankley

Kathleen Claussen

Judith Starr

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Kristen Blankley[à], Kathleen Claussen[†], and Judith Starr[*]

Abstract: This Article studies how federal agencies use and might better use different types of alternative dispute resolution (ADR)—including mediation, conciliation, facilitation, factfinding, minitrials, arbitration, and the use of ombuds—in the programs Congress has entrusted them to administer. The use of ADR by the executive branch of the federal government to resolve disputes with or among private actors has deep historical roots. ADR related to managerial agency matters such as employment or procurement is well-established across the government and performed under a uniform set of laws. Much less has been known, however, about the scope and reach of ADR in the execution of government programs entrusted to agencies by Congress, including regulatory enforcement, adjudication of claims, and administering benefits or reimbursing services such as provider fees. This Article begins to fill that gap.

Today, at least three dozen federal agencies publicly promote the use of ADR for their administrative programs. This Article presents that data for the first time. The project considers five fundamental aspects of agency ADR practice: the selection and implementation of the appropriate type of ADR and associated procedures; the qualifications and selection of agency ADR personnel; training of ADR staff; ADR case management practices; and interagency mechanisms to facilitate ADR and support agency ADR personnel.

Taken together, the Article makes three contributions. First, it lays out the legal framework for modern administrative-program ADR in federal agencies, along with some historical comparisons. Second, using an extensive and original qualitative empirical study, it describes agency ADR practices across the executive branch along five critical dimensions of ADR administration. Third, it develops conclusions and recommendations surrounding the uses of ADR in our administrative state.

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[à] Henry M. Grether, Jr. Professor of Law, University of Nebraska College of Law.
[†] Professor of Law, Georgetown University Law Center.
[*] Principal, Starr ADR, LLC; former General Counsel, Pension Benefit Guaranty Corporation, 2005-2019. This article is a lightly revised and shortened version of a report that was prepared in 2021-2022 for the Office of the Chairman of the Administrative Conference of the United States (ACUS). It does not necessarily reflect the views of the Office of the Chairman or the Conference (including the Conference's Council, committees, or members).

INTRODUCTION

The use of alternative dispute resolution ("ADR") by the executive branch of the federal government to resolve disputes with or among private actors has deep historical roots.[1] ADR related to managerial agency matters such as employment or

1. Thomas Jefferson (as Secretary of State) and Theodore Roosevelt (as President) each mediated critical disputes—the former with respect to the location of the nation's capital and the latter concerning the anthracite coal strike of 1902. *See* JEROME BARRETT & JOSEPH BARRETT, A HISTORY OF

procurement is well-established across the government and performed under a uniform set of laws.[2] Much less is known, however, about the scope and reach of ADR in the execution of government programs entrusted to agencies by Congress, including regulatory enforcement, adjudication of claims, and administering benefits or reimbursing services such as provider fees. This Article uses the term "administrative program ADR" to refer to this category of ADR. The U.S. Code defines an "administrative program" in the context of ADR carried out by agencies as including "a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rulemaking, adjudication, licensing, or investigation."[3]

In 1987, the Administrative Conference of the United States ("ACUS") developed a guide (the "Sourcebook") on federal agency ADR that reviewed some of this type of ADR work and provided guidance on its selection and use.[4] Since then, agency practices have changed, and new agencies developed innovative ADR programs not captured by any prior work. This study seeks to fill that gap.

Today, at least three dozen federal agencies publicly promote the use of ADR for their administrative programs. Agency ADR activities contribute in important ways to the work of the U.S. government. Although there is no government-wide data on the effectiveness of agency ADR, several agencies report that ADR has been a faster, cost-effective, and satisfactory form of dispute resolution for their programs.[5]

This Article studies how federal agencies currently use and might better use different types of ADR—including mediation, conciliation, facilitation, factfinding, minitrials, arbitration, and the use of ombuds—in the programs Congress has entrusted them to administer. It also addresses the use of ADR to resolve disputes before the initiation of a formal agency adjudicative proceeding or litigation involving the agency's enforcement authority. The project considers topics such as the selection and implementation of the appropriate type of ADR and associated procedures; the qualifications, selection, and training of agency ADR personnel; ADR case management practices; and interagency mechanisms to facilitate ADR and support agency ADR personnel.

The Article has three objectives. First, it provides, for the first time, background on the scope of administrative-program ADR in federal agencies, along with some historical comparisons. Part I provides important background and history on the legal framework for administrative-program ADR, the terminology used in this Article, and a synthesis of prior research on relevant issues. Second, the main contribution of this Article is its textured and in-depth analysis of agency ADR practices.

ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, CULTURAL, AND SOCIAL MOVEMENT (2004).

2. Some of these laws are administered by the Equal Employment Opportunity Commission (EEOC). The Federal Service Labor Management Relationship Statute is administered by the Federal Labor Relations Authority. Federal contracting is governed by the Federal Acquisition Regulation.

3. 5 U.S.C. § 571.

4. MARGUERITE S. MILLHAUSER & CHARLES POU, JR., SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION (1987) (prepared for the Office of the Chairman Administrative Conference of the United States).

5. *See, e.g.*, *Studies of the Mediation Program*, U.S. EEOC, https://www.eeoc.gov/studies-mediation-program (last visited Apr. 18, 2024); UDALL FOUND., ENVIRONMENTAL COLLABORATION AND CONFLICT RESOLUTION (ECCR) IN THE FEDERAL GOVERNMENT: SYNTHESIS OF FISCAL YEAR 2019 REPORTS 8 (2019), CONSENSUS BLDG. INST., USING DISPUTE RESOLUTION TECHNIQUES TO ADDRESS ENVIRONMENTAL JUSTICE CONCERNS: CASE STUDIES (2003).

It offers an empirical review premised on responses from nearly three dozen agencies surveyed, their publicly available information, and interviews with agency employees involved in ADR. As shown in Parts II-VI, these resources offer the only up-to-date glimpse into the ADR workings of the federal government presently available. Each Part summarizes agency ADR practices and provides some examples of the ways agencies have successfully deployed ADR as well as trends that are notable across the branch. Third, the Article develops conclusions and recommendations surrounding the uses of ADR in the five critical areas of ADR administration.

I. BACKGROUND ON ADR IN FEDERAL AGENCIES

There are at least two distinct origins of the programs studied here: those that were an outgrowth of ordinary agency adjudication to address agency needs, such as efficiency and burgeoning caseloads, and those that agencies created as standalone programs. Some agencies have administered ADR programs for several decades, especially where policymakers saw ADR as an opportunity to execute the agency's mission. Congress tasked many of those agencies with creating ADR initiatives as part of their core mandate.[6] Statutes dating back to the early part of the twentieth century empowered agencies to use ADR as a means of achieving their primary purposes.[7] More recently, agencies adopted ADR as a means of alleviating backlog or eliminating the need for agency adjudication as interest in alternative processes grew both inside the federal government and outside of it.[8] We treat these differing underlying motivations for agency ADR the same in this study and in some instances their edges blend. That is, for some agencies, what may have been an alternative to ordinary adjudication became a broader tool once those agencies realized its potential.

As noted above, this Article does not review ADR programs designed to address employee grievances, procurement, freedom of information act requests, or similar programs. Rather, this Article focuses on ADR programs that manifest the administrative and enforcement authorities granted by Congress. These are programs available to actors outside of the agency that serve the agency's programming mandates, sometimes called externally-facing programs. We will abbreviate our references to federal program ADR with the understanding that the study is limited to this type of ADR.

A. Brief History of ADR Among Federal Agencies

Congress first expressly authorized agency use of ADR to deal with labor unrest. In 1913, Congress empowered the Secretary of Labor to mediate and appoint commissioners of conciliation in labor disputes.[9] In its first year, the Department of

6. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000g (creating the Community Relations Service).

7. *See infra* Part I.A.

8. *See, e.g.*, Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 331–32 (2001) (discussing the use of mediation by the EEOC to reduce docket backlogs).

9. 29 U.S.C. § 1 *et seq.* (originally enacted as Act of Mar. 4, 1913, ch. 141, § 8, 37 Stat. 736) (providing that "the Secretary of Labor shall have power to act as mediator and to appoint commissioners of

Labor mediated 33 labor disputes.[10] The U.S. Conciliation Service within the Department carried out this function until 1947, when its functions were transferred to a new entity created by the 1947 Labor-Management Relations Act ("the Taft-Hartley Act").

The Taft-Hartley Act created the Federal Mediation and Conciliation Service ("FMCS"), an independent agency charged with preventing or minimizing the impact of labor-management disputes on the free flow of commerce.[11] The FMCS seeks to preserve and promote labor-management peace and cooperation by serving communities, industries, and other agencies.[12] This move toward ADR in labor-management disputes complemented the use of ADR by private actors to resolve commercial disputes under the principles of the 1925 Federal Arbitration Act,[13] and the creation of the American Arbitration Association ("AAA"), which is today the largest non-profit global provider of ADR services, particularly arbitration services.[14]

Beginning in the 1970s, agencies used ADR experimentally to combat court backlogs and resolve environmental and natural resource disputes.[15] For example, Congress gave the Department of Health, Education, and Welfare the authority to act as the administrator of the Age Discrimination Act of 1975 to resolve claims of age discrimination in federal workplaces.[16] The Department obtained assistance from the FMCS to mediate complaints under the new act to facilitate speedy resolutions. By 1979, this process became routine for the Department and began to gain interest on a larger scale. At this same time in the private sphere, retired Judge Warren Knight of California started the Judicial Arbitration and Mediation Service ("JAMS"), which provides law firms, businesses, and individuals with access to former judges open to serving in ADR capacities.[17] Today, AAA and JAMS are two of the country's largest private ADR provider organizations.

The 1980s brought a significant increase in interest from legal experts and academics in the use of ADR across several different fields.[18] Interest grew so quickly that universities and law schools nationwide began introducing courses and degrees in ADR topics. ACUS issued a series of recommendations related to agency use of

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conciliation in labor disputes whenever in his judgment the interests of industrial peace may require it to be done").

10. BARRETT & BARRETT, *supra* note 1, at 4.

11. Labor Management Relations Act of 1947, 29 U.S.C. § 141 *et seq*.

12. *About Us*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/aboutus/ (last visited Apr. 18, 2024) [hereinafter "*About Us*, FMCS"].

13. 9 U.S.C. §§ 1–16; 9 U.S.C. §§ 201–08; 9 U.S.C. §§ 301–07.

14. AM. ARB. ASS'N, *The American Arbitration Association: A Long History of Working with Government* (last visited Apr. 18, 2024).

15. U.S. OFF. OF PERS. MGMT., ALTERNATE DISPUTE RESOLUTION HANDBOOK 1, *available at* https://www.opm.gov/policy-data-oversight/employee-relations/employee-rights-appeals/alternative-dispute-resolution/handbook.pdf (last visited Apr. 18, 2024).

16. Michael McManus & Brianna Silverstein, *Brief History of Alternative Dispute Resolution in the United States*, 1 CADMUS J., 100, 102 (2011).

17. *The JAMS Story*, JUD. ARB. & MEDIATION SERV., https://www.jamsadr.com/history (last visited Apr. 18, 2024).

18. *Id.*

ADR.[19] In 1985, the U.S. Attorney General issued an order recognizing the potential of ADR to reduce the time and expense of civil litigation.[20]

In 1986, ACUS issued a series of recommendations aimed at promoting the increased and thoughtful use of ADR methods by federal agencies.[21] They included a framework for determining when ADR is appropriate,[22] and recommendations for congressional action to grant agencies authority to employ the full range of ADR techniques with the parties' agreement.[23] The recommendations were intended as a first step to be supplemented by further empirical research, consultation with experts and interested parties, and more specific proposals. These recommendations came around the same time that the concept of "reg-neg" grew in popularity.[24] "Reg-neg" refers to the administrative practice of negotiated rulemaking. Across the administrative state, systems were changing to accommodate the growth of regulation and regulatory functions.

By that time, federal agencies were deciding far more cases annually than federal courts, and costs and delays had steadily increased.[25] Noting that traditional administrative proceedings had become "increasingly formal, costly, and lengthy," Congress passed the Administrative Dispute Resolution Act of 1990 ("ADRA").[26] The ADRA authorized and encouraged federal agencies to use alternative means of dispute resolution to resolve "an issue in controversy that related to an administrative program."[27] According to the ADRA, "alternative means" included settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, either together or in combination.

The ADRA required all federal agencies to appoint senior officials as dispute resolution specialists.[28] These specialists were tasked with training ADR personnel; assessing programs with ADR potential; educating relevant stakeholders about ADR and its benefits; and most crucially, adopting agency-specific policies addressing the use of ADR and case management. Congress sought to encourage agencies to use ADR to enhance executive branch operations and better serve the public.

The ADRA also reflected numerous ACUS recommendations and instructed agencies to consult with ACUS and the FMCS to develop their ADR policies.[29]

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19. *See, e.g.*, Admin. Conf. of the U.S., Recommendation 1982-2, *Resolving Disputes Under Federal Grant Programs*, 47 Fed. Reg. 30704 (July 15, 1982); Admin. Conf. of the U.S., Recommendation 1982-4, *Procedures for Negotiating Proposed Regulations*, 47 Fed. Reg. 30708 (July 15, 1982).

20. U.S. OFFICE OF PERSONNEL MANAGEMENT, *supra* note 15, at 1.

21. *See, e.g.*, Recommendation 82-2, *supra* note 19; Recommendation 82-4, *supra* note 19; Admin. Conf. of the U.S., Recommendation 1986-3, *Agencies' Use of Alternative Dispute Resolution*, 51 Fed. Reg. 25643 (July 16, 1986); David M. Pritzker, *The Administrative Conference and the Development of Federal ADR*, ADMIN. CONF. OF THE U.S.: ADMIN. FIX (Oct. 29, 2014, 8:05 AM), https://www.acus.gov/newsroom/administrative-fix-blog/administrative-conference-and-development-federal-adr.

22. Recommendation 82-2, *supra* note 19.

23. Recommendation 86-3, *supra* note 21.

24. *See, e.g.*, Negotiated Rulemaking Act, Pub. L. No. 101-648, codified at 5 U.S.C. §§ 561–70.

25. U.S. OFFICE OF PERSONNEL MANAGEMENT, *supra* note 15, at 1.

26. ADR Act, Pub. L. No. 101-552, 104 Stat. 2736. Congress also amended the Administrative Procedure Act, the statute that principally governs the administrative adjudication work of agencies, to promote the use of ADR in lieu of agency adjudication. *See* 5 U.S.C. § 571 *et seq.*

27. 5 U.S.C. § 572(a).

28. ADR Act, Pub. L. No. 101-552, 104 Stat. 2736.

29. ADMIN. CONF. OF THE U.S., *Administrative Dispute Resolution Act*, *in* FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, https://sourcebook.acus.gov/wiki/Administrative_Dispute_Resolution_Act/view (last visited Apr. 18, 2024).

Importantly, binding arbitration was authorized only with all parties' consent, although agencies had the ability to reject an arbitrator's award at will.[30] The statute was time-limited and terminated on October 1, 1995.[31]

Congress renewed the ADRA in 1996, removing its sunset provision and enhancing its confidentiality protections.[32] The 1996 ADRA, like its predecessor, reflected numerous ACUS recommendations. ACUS staff initially prepared the legislation.[33] The 1996 ADRA removed "settlement negotiation" from the definition of alternative means of dispute resolution due to its potential overbreadth.[34] It also added ombuds practice to the definition of alternative means of dispute resolution. Ombuds practice was gaining momentum within government and private organizations at the time.[35] The 1996 ADRA also removed agencies' ability to reject an arbitration decision.

President Clinton implemented the ADRA by way of a Presidential Memorandum dated May 1, 1998, which created the Interagency ADR Working Group (the "Interagency Working Group").[36] The Memorandum commissioned the Interagency Working Group, convened by the Attorney General, to assist agencies in their ADR training and stakeholder education.[37]

The Alternative Dispute Resolution Act of 1998 again expanded the use of ADR in the federal government, requiring federal trial courts to designate officers to implement, administer, oversee, and evaluate the courts' ADR programs.[38] The Environmental Policy and Conflict Resolution Act of 1998 ("EPCRA") also created the National Center for Environmental Conflict Resolution (the "National Center") to facilitate the use of ADR across agencies with environmental law responsibilities.[39]

As the above history shows, since the late 1990s, ADR has become an accepted part of agency practice. Groups began to publish updated directories and resources regarding ADR practitioners, their firms, and areas of practice, opening greater access to ADR and facilitating their use by agencies.[40] These developments both contributed to and benefitted from increased interest in legal services more generally.

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30. *See* Margaret Ward, *Public Fuss in a Private Forum*, 2 HARV. NEGOT. L. REV. 217, 218–19 (1997).

31. *Key ADR Statutes,* INTERAGENCY ALT. DISP. WORKING GRP., https://adr.gov/guidance/adrguide-home/04-statutes/ (last visited Apr. 18, 2024).

32. Travis McDade, *Administrative Dispute Resolution Act (1990)*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/administrative-dispute-resolution-act-1990 (last visited Apr. 18, 2024).

33. ADMINISTRATIVE CONFERENCE OF THE U.S., *supra* note 29.

34. Ward, *supra* note 30, at 223.

35. 5 U.S.C. § 571(3). *See* Eric S. Adcock, *Federal Privilege in the Ombudsman's Office*, 8 CHARLESTON L. REV. 1, 10–15 (2013) (discussing the historical roots of the ombuds office as it moved from Scandinavia to the United States and grew in popularity).

36. *See* Memorandum on Agency Use of Alternate Means of Dispute Resolution and Negotiated Rulemaking, 34 WEEKLY COMP. PRES. DOC. 749 (May 1, 1998) (implementing the Alternative Dispute Resolution Act (ADRA) and establishing an interagency committee to facilitate and encourage agency use of dispute resolution); *see also* 5 U.S.C. § 573(c).

37. Memorandum on Agency Use, *supra* note 36.

38. Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (1998); ADMINISTRATIVE CONFERENCE OF THE U.S., *supra* note 29.

39. Environmental Policy and Conflict Resolution Act of 1998, Pub. L. No. 105-156, 112 Stat. 8 (1998).

40. *See, e.g.*, MEDIATE.COM, https://mediate.com/ (last visited Apr. 18, 2024) (leading website for promotion of mediator practice, as well as education for new and current mediators).

The turn of the twenty-first century saw a majority of law schools providing ADR-related programs and courses, including clinical opportunities, as well as school organizations and extracurricular competitions.[41] Law firms regularly employ retired judges and certified attorneys with ADR experience and expertise to offer mediation, negotiation, and arbitration services.[42] Bar association ADR groups, like the American Bar Association ("ABA") Dispute Resolution Section with over 9,000 members, have established a professional community of ADR practitioners across the public and private sectors.[43] The growth in federal agency ADR is part of this larger trend.

B. Modalities of ADR

Today, the term "ADR" encompasses many different processes. In the preparation of this Article, it became clear that agencies are using many tools that could be considered ADR even if not so labeled.

1. ADR Modalities in the 1990 ADRA

In 1986, ACUS defined seven modalities of ADR for federal agencies as part of a recommendation that agencies use ADR in their work.[44] This recommendation was a precursor to the ACUS Sourcebook published the following year and to the ADRA that would follow four years later. That "lexicon," as it was called, included: arbitration, factfinding, minitrial, mediation, facilitation, convening, and negotiation.[45] Our study adopts a modernized vernacular and considers the following processes identified in the 1996 Act: conciliation, facilitation, factfinding, minitrials, arbitration, and mediation. This study also considers the use of ombuds, added to the ADRA in 1996.[46] Although not mentioned in the ADRA, we also define the terms "restorative justice" and "conflict coaching," used in some of the recommendations below.

Prior to turning to the various processes, a word on the term "neutral" may be helpful. The ADRA defines "neutral" as "an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy."[47] In the statutory section titled "Neutrals," the ADRA notes that a neutral (no matter the type of ADR involved) may be a federal employee or any other person acceptable to the parties.[48] For neutrals serving as mediators, facilitators, or conciliators, the neutral serves at the "will of the parties."[49] In other words, neutrals serving an adjudicative role (i.e., arbitrator or fact-finder) serve on the case until the case's completion. Neutrals in consensual processes, such as mediation and

41. McManus & Silverstein, *supra* note 16, at 102.
42. *Id.*
43. *Section of Dispute Resolution: Section Membership*, AM. BAR ASS'N: ABA GROUPS, https://www.americanbar.org/groups/dispute_resolution/membership/ (last visited Apr. 18, 2024).
44. Recommendation 86-3, *supra* note 21.
45. *Id.*
46. 5 U.S.C. § 571(3) (defining "alternative means of dispute resolution").
47. *Id.* § 571(9).
48. *Id.* § 573(a).
49. *Id.* § 573(b).

facilitation, serve in the role *either* until the case's completion or until the parties revoke their consent to the neutral.

The meaning of "conciliation" has changed over time. In past decades, the term was used to depict a reconciliation process led by a third party to the dispute.[50] Today, however, conciliation is often used to refer broadly to any process in which a confidential third-party resolves a dispute.[51] The lack of a shared understanding of conciliation is in part the result of the fact that it remains undefined in many areas of the law, such as in civil rights legislation and subsequent implementing regulations.[52] For one agency, conciliation involves an impartial board of inquiry that investigates relevant issues and makes recommendations for settling the dispute.[53] Some programs use the term "conciliation" interchangeably with "mediation," while other programs distinguish between the two. When a program involves both mediation and conciliation, the conciliator often takes a more hands-on and potentially more evaluative role than a mediator.[54]

Facilitation "helps parties reach a decision or a satisfactory resolution of the matter to be addressed."[55] A facilitator usually conducts meetings but may not become deeply involved in the discussion or issue. Facilitation often refers to a process during which a group engages in collaborative discussion with the help of a third party.[56] Like conciliation, some people and programs use the term interchangeably with "mediation," but facilitation usually refers to a process that is more party-driven and may involve dozens of stakeholders.[57] Facilitation need not involve a concrete dispute but may address problems with communications among individuals and groups. Facilitated processes may include both large group and small group meetings to accomplish the goals of the project. Facilitation might be best known for its use in public policy discussions, regardless of whether those discussions involve an element of decision-making. For example, a facilitator may work with a large group to draft a new policy, convening relevant stakeholders from within and outside the organization or agency.

A "factfinding proceeding" entails the "appointment of a person or group with the technical expertise in the subject matter to evaluate the matter presented and file

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50. The term "conciliation" has some roots in religious and family disputes, often with a focus on reconciliation. *See, e.g.*, Glenn G. Waddle & Judith Keegen, *Christian Conciliation: An Alternative to "Ordinary" ADR*, 29 CUMB. L. REV. 583, 584–85 (1999) (describing the use of conciliation in disputes seeking religious reconciliation).

51. *See, e.g.*, Katherine Lynch, *Private Conciliation of Discrimination Disputes: Confidentiality, Informalism, and Power*, 22 WILLAMETTE J. INT'L DISP. RESOL. 49, 66 (2014).

52. *See, e.g.*, Stephanie Greene & Christine N. O'Brien, *Judicial Review of the EEOC's Duty to Conciliate*, 119 DICK. L. REV. 837, 847–48 (2015).

53. *See* 29 U.S.C. § 183 (authorizing Federal Mediation and Conciliation Service to take such steps to resolve labor disputes in the health care industry).

54. Thomas J. Stipanowich & Veronique Fraser, *The International Task Force on Mixed Mode Dispute Resolution: Exploring the Interplay Between Mediation, Evaluation and Arbitration in Commercial Cases*, 40 FORDHAM INT'L L.J. 839, 848 (2017) (describing the role of the conciliator as more evaluative than a true mediator).

55. Recommendation 86-3, *supra* note 21, at 8.

56. SAM KANER, FACILITATOR'S GUIDE TO PARTICIPATORY DECISION-MAKING xx (3d ed. 2014) ("A facilitator is an individual who enables groups and organizations to work effectively; to collaborate and achieve synergy.").

57. *See, e.g.*, Janice M. Fletcher, *One Size Does Not Fit All: Differentiating ADR Processes*, 49 S. TEX. L. REV. 1039, 1043–44 (2008) (noting that in the author's experience, practice as a facilitator does not fit neatly into any given label or box).

a report establishing the facts."[58] Factfinding is a quasi-adjudicative process during which the parties, usually through their attorneys, present evidence and arguments to a neutral party, and the neutral determines the likely outcomes at trial. The evaluation can take many forms, but one common form is findings of fact and conclusions of law. In this context, factfinding is the functional equivalent of early neutral evaluation (often abbreviated "ENE"). The evaluation is made for settlement purposes only; if the parties do not settle after the determination, the dispute resolution process continues as if the factfinding had not occurred.

A "minitrial" is "a structured settlement process in which each side presents a highly abbreviated summary of its case before senior officials."[59] The ACUS Sourcebook does not define the term "senior official," but this term appears to be shorthand for any person with authority to bind the agency for the specific case. The minitrial is structurally similar to the factfinding proceeding, involving the presentation of evidence and argument by lawyers for the parties. A third-party neutral's role is limited to guiding the presentations because the purpose of the minitrial is *not* to persuade the neutral third party but rather the principal decision-makers.[60] The principals may have the opportunity to ask questions to the lawyers presenting the cases during or after the process.[61] The purpose of the minitrial is to expose the strengths and weaknesses of each side's claims and provide information necessary to aid in settlement discussions. Once the presentations conclude, the senior officials have the opportunity to discuss settlement options with the parties behind closed doors and without any attorneys or third-party assistance. As with factfinding, if the minitrial does not result in a settlement, the parties proceed as if the minitrial had not happened.

In "arbitration," a third-party neutral decides the submitted issue after reviewing the evidence and hearing arguments from the parties. Arbitration involves the presentation of evidence and witnesses to a neutral third party. Compared to litigation, arbitration is typically a private process occurring outside of public view.[62] Decisions by arbitrators are considered binding because federal law only provides for the most limited review of arbitrator awards.[63] Although the idea of arbitration has held much promise to advocates for its time- and cost-efficiency, modern arbitration practice tends to look similar to litigation, but private and with a decision-maker of the parties' choosing.[64]

By contrast, "mediation" involves a neutral third party to assist the parties in negotiating an agreement. The mediator has no independent authority and does not render a decision; the parties themselves must reach a decision.[65] Like facilitators,

58. Recommendation 86-3, *supra* note 21.

59. *Id.*

60. KRISTEN M. BLANKLEY & MAUREEN WESTON, UNDERSTANDING ALTERNATIVE DISPUTE RESOLUTION 241 (2017) (describing the minitrial process).

61. *Id.*

62. *See* Kristen M. Blankley, *The Ethics and Practice of Drafting Pre-Dispute Resolution Clauses*, 49 CREIGHTON L. REV. 743, 770 (2016) ("Arbitration is a private method of dispute resolution, where the parties can choose their decision-maker, and the arbitrator makes a binding decision on the merits of the dispute.").

63. 9 U.S.C. § 10(a) (providing review of an arbitrator's award for ethical misconduct, arbitrator bias, serious flaws in the process, and arbitrators exceeding the powers given to them by contract).

64. *See* Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 ILL. L. REV. 1, 8–9 (2010) (noting that by the turn of the millennium, arbitration processes largely mirrored litigation processes, including the delays and expenses associated with prolonged discovery).

65. BLANKLEY & WESTON, *supra* note 60, at 51 (describing decision-making autonomy in mediation).

mediators guide a discussion between the parties, but mediation is usually limited to solving discrete problems,[66] while facilitators may work with parties to simply increase communication or run a meeting. Mediators use a wide variety of strategies to solve problems, such as active listening, managing impasse and heightened emotion, and working with parties to create and evaluate settlement proposals, among others. While some mediators focus on enabling conversation among the parties, other mediators may direct the process, provide advice, and give informal recommendations to resolve the dispute. When a mediation is successful, the parties formalize their agreements in a contract. If unsuccessful, the parties proceed in litigation, adjudication, or another process.

2. ADR Modalities in the 1996 ADRA

The 1996 revisions to the ADRA removed negotiation from the list but added "ombudsman" programs. Ombuds offices may vary in the services provided, making this modality difficult to define with any precision. As a general matter, an ombuds is usually an employee of an organization with multiple powers of investigation and dispute resolution.[67] Despite being organizational employees, ombuds have great independence, resulting in flexibility to resolve issues from stakeholders. Ombuds usually follow standards of practice focusing around four principles: (1) independence, (2) neutrality, (3) confidentiality, and (4) informality.[68] Ombuds provide many services, including, depending on the situation, listening to problems, providing information, investigating complaints, resolving conflicts, advocating for changes within the organization, and writing reports, among other functions.[69] Ombuds most often work one-on-one with a stakeholder who reports a problem or frustration, but some ombuds provide mediation services to multiple parties to a dispute.

3. Additional ADR Modalities Not Currently in the ADRA

Although not currently addressed in the ADRA, we define two additional types of ADR: "conflict coaching" and "restorative justice." Some neutrals working on federal ADR may already be using the coaching model, particularly facilitators and ombuds. Second, we mention restorative justice as a model of ADR that agencies may consider using in the future. Neither of these processes is defined by the ADRA, so we provide definitions from the literature.

Conflict coaching is an activity that grew out of executive coaching. It involves one-on-one discussions with a person in a conflict for the purpose of developing an understanding of the conflict and skills for the client to work through the conflict. From the coach's perspective, this approach does not require the participation of all

66. The Uniform Mediation Act defines mediation as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute." Uniform Mediation Act § 2(1) (2003).

67. *See* Harold J. Krent, *Federal Agency Ombuds: The Costs, Benefits, and Countenance of Confidentiality*, 52 ADMIN. L. REV. 17, 20–21 (2000) (discussing the history and structure of ombuds offices).

68. *IOA Standards of Practice,* INT'L OMBUDSMAN ASS'N (Mar. 17, 2022); *see also* CAROLE S. HOUK ET AL., A REAPPRAISAL—THE NATURE AND VALUE OF OMBUDSMEN IN FEDERAL AGENCIES, Part 1, 13–15 (2016) (discussing standards of practice among federal agency ombuds) [hereinafter ACUS Ombuds Report].

69. *See* ACUS Ombuds Report*, supra* note 68, at 286 (discussing actions taken by programmatic ombuds programs).

parties in the conflict but rather only those who wish for additional insight and strategy. Mediators, facilitators, and ombuds may also use the skills of coaching in their work, particularly when working with one party.[70]

Restorative justice is an umbrella term that describes a philosophy for resolving problems that involve harm by one side against another side. It is not a particular process. In the criminal law context, the U.S. Code defines "restorative justice" as a "program that emphasizes the moral accountability of an offender toward the victim and the affected community."[71] Restorative practices seek to hold accountable an individual who caused harm, focus on the needs of the harmed party, and work to reintegrate all parties back into the community.[72] Restorative justice uses many modalities, ranging from the conciliatory processes of mediation and facilitation to the adjudicative processes of specialized courts and commissions (such as the Truth and Reconciliation Commission in South Africa).[73] Although most restorative practices today in the United States largely focus on youth, some are also used in communities and workplaces.[74] Restorative practice in the federal government currently appears to be limited to the Department of Justice Community Relations Service, which works with community groups to resolve community conflicts and prevent and respond to hate crimes.[75] In 2019, the Department of Justice established the National Center on Restorative Justice to study mechanisms to advance restorative justice principles and practice in criminal justice (both youth and adult offenders) and other conflicts. This body partners with law schools to assess education, training, and research resources in the field.[76] Restorative justice also holds promise in other areas of the law, such as in areas involving civil rights or environmental issues, to repair harms.

II. SELECTION AND IMPLEMENTATION OF ADR

A. Introduction

Agencies typically select and make one ADR modality, such as mediation or arbitration, available to participants. Few agencies offer participants a menu of options.[77] The following table shows the number of agency programs reported by modality.

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70. *See* Cindy Fazzi, *Book Review: Introducing the One-on-One Dispute Resolution Process Conflict Coaching: Conflict Management Strategies and Skills for the Individual*, 64 DISP. RESOL. J. 90 (2009) (defining conflict coaching).

71. 34 U.S.C. § 10401. Note that this statute involves juvenile justice, currently one of the areas in which restorative justice is most widely available.

72. *See* Kristen M. Blankley & Alisha Caldwell Jimenez, *Restorative Justice and Youth Offenders in Nebraska*, 98 NEB. L. REV. 1, 6–11 (2019).

73. *Id.* at 12–15.

74. *See* TED WACHTEL, TERRY O'CONNELL & BEN WACHTEL, RESTORATIVE JUSTICE CONFERENCING (International Institute for Restorative Practices 2010).

75. *Community Relations Service*, U.S. DEP'T OF JUST., https://www.justice.gov/crs (last visited Apr. 18, 2024).

76. *National Center on Restorative Justice*, U.S. DEP'T OF JUST., https://bja.ojp.gov/program/national-center-restorative-justice/overview (last visited Apr. 18, 2024).

77. An example of an agency that does provide a menu of modalities is the Federal Maritime Commission, which offers both adjudicative and non-adjudicative forms of ADR at the parties' election. *See Consumer Affairs & Alternative Resolution Services*, FED. MAR. COMM'N, https://www.fmc.gov/databases-services/alternative-dispute-resolution-services/ (last visited Apr. 19, 2024).

Table of ADR Modalities*	
Mediation	**25**
Arbitration	**4**
Facilitation	**11**
Conciliation	**4**
Fact-finding	**1**
Ombuds	**13**

*Based on review of 36 agencies, including as separate agencies those that are within a cabinet department and have their own programs. Numbers do not total to 36 as some agencies have multiple modalities.

Although participation in ADR is mandatory in some programs, primarily in the area of labor relations,[78] it is voluntary at most agencies. That is, agencies that provide ADR as an alternative to traditional adjudication generally give parties the choice of using ADR rather than mandating it. Likewise, where ADR is offered as a program apart from traditional agency adjudication, private parties are not required to participate.

This section outlines the ADR modalities agencies are using and how they have operationalized those choices (i.e., whether the modality is mandated by statute or whether agencies have discretion to select among the ADR modalities). It also explores agency evaluation of their programs and whether those evaluations have precipitated changes to their programs when permitted under law.

Prior to discussing the types of ADR agencies currently use, this section gives background, including historical context, regarding how organizations, including governmental organizations, determine which ADR modalities to implement. This section then briefly discusses legal authority for implementing dispute resolution programs.

1. Theories of Process Design

In 1976, Harvard Law Professor Frank Sander delivered the keynote address at the historic ADR Pound Conference, imagining a "multi-door courthouse" in which litigants could be triaged into the most appropriate process for their dispute, such as mediation, arbitration, or litigation, by a court clerk or other program manager.[79] This conference served as a catalyst for the increased use of ADR within the courts, including federal courts.[80] Former Attorney General Griffin Bell and the Department of Justice began creating ways to implement the ideas of the Pound

78. *See, e.g.*, Railway Labor Act, 41 U.S.C. § 151 *et seq.* (mandatory arbitration) and National Labor Relations Act, 29 U.S.C. § 183 (mandatory conciliation).

79. Frank E.A. Sander, Professor of Law at Harvard University, *Varieties of Dispute Processing,* Conference Papers Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 8, 1976) (on file with the National Center for State Courts (NCSC)).

80. Louise P. Sendt & Cynthia A. Savage, *ADR in the Courts: Progress, Problems, and Possibilities*, 108 DICK. L. REV. 327, 327–28 (2003) (discussing the history of the Pound Conference).

Conference into the federal government.[81] In addition, "multi-door courthouses" popped up across the country, offering a menu of processes to resolve disputes.[82]

Congress passed the 1990 version of the ADRA at this time, appearing to draw on the concept of the multi-door courthouse. Similar to the trend of ADR programs in those years, the ADRA included a menu of dispute resolution options, including conciliation, facilitation, mediation, factfinding, minitrials, and arbitration.[83] As noted above, the use of ombuds services was added in 1996.[84] Congress gave agencies broad authority to use dispute resolution proceedings when parties voluntarily agree to participate.[85] The reason for a broad selection of options was to preserve the ability to "fit the forum to the fuss,"[86] and be able to match a dispute with the most appropriate process, taking into account party needs and interests. Key interests that may determine the appropriate process choice include accessibility (including lack of formality), time and cost efficiencies, and preservation of relationships, among other factors.[87] The 1990s were a high point for the sheer number of types of ADR processes, both consensual and adjudicative, and even some hybrid processes. This time period also ushered in a host of ADR-related laws and, a few years later,[88] the promulgation of process-specific standards of ethics and practice.

Over time, the truest vision of the multi-door courthouse with a plethora of processes did not materialize. Rather, three processes emerged dominant, depending on the situation: arbitration, mediation (and, to a lesser extent, facilitation), and ombuds practice. Systems historically using arbitration (i.e., prior to the reforms of the 1960s through 1990s) continue to use arbitration to this day. In particular, private cases involving labor relations are often resolved by arbitration due to language in specific collective bargaining agreements.[89] Within the courts, mediation rose to prominence as the preferred method of dispute resolutions by court systems, attorneys, and parties.[90] Finally, both private and public organizations have increasingly used ombuds services.[91] The use of trained third-party facilitators is a smaller, but growing practice to structure discussions regarding public policy—including conversations about environmental concerns or policing, as two examples. Other types

81. Frank Sander & Mariana Hernandez-Crespo, *A Dialogue Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse*, 5 U. ST. THOMAS L. J. 665, 671 (2008) (discussing the interest of the attorney general).

82. *See id.* at 673 (describing multi-door courthouse programs arising in the 1990s).

83. 5 U.S.C. § 571 (1990).

84. *Id.* § 571 (1996).

85. *Id.* § 572.

86. *See generally* Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

87. *See* Hon. Gladys Kessler & Linda J. Finkelstein, *The Evolution of a Multi-Door Courthouse*, 37 CATH. U.L. REV. 577, 580–85 (1988) (discussing case needs and how the programs move cases into dispute resolution processes in the D.C. courts).

88. *See* Jacqueline Nolan-Haley, *International Dispute Resolution and Access to Justice: Comparative Law Perspectives*, 2020 J. DISP. RESOL. 391, 399 (2020) (discussing federal efforts in the 1990s regarding ADR).

89. *See* Epic Sys. Corp. v. Lewis, 584 U.S. 497 (2018) (consolidating two cases before the National Labor Relations Board (NLRB) and one case from the realm of employment regarding arbitration issues).

90. *See, e.g.*, Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. DISP. RESOL. 271, 298–99 (2011) (noting the preference for mediation).

91. *See* Timothy Hedeen, *Ombuds as Nomads? The Intersection of Dispute System Design and Identity*, 13 U. ST. THOMAS L.J. 233, 235–37 (2017) (discussing the history of ombuds practice).

of processes, such as minitrials, factfinding, and conciliation, have diminished in frequency or been used on a limited case-by-case or program-by-program basis.[92]

Although the multi-door courthouse ideal that existed at the time of the passage of the ADRA did not materialize as originally thought, now the growing field of "dispute system design" ("DSD") is used to plan for and implement new ADR processes.[93] DSD is the "applied art and science of designing the means to prevent, manage, learn from, and resolve streams of conflict."[94] Central principles of DSD include thoughtful consideration of process values and of process flexibility, seeking and incorporating valuable feedback from stakeholders, and engaging in periodic evaluation of the process to determine successes and shortcomings.[95] DSD principles are now widely considered best practices for many types of institutions.[96]

This summary of considerations for implementing ADR programs highlights a few widely accepted views in the academic literature. First, the design of any ADR program should be intentional; the choice of modality for a program should be based on the interests of the participants and the goals of the program. Second, when programs are designed, stakeholders should be consulted to give input. The relevant stakeholder groups should include not only the participants from within the agency but also those from outside the agency who might later be a party to the process.[97] Third, all programs should be reviewed periodically for success, and should be flexible to adjust over time.

2. Agency Authority to Institute ADR Programs

Agencies have broad authority to choose ADR processes for their programs. Under the ADRA: "An agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding."[98] Although the ADRA lists certain ADR modalities, the law does not limit agencies to the modalities within the list nor does it dictate which process any one agency should adopt.[99] Further, the ADRA supplements any other agency authority to implement ADR programs under other law.[100]

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92. *See* Nancy A. Welsh, *I Could Have Been a Contender: Summary Jury Trial as a Means to Overcome Iqbal's Negative Effect Upon Pre-Litigation Communication, Negotiation, and Early, Consensual Dispute Resolution*, 114 DICK. L. REV. 1149, 1185–88 (2010) (urging more use of summary jury trials).

93. *See* Andrea Kupfer Schneider, *How Does DSD Help Us Teach About Community Conflict (And How Can Community Conflict Help Illustrate DSD)?*, 13 U. ST. THOMAS L.J. 370, 371 (2017) (describing dispute settlement design as a sub-field drawing on conflict theory, organizational behavior, and alternative dispute resolution).

94. Victor D. Quintanilla, *Human-Centered Civil Justice Design*, 121 DICK. L. REV. 745, 758 (2017).

95. *Id.* at 758–59 (summarizing key elements of dispute system design); *see also* Schneider, *supra* note 93, at 372.

96. Lisa B. Bingham, *Control Over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221, 222 (2004) (discussing some of the origins of dispute resolution design).

97. *See* Recommendation 86-3, *supra* note 21.

98. 5 U.S.C. § 572(a); *see also* Michael Asimow, *Best Practices for Administrative Hearings Outside the Administrative Procedures Act*, 26 GEO. MASON L. REV. 923, 954 (2019) (discussing the use of ADR as an agency best practice).

99. 5 U.S.C. § 571(3) (defining ADR as "any procedure that is used to resolve issues in controversy, including, but not limited to . . .").

100. *Id.* § 572(c) ("Alternative means of dispute resolution authorized under this subchapter are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques.").

The ADRA, however, directs agencies to consider not using ADR in six instances, all of which implicate public policy issues such as the need for precedent, the need for a record, the absence of needed third parties, and the need for continuing jurisdiction on the part of the agency.[101] To date, no court has reached the question of whether an agency acted outside of its authority in creating a dispute resolution program. In fact, only a handful of cases involve federal agencies' use of ADR at all. In one case, a court found no error in an environmental dispute resolution process,[102] and in another, the court found that an agency had the authority to agree to binding arbitration with a stakeholder, as opposed to non-binding arbitration under the ADRA.[103]

As a matter of policy, agencies may decide not to employ ADR programs even where there is a perceived need in certain circumstances. For example, ADR may not be appropriate where an agency seeks to establish authoritative precedent, particularly in new or emerging areas of law. Similarly, ADR may not be the right choice for an agency where a full, public record would be important to the agency or the public. ADR processes involving confidentiality would not meet that need; confidentiality is discussed in greater detail below. As a matter of law, agencies are guided to consider not using ADR where these and other considerations come into play.[104] Likewise, some academics have recognized these interests and others such as balances in power or the potential role of the courts.[105] The relative dearth of judicial decisions and scholarly discussion on the authority of agencies to implement ADR programs suggests that their legal foundations are widely considered to be sound.

B. Agency Practices

To investigate agency motivations and decisions regarding their choices of ADR programs, we first asked each of the targeted agencies what modalities of ADR they are using and provided a closed set of options: conciliation, facilitation, factfinding, minitrials, arbitration, mediation, and ombuds practice. We also reviewed publicly available information on agency websites to gain a fuller picture to supplement agency responses to our inquiries. This section provides information not only on the types of ADR performed by agencies but also feedback and measures of success.

1. ADR Programs Offered by Agencies

Mediation is the most commonly used modality of ADR. At least twenty-five agencies indicated using some form of mediation in their ADR programs. The following agencies report using mediation on their websites: the Environmental

101. *Id.* § 572(b) (listing six exceptions to the general rule regarding ADR authority).

102. *See* Miccosukee Tribe of Indians of Fla. v. United States, 420 F. Supp. 2d 1324, 1339 (S.D. Fla. 2006) (finding no error in the use of Institute of Environmental Conflict Resolution program).

103. College Blvd. Nat'l Bank v. Credit Sys., Inc., 1994 WL 242670, at *2 (D. Kan. 1994) (finding that the ADRA is not the only authority that the FDIC may have to enter into a dispute resolution contract).

104. 5 U.S.C. § 572(b).

105. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); *see also* Jack B. Weinstein, *Comments on Owen M. Fiss,* Against Settlement, 78 FORDHAM L. REV. 1265, 1267 (2009).

Protection Agency ("EPA"),[106] the Nuclear Regulatory Commission ("NRC"),[107] the International Trade Commission,[108] the Department of Education,[109] three agencies of the Department of Agriculture,[110] the Department of the Interior ("DOI"),[111] the Internal Revenue Service ("IRS"),[112] Health and Human Services,[113] the Federal Energy Regulatory Commission ("FERC"),[114] the Department of Justice Community Relations Service,[115] the Department of Transportation,[116] the Department of Commerce,[117] the Pension Benefit Guaranty Corporation,[118] the National Mediation Board ("NMB"),[119] FMCS,[120] the Federal Maritime Commission,[121] the Office of Special Counsel ("OSC"),[122] the National Labor Relations Board ("NLRB"),[123] the

106. *Conflict Prevention and Resolution Center (CPRC)*, U.S. EPA, https://www.epa.gov/adr (last visited Apr. 30, 2024) [hereinafter "*Conflict Prevention and Resolution Center*"].

107. *Alternative Dispute Resolution in the NRC's Enforcement Program*, U.S. NRC, https://www.nrc.gov/about-nrc/regulatory/enforcement/adr.html (last visited Apr. 30, 2024).

108. *Mediation Program*, U.S. INT'L TRADE COMM'N, https://www.usitc.gov/intellectual_property/mediation.htm (last visited Apr. 30, 2024).

109. *Alternative Dispute Resolution (ADR)*, U.S. DEP'T OF EDUC.: OFF. OF THE GEN. COUNS., https://www2.ed.gov/about/offices/list/ogc/adr-page.html (last visited Apr. 30, 2024) [hereinafter "*Alternative Dispute Resolution (ADR)*"].

110. USDA, FARM SERVICE ADMINISTRATION AGRICULTURAL MEDIATION PROGRAM: FACT SHEET (2021); *Crop Insurance Mediation*, USDA, https://www.rma.usda.gov/en/About-RMA/Laws-and-Regulations/Mediation (last visited May 13, 2024); *Certified Mediation Program*, USDA, https://www.fsa.usda.gov/programs-and-services/certified-mediation-program/index (last visited Apr. 30, 2024).

111. *Office of Collaborative Action and Dispute Resolution*, U.S. DEP'T OF THE INTERIOR, https://www.doi.gov/pmb/cadr (last visited Apr. 30, 2024) [hereinafter "*Office of Collaborative Action and Dispute Resolution*"].

112. *IRS Appeals Mediation Program*, https://www.irs.gov/appeals/appeals-mediation-programs (last visited Apr. 10, 2024).

113. *Mediation*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/about/agencies/dab/adr-services/mediation/index.html (last visited Apr. 30, 2024).

114. *Alternative Dispute Resolution*, FED. ENERGY REGUL. COMM'N, https://www.ferc.gov/enforcement-legal/legal/alternative-dispute-resolution (last visited Apr. 30, 2024).

115. *Community Relations Service*, U.S. DEP'T OF JUST., https://www.justice.gov/crs/our-focus (last visited Apr. 30, 2024).

116. *Mediation, Facilitation and Consulting Services*, U.S. DEP'T OF TRANSP., https://www.transportation.gov/CADR/mediation-facilitation-and-consulting (Feb. 17, 2022).

117. *Coastal Zone Management Act Mediation*, U.S. DEP'T OF COMMERCE.

118. *PBGC Mediation Program*, PENSION BENEFIT GUAR. CORP., https://www.pbgc.gov/prac/other-guidance/pbgc-mediation-program (last visited Apr. 10, 2024).

119. *Mission & Organization*, NAT'L MEDIATION BD., https://nmb.gov/NMB_Application/index.php/mission-organization/ (last visited Apr. 30, 2024).

120. *Alternative Bargaining Processes*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/services/resolving-labor-management-disputes/alternative-bargaining-processes/ (last visited Apr. 30, 2024).

121. *Alternative Dispute Resolution Services*, FED. MAR. COMM'N, https://www.fmc.gov/databases-services/alternative-dispute-resolution-services (last visited Apr. 30, 2024) [http://web.archive.org/web/20220523042320/https://www.fmc.gov/databases-services/alternative-dispute-resolution-services/].

122. *Alternative Dispute Resolution Overview*, U.S. OFF. OF SPECIAL COUNS., https://osc.gov/Services/Pages/ADR.aspx (last visited Apr. 30, 2024).

123. *NLRB Contracts with FMCS to Provide Mediators in Board Alternative Dispute Resolution Program*, NLRB: OFF. OF PUB. AFFS. (Oct. 23, 2012), https://www.nlrb.gov/news-outreach/news-story/nlrb-contracts-with-fmcs-to-provide-mediators-in-board-alternative-dispute.

National Archives and Records Administration,[124] the National Center,[125] the Federal Labor Relations Authority,[126] the Federal Communications Commission ("FCC"),[127] the Federal Election Commission,[128] and the Equal Employment Opportunity Commission ("EEOC").[129]

Most of the agencies surveyed use facilitative mediation in which a professional mediator attempts to facilitate negotiation between the parties in conflict without providing a substantive assessment of the merits of the case. The mediator encourages the parties to reach a voluntary solution by probing their interests.[130] Four agencies use evaluative mediation, which is a process modeled on settlement conferences held by judges. An evaluative mediator assists the parties in reaching resolution by pointing out the strengths and weaknesses of their cases and predicting what a judge or jury would be likely to do.[131]

Two agencies use transformative mediation, which, in contrast with the other forms of mediation that focus on problem-solving, is focused on fostering the parties' "empowerment" to participate and "recognition" of the other party.[132] The theoretical underpinnings of transformative mediation assume that people in conflict are more self-absorbed and unable to see the conflict partner clearly. This model attempts to shift the mindsets of the participants by first building up the participants ("empowerment") to give them the ability to understand the conflict from the other perspective and repair the relationship ("recognition"). The goal of transformative mediation is first to move the relationship forward and less to resolve the underlying dispute.[133] Six agencies leave the choice of style to the mediator.

The FMCS, the NMB, and the Federal Maritime Commission use arbitration in addition to mediation.[134] The Federal Labor Relations Authority is notable in that it also uses "med-arb" in which if any issues are unresolved after mediation, the mediator serves as arbitrator.[135]

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124. *Mediation Program*, U.S. NAT'L ARCHIVES & RECS. ADMIN.: OFF. OF GOV'T INFO. SERVS., https://www.archives.gov/ogis/mediation-program (last visited Apr. 4, 2024).

125. *John S. McCain III National Center for Environmental Conflict Resolution*, UDALL FOUND., https://www.udall.gov/ourprograms/institute/institute.aspx (last visited Apr. 30, 2024).

126. *Negotiation Impasse*, U.S. FED. LAB. RELS. AUTH., https://www.flra.gov/cases/negotiation-impasse (last visited Apr. 30, 2024).

127. *EB—Market Disputes Resolution Division*, FED. COMMC'NS COMM'N, https://www.fcc.gov/eb-mdrd (July 13, 2023).

128. *Alternative Dispute Resolution*, FED. ELECTION COMM'N, https://www.fec.gov/legal-resources/enforcement/alternative-dispute-resolution (last visited Apr. 30, 2024).

129. *Questions And Answers About Mediation*, U.S. EEOC, https://www.eeoc.gov/questions-and-answers-about-mediation (last visited Apr. 30, 2024).

130. Katie Shonk, *Types of Mediation: Choose the Type Best Suited to Your Conflict*, HARV. L. SCH. PROGRAM ON NEGOT., https://www.pon.harvard.edu/daily/mediation/types-mediation-choose-type-best-suited-conflict/ (Feb. 27, 2024).

131. Diane Cohen, *Evaluative Mediation*, MEDIATE.COM (Mar. 21, 2011), https://mediate.com/evaluative-mediation/.

132. Brad Spangler, *Transformative Mediation*, BEYOND INTRACTABILITY, https://www.beyondintractability.org/essay/transformative_mediation (2013).

133. *Id.*

134. *Arbitration and the Arbitrator Roster*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/services/arbitration/ (last visited Apr. 30, 2024); *Arbitration Overview*, NAT'L MEDIATION BD., https://nmb.gov/NMB_Application/index.php/arbitration-overview/ (last visited Apr. 30, 2024); FEDERAL MARITIME COMMISSION, *supra* note 77.

135. *Mediation-Arbitration ("Med-Arb")*, U.S. FED. LAB. RELS. AUTH., https://www.flra.gov/fsip_drpg_4c (last visited Apr. 30, 2024).

A dozen agencies within this group have ombuds. Some of these and other agencies, such as the Federal Deposit Insurance Corporation, use ombuds services for both program ADR and internal ADR.

Finally, seven agencies deploy facilitation: the DOI, the Department of Education, and the Department of Transportation, as well as the EPA, the FMCS, the National Center, the FERC, and the U.S. Army Corps of Engineers.[136] The Office of Inspector General at the Department of Defense offers mediation and facilitation in a program that is unique in the federal government: helping to resolve whistleblower reprisal cases against DOD components.[137]

At least a handful of agencies including the DOI, Department of Education, Department of Justice, as well as the NRC, the EPA, and the NLRB offer additional forms of ADR.[138] Some use multiple modalities in combination, and a few offer a menu of modalities from which either participants or agency staff then select. For instance, the FCC offers mediation at three different stages of its adjudicative process: in addition to offering mediation for the resolution of complaints, it has an informal pre-complaint mediation process offered to parties who initially contact the FCC about potentially filing a complaint and an informal complaint mediation process for those in the process of filing a complaint, which tolls the limitations period for six months.[139] The EPA Environmental Appeals Board ("EAB") employs a process in which all parties to a case first receive a confidential evaluation by an off-panel EAB Judge of the strengths and weaknesses of their respective positions through a process best described as ENE; once the parties have the benefit of those evaluations, then the process shifts to mediation or facilitation in an effort to resolve the issues identified by the parties.[140] FERC also offers ENE.[141] FMCS uses several modalities and also offers to tailor an ADR process to the parties' needs.

As noted above, DSD is an important emerging part of the field of dispute resolution. FMCS has expertise in providing design services to other agencies. According to the FMCS website, "FMCS can assist your organization to design and develop a new alternative dispute resolution system or to refresh your current system so that it can manage both internal and external conflict sources."[142] In addition to assisting with the design of a program, FMCS can also consult with federal agencies to design a process for a specific case.

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136. *CPRC Services*, U.S. EPA, https://www.epa.gov/adr/cprc-services (last visited Apr. 30, 2024) [hereinafter "*CPRC Services*"]; *Facilitation*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/services/alternative-dispute-resolution-for-government/facilitation/ (last visited Apr. 30, 2024).

137. *ADR Program for Whistleblower Reprisal Complaints*, OFF. OF INSPECTOR GEN., https://www.dodig.mil/Components/Administrative-Investigations/Alternative-Dispute-Resolution-ADR-Program-for-Whistleblower-Reprisal-Complaints/ (last visited Apr. 30, 2024).

138. *See, e.g.*, *Alternative Dispute Resolution (ADR)*, *supra* note 109; *Office of Collaborative Action and Dispute Resolution*, *supra* note 111; *CPRC Services*, *supra* note 136.

139. Interview with Rosemary McEnery, ADR Division Chief, Enforcement Bureau, FCC (Feb. 21, 2021).

140. Interview with David Hecker, Staff Attorney, EPA Environmental Appeals Board (June 8, 2021).

141. *Dispute Resolution Service*, FED. ENERGY REGUL. COMM'N, https://www.ferc.gov/enforcement-legal/legal/alternative-dispute-resolution/dispute-resolution-service (Oct. 28, 2020).

142. *Dispute Resolution Systems Design*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/services/alternative-dispute-resolution-for-government/dispute-resolution-systems-design/ (last visited Apr. 30, 2024).

Several agencies provide ADR-specific annual reports and make them available to the public,[143] but most do not. Some agencies noted that their organic statutes or the supplemental statutes on which they rely for authority to conduct ADR do not define the scope of their chosen modality, such as "mediation," and the phrase "ADR" does not appear in the statutory language. In fact, when some agencies began this work, those terms were not in common usage. Agencies have developed complex ADR programs and used loose fitting statutory language as the hook for their doing so.[144]

2. Feedback and Measures of Success

Most agencies surveyed had a means for receiving feedback to measure the success of their ADR programs. Some agencies have contracts with private parties that collect feedback about their ADR program. Other agencies gather their own feedback.[145] For example, the ombuds at the Office of Federal Contract Compliance Programs of the Department of Labor, provides a feedback form on its website and at the end of the fiscal year sends it to all parties that brought a matter to the ombuds office.[146] Of particular note is the National Center, which uses various feedback forms for its facilitation participants. It will either deploy a short survey (nine questions, each on a sliding scale)[147] or a longer questionnaire with answers on sliding scales and free-response questions.[148] After the National Center conducts a mediation, it deploys its Mediator Participant Evaluation, asking questions about the process and the neutral.[149] Additionally, the Internal Revenue Manual includes a requirement that following appellate mediation, the mediator provides the customer with a voluntary satisfaction survey with a request to complete the survey within thirty days. The IRS additionally provides a self-addressed stamped envelope for the customer's convenience.[150]

One agency observed that after the 1996 ADRA specifically noted evaluation of ADR programs, it began evaluating its program and sought independent academic and other researchers to help assess the ADR program and make changes.[151] Another agency commented that it meets regularly with practitioners that appear before it and that they provide informal feedback. In general, according to the

143. *See, e.g.*, U.S. EPA, ENVIRONMENTAL COLLABORATION AND CONFLICT RESOLUTION FY 2019 ANNUAL REPORT (2019), [hereinafter "2019 EPA ANNUAL REPORT"].

144. Congress can require an agency to adopt a particular variant of ADR. For example, the Affordable Care Act mandated that Health and Human Services (HHS) create a binding ADR program for claims between health care providers and manufacturers that participate in what is known as the "340B program" which establishes price ceilings for certain covered outpatient drugs. HHS issued the final rule establishing the binding ADR program, which resembles arbitration by a panel of HHS officials, in December 2020. *See* 85 Fed. Reg. 80632 (Dec. 14, 2020).

145. Surveys deployed by or on behalf of agencies aimed at more than nine members of the public must, of course, comply with the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq*. (1995).

146. Interview with Marcus Stergio, Ombuds, Office of Federal Contract Compliance Programs (June 23, 2021).

147. National Center, Meeting Facilitation Form, OMB Number: 2010-0042, 2434.54.

148. National Center, Long Term Group Facilitation Participant Questionnaire, OMB Number: 2010-0042, 2434.54.

149. National Center, Mediation Participant Evaluation, OMB Number: 3320-0004.

150. Internal Revenue Manual 8.23.3.10 (2017), https://www.irs.gov/irm/part8/irm_08-026-003 (last visited Apr. 30, 2024).

151. Interview with Stephen Ichniowski, National ADR Coordinator, EEOC (Apr. 21, 2021).

agency, most practitioners have been very satisfied with the program. Several agencies commented that they interpret that their programs or individual cases are "successful" if they do not hear back from participants after the conclusion of the mediation or other engagement. Agency comments confirmed that where an agency does not provide an easy, readily available format to parties for giving feedback at the close of the process, those parties are unlikely to give such feedback voluntarily.[152]

C. Recommendations

In this section, we provide three recommendations regarding the general practice of selection and implementation of agency ADR.

1. Application of DSD Principles

Agencies should apply DSD principles to be thoughtful about their ADR modalities in light of the goals and objectives of the program. As noted above, the different modalities are based on differing goals and philosophies. Program administrators and designers should think carefully about whether the modality is intended to reach consensual outcomes (such as mediation, in which the parties hold the power to accept or reject settlement offers) or provide information and guidance to the participants (such as in factfinding, ENE, minitrials, or even ombuds practice), to name just two. ADR programs with a goal of reducing delay might find arbitration particularly attractive since arbitration promotes finality in ways not provided by other processes. Elaborating on these considerations is beyond the scope of this data-gathering study but the academic and practice literatures provide such guidance.

Fitting "the forum to the fuss" requires understanding the problem to be addressed, designing an ADR process that addresses it, and then reviewing the results from the perspective of stakeholders and the agency. For example, after years of a burgeoning caseload leading to a significant backlog, in 1991, the EEOC launched a pilot mediation program in four of its regional offices. The program was designed to capture one category of case that EEOC saw as being both best suited for ADR and also yielding the most benefits: cases in which the charges had possible merit but final findings were conditioned on the results of an investigation.[153] At the end of the first year, the EEOC hired a consultant to conduct a survey of participant satisfaction, which was found to be high. Resolution rates and processing time also significantly improved. The agency then expanded the program to all its regions. In the ensuing years, the EEOC conducted three studies of the expanded program: one of participant satisfaction, one of mediator feedback, and a third survey of employers who did not use the mediation program to determine the reason and what actions might be available to induce them to try it.[154] Some of the factors present in this example—namely a large caseload of potentially meritorious cases—likely exist

152. Defaults (doing nothing) are sticky, absent some kind of a nudge. *See generally* RICHARD THALER & CASS SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 141 (Penguin Books 4th ed. 2021).

153. EEOC excluded from the program its two other categories of cases: those that clearly have merit at the outset, and those that clearly do not. *Studies of the Mediation Program*, U.S. EEOC, https://www.eeoc.gov/studies-mediation-program (last visited Apr. 30, 2024).

154. *Id.*

within other agencies, so this model could be piloted at other agencies and also evaluated for success.

More recently, after a U.S. Government Accountability Office report specifically noted the need to increase transparency and enhance communications with outside stakeholders at the Office of Federal Contractor Compliance Programs,[155] that agency began holding a series of annual town halls during which agency stakeholders reiterated the needs for increased transparency and enhanced communication.[156] The agency response to the GAO report and the town hall feedback was the hiring of an ombuds who could help the agency accomplish these two goals while facilitating the resolution of individual disputes between the agency and stakeholders in the short term and improving agency-stakeholder relations in the long term. There had been such a program which had been popular at the time but was discontinued with a change of presidential administrations. The ombuds program was created by a directive from the agency head in 2018, and an experienced ADR professional was hired.[157] The ombuds assiduously seeks feedback from stakeholders which, so far, has been high.[158]

2. Program Visibility

The visibility and ease of access to information about agency ADR programs vary widely. Some agencies prominently display ADR program information on their websites, have codified their ADR programs in either regulations or guidance, and have issued press releases about their programs or otherwise publicized them.[159] Other ADR programs can be found only by targeted internet search. Some agencies have incorporated ADR into their adjudication and/or enforcement procedures; for example, offering ADR as an option within a notice that a complaint has been filed with the agency.[160] Other agencies that offer ADR deploy an ad hoc approach. In some instances, not only do members of the public not know about the ADR options available to them, but some officials at some agencies did not know about available ADR programs in other agency components.

Although some agencies remarked on how it is difficult to let participants know about their ADR programs, others expressed concern that if interest in their ADR programs greatly increased, they would not have enough staff to accommodate so many new cases. Several agencies discussed the limitations of their programs either due to legal or personnel constraints. Those constraints could be addressed through more reliable funding and codification of their programs, or, if resources are limited, through interagency agreements discussed in later sections of this Article.

Accordingly, we recommend that agencies make their ADR programs readily accessible on their websites and push information to their constituents to publicize the programs (e.g., press releases, speeches, brochures). Even where resources are

155. Cindy Barnes & Chuck Young, *Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE (Sept. 22, 2016), https://www.gao.gov/products/gao-16-750.

156. Interview with Marcus Stergio, *supra* note 146.

157. *Id.*

158. *2020 Annual Report OFCCP Ombuds Service*, U.S. DEP'T OF LAB. OFF. OF FED. CONT. COMPLIANCE PROGRAMS 24 (2020).

159. *Office of Collaborative Action and Dispute Resolution*, *supra* note 111.

160. *See, e.g.*, 47 C.F.R. § 1.737 (2018).

limited, these are low-cost means by which to enhance the ADR experience. In addition, information about the option to use ADR should be incorporated into the relevant agency processes, whether by regulation, guidance or other vehicle that ensures that parties have consistent access to ADR.

3. Program Evaluation and Feedback.

Another area for improvement is that of feedback and evaluation. Not all agencies actively measure feedback from participants in their ADR programs. Detailed surveys following the conclusion of ADR services would help provide additional information to an agency as to how it could improve accessibility and outcomes. Feedback from participants has the potential to alert agencies to both the good and the bad of a program. Feedback is also useful for neutrals. We recommend that agencies create participant feedback mechanisms, deploy them consistently (in compliance with the Paperwork Reduction Act), and review the feedback periodically to improve the practice of the neutrals and the program. Agencies should also monitor whether their feedback mechanisms are actually collecting the information sought and modify the feedback system, if necessary.

III. QUALIFICATIONS AND SELECTION OF PERSONNEL TO CONDUCT AND MANAGE ADR

A. Introduction

None of the general umbrella statutes governing agency ADR programs elucidates requirements with respect to personnel. This omission provides agencies with considerable discretion as evidenced in the variety of tactics these agencies have adopted.

Highly distinct models for staffing ADR services have evolved over the past few decades. One example is that of community mediation centers, which began in the 1960s as an outgrowth of the civil rights movement to provide neighborhoods with localized and affordable conflict resolution services. These community mediation centers use trained community volunteers as providers of mediation services; the practice of mediation is open to all persons.[161] Professional and educational credentials are not generally required, and the centers provide continuous training and mentoring by more experienced mediators.[162]

Many states and the District of Columbia offer ADR programs through their court systems, and all federal courts have ADR programs.[163] The methods for delivery of ADR services to the courts span a wide continuum. On one end of this continuum lie courts that establish ADR programs within the court structure and have court staff provide ADR services. In the middle of the continuum are courts

161. *See 9 Hallmarks of Community Mediation Centers,* NAFCM, https://www.nafcm.org/page/9Hallmarks (last visited Apr. 30, 2024).

162. *See* Timothy Hedeen, *The Evolution and Evaluation of Community Mediation: Limited Research Suggests Unlimited Progress*, 22 CONFLICT RESOL. Q. 101, 117–18 (2004).

163. *See Compendium of Federal District Courts' Local ADR Rules*, U.S. DEP'T OF JUST., https://www.justice.gov/archives/olp/compendium-federal-district-courts-local-adr-rules (Mar. 11, 2020). The ADRA of 1998, 28 U.S.C. § 651, requires each federal district court to offer ADR to litigants by local rule. For a summary of each district's ADR local rule, see *id.*

that develop and maintain a roster of neutrals from which neutrals are appointed by the court. Finally, on the opposite end of the continuum are programs that are outside the court system. For these types of programs, the court contracts with an outside entity to administer the ADR program and provide services on the court's behalf.[164] As an examination of this rich subject area is beyond the scope of this Article, we briefly review two well-regarded programs from different points on the continuum.

Connecticut's highly successful Foreclosure Mediation Program is one example of an ADR program staffed by full-time government employees.[165] The program was founded in 2008 in the wake of a tsunami of foreclosures from the recession. The state legislature provided dedicated funding for the program, which enabled the hiring of an experienced housing mediator to run it and mediator staff who are all lawyers in each judicial district in the state.[166] The program provides extensive training on both mediation and relevant aspects of federal and state housing law.[167]

The District of Columbia's Multi-Door Dispute Resolution Division, by contrast, is staffed by volunteers. The Multi-Door program has two avenues for recruiting neutrals. New mediators must apply and be selected for one of the programs (family, child protection, small claims, landlord/tenant, or civil), complete a specialized training class and then complete a mentorship. There are no professional qualifications except for civil, tax, and probate, which require bar membership. After forty hours of training, new mediators then must mediate three to six cases, depending on the program, without a stipend. After that, the new mediators undergo a one-year probationary period during which they can receive a stipend. The other avenue for recruitment, open enrollment, is an application process for people who have previously completed a basic training of at least forty hours and have significant experience mediating cases relevant to the court.[168]

In the private sphere, parties hire neutrals either by using a provider organization, such as AAA or JAMS, or by appointing the neutral on an "ad hoc" (or one-time) basis. Membership on AAA rosters requires significant experience,[169] and parties pick neutrals who work as independent contractors.[170] JAMS also uses a panel system—the use of a standing roster of qualified individuals—to appoint arbitrators and mediators for service in individual cases.[171]

As noted in academic literature, ombuds offices generally fall within one of three categories, and the type of ombuds office determines the staffing. The "classical" ombuds offices are those that respond to citizen complaints and consist of governmental employees, and these offices are most commonly found within state

164. *How Do Courts Use ADR?*, RESOL. SYS. INST., https://www.aboutrsi.org/resource-center/how-do-courts-use-adr (2019).

165. *See Foreclosure Mediation Program,* ST. OF CONN. JUD. BRANCH (2022), https://www.jud.ct.gov/foreclosure/.

166. Interview with Hon. Douglas C. Mintz, Judge (ret.), Connecticut Superior Court (June 18, 2021).

167. *Id.*

168. *Multi-Door Dispute Resolution Division 2019 Program Summary*, D.C. SUPER. CT. 6 (2019).

169. *AAA Panel of Mediators Qualification Criteria*, AM. ARB. ASS'N, ("A minimum of 10 years of senior-level experience in business, industry or a profession").

170. *See Arbitrators & Mediators Arbitrator Selection,* AM. ARB. ASS'N, https://www.adr.org/ArbitratorSelection (last visited May 2, 2024); *What We Do Mediation,* AM. ARB. ASS'N, https://www.adr.org/Mediation (last visited May 2, 2024).

171. *Comprehensive Arbitration Rules & Procedures Rule 15,* JAMS (June 1, 2021), https://www.jamsadr.com/rules-comprehensive-arbitration/#Rule-15.

governments.[172] Many classical ombuds offices take issues, complaints, or concerns across government agencies.[173] Classical ombuds offices may take complaints on a wide variety of topics, such as prison conditions, denials of statutory benefits, or claims of delays in responding to individuals. An "advocacy" ombuds office is often a governmental agency usually tasked with receiving complaints from and helping consumers within an industry, such as health care.[174] For example, a long-term care ombuds takes complaints on behalf of residents and attempts to resolve them. Finally, "organizational" ombuds are usually employees of the organization tasked to handle conflict management issues relevant to the organization.[175] Organizational ombuds offices may resolve issues internal to the organization, such as personnel matters, or external to the organization, such as customer complaints. All of the ombuds offices discussed in this Article fall into the category of organizational ombuds, and this Article only covers the programs that are external facing.

B. Agency Practices

This section describes how ADR programs have organized their staff, particularly their neutrals, and what they require of them.

1. Qualifications of Neutrals and ADR Staff

Although there are no specific federal requirements for qualifications of ADR staff, the Interagency ADR Working Group has developed guidance on Criteria for Mediator and Quality Control.[176] While the information collected (in 2002) is somewhat dated, the considerations for hiring neutrals remain useful today. For example, the guidance reviews levels of credentialing, such as a tiered approach with basic and advanced levels of knowledge, skills and abilities. It describes training requirements focused on classroom preparation and assessment, education requirements at college level or above, and experience measured in a minimum number of cases and/or number of hours in mediation. Other categories include monitoring or supervision prior to credentialing and using a mock mediation as part of a skills assessment for candidates. Although agencies differ in which of these requirements make sense for their programs given their size, funding level, and technical knowledge requirements, the elements described in the guidance are useful considerations in creating a staffing plan.

Otherwise, agencies generally have been left to their own devices to develop position descriptions for neutrals. We identified only a sampling of those

172. *See, e.g.*, Julie L. Rogers, *Public Counsel (Ombudsman's Office),* NEB. LEGISLATURE, https://nebraskalegislature.gov/divisions/ombud.php (last visited May 2, 2024) (outlining duties of the Ombudsman's Office).

173. *Id.*

174. *See, e.g.*, *Office of the State Long-Term Care Ombudsman*, IOWA HEALTH & HUM. SERVS., https://hhs.iowa.gov/programs/programs-and-services/aging-services/ltcombudsman (last visited May 2, 2024).

175. *See, e.g.*, *University Ombuds Office*, OR. ST. UNIV., https://ombuds.oregonstate.edu/ (last visited May 2, 2024) (describing services provided to the campus community).

176. *Criteria for Mediator Credentials and Quality Control,* INTERAGENCY ALT. DISP. RESOL. WORKING GRP. (2022), https://adr.gov/guidance/criteria-for-mediator-credentials-and-quality-control/ [hereinafter "*Criteria for Mediator Credentials*"].

descriptions from which it is difficult to generalize. For example, in November 2021, we found three neutral position descriptions in the Office of Personnel Management library based on a mediator position in labor relations specifically limited to use by the FMCS and the NMB.[177] The minimum qualifications for the position include full-time experience utilizing the concepts and theories of collective bargaining alternative dispute resolution, negotiation and/or conflict resolution, while serving in the role of lead or second chair spokesperson, benefits expert, mediator, consultant or trainer. The three positions reflect different levels of experience to qualify for progressively higher pay levels. More recently, the EEOC posted a position for an "ADR Mediator," at the GS-12 level. The posting does not require any specific type of educational background but does require at least one year of experience in employment-related ADR.[178]

The Coalition of Federal Ombudsman's ("COFO") Unified Model for Developing an Ombudsman Program provides an example of an ombuds staff position description from the Department of Education's Federal Student Aid Office of the Ombudsman.[179] The requirements focus on knowledge such as in the application of qualitative and quantitative methods for assessment of program effectiveness, and skills such as ability to negotiate effectively with management to accept and implement recommendations, and ability to maintain confidentiality and neutrality. In 2021, a posting for an associate ombuds at the Department of Energy was advertised at the GS-15 level, requiring at least one year of ADR experience. The posting did not include any specific educational requirements.[180]

Thus, agencies largely have tailored their standards for the qualifications of neutrals to their particular needs.

2. Employment Status and Contractual Systems for ADR Staff

We discovered four different approaches for staffing and managing the ADR function at federal agencies, as well as several combinations of them. They include: (1) using the agency's own federal employees, (2) contracting with another federal agency to use its employees, (3) contracting with the private sector, and (4) maintaining a roster of pre-qualified neutrals from which the parties can make their own selection. Some agencies use combinations of the approaches; we found a few agencies using all of them.

a. Agencies Using Full Time Federal Employees

Many agencies employ full time federal employees as neutrals. In some agencies, the neutrals are all attorneys. They are experts in the agency's laws and regulations and have mediation experience and training or obtain experience while

177. *Position Classification Standard for Medication Series*, GS-0241, U.S. OFF. OF PERS. MGMT., 2–3 (June 1964).

178. *ADR Mediator*, USAJOBS, https://www.usajobs.gov/GetJob/ViewDetails/607025300 (last visited May 2, 2024).

179. *Associate Ombudsman,* USAJOBS, https://www.usajobs.gov/job/606860000 (last visited May 2, 2024). The Coalition of Federal Ombudsman (COFO) is the principal interagency forum that provides collaboration, advice, and guidance on professional ombuds standards, skills development, program development, and effectiveness.

180. *Id.*

employed as agency counsel. For example, by regulation, the FCC provides for mediation for the pre-complaint, informal complaint, and formal complaint stages of common carrier and pole attachment disputes under the Communications Act of 1934.[181] The mediation function is located in the FCC Market Disputes Resolution Division of the Enforcement Bureau, which is also ultimately responsible for adjudication of such complaints. The ten mediators are all experienced lawyers who also handle FCC adjudications.[182] All have been trained in conflict resolution. Similarly, the NLRB's Office of the Executive Secretary has five attorney-mediators who handle mediation for cases that are pending on appeal to the Board.[183]

In a few agencies, administrative law judges sometimes serve as neutrals. The NLRB's Office of Administrative Law Judges has a program in which an administrative law judge ("ALJ") not assigned to the case serves as "settlement judge." ALJs serve as settlement judges depending on their availability. The EAB similarly assigns a non-presiding Appeals Board Member as a "settlement judge" and pairs that neutral with a staff attorney who acts as a second neutral for the case.

In several agencies, neutrals come from many different fields. They are required to have a certain level of ADR experience and knowledge of the agency's governing law and practice. The EPA's Conflict Prevention and Resolution Center is located in the agency's Office of General Counsel but works with environmental collaboration and conflict resolution specialists located in all ten EPA regions to help deliver services in support of regional programs. While many of these specialists are attorneys, some come from other EPA areas of expertise including public involvement, environmental justice, and enforcement.[184] The EEOC requires particular professional credentials but has tailored the mediator position description to include requirements relevant to EEOC practice, i.e., five years of EEO- and EEOC-related experience and two years of EEOC-specific experience.[185]

Agencies in this group tend to seek a combination of ADR experience, training, and education when hiring neutrals. This flexibility enables agencies to hire neutrals at different levels, which enhances succession planning, as does the existence of basic neutral training, which is discussed in the next section of this Article. One interesting example of a flexible approach is the Office of Collaborative Action and Dispute Resolution at the DOI, which houses both environmental and workplace neutrals and enables them to cross-train with one another.[186] Another is the OSC, which permits its attorneys in other units to be trained in mediation and serve as collateral duty mediators when needed.[187]

Minimum competency levels may be achieved through careful crafting of neutral qualifications. The FMCS, for instance, has rigorous requirements to be on its arbitration roster, including the submission of five letters of reference and five recently drafted arbitration awards.[188] To become an FMCS "shared neutral," the prospective mediator must provide documentation of mediation training, two letters of

181. 47 C.F.R. § 1.737.
182. Interview with Rosemary McEnery, *supra* note 139.
183. Survey response from NLRB, Dec. 2020.
184. *See Conflict Prevention and Resolution Center*, *supra* note 106.
185. Interview with Stephen Ichniowski, *supra* note 151.
186. *See Office of Collaborative Action and Dispute Resolution*, *supra* note 111.
187. Survey response from OSC, Dec. 2020.
188. *Information on Joining the Arbitration Roster*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/services/arbitration/information-joining-arbitrator-roster/ (last visited May 3, 2024) [hereinafter "*Information on Joining the Arbitration Roster*"].

recommendation, and complete an application form describing the mediator's training and experience.[189] Other agencies reported backgrounds in conflict resolution or other training to be a neutral. The ACUS Ombuds Report recommended that the federal ombuds be purposeful in crafting job descriptions and qualifications in part, to ensure the quality of the program.[190]

As might be expected, agencies with a primary mission relating to ADR have the most developed ADR personnel practices since neutrals make up much of their labor force. There are three federal agencies with primary missions relating to ADR: the NMB, the FMCS, and the National Center.

The NMB's mission is to support labor peace in the airline and railway industries by providing representation, mediation, and arbitration services for labor/management disputes. The NMB has separate offices for mediation and arbitration. Its mediation office is staffed by federal employees. It recently expanded its mission to include the provision of other ADR training and education to its constituents. The NMB includes information about its mediators on its website.[191] All are experienced labor relations professionals from the airline or railway industries; of the ten neutrals, a minority are lawyers. The NMB does not employ its own arbitrators but contracts for them, discussed in more detail below.

The FMCS has organized its delivery of ADR services in four offices. The Office of Arbitration and Shared Neutrals oversees its arbitration program, which is not staffed by federal employees but by a roster of outside professionals, discussed in more detail below. Mediation is the agency's core program. The FMCS's approximately 150 mediators work within the three offices of the Division of Agency Initiatives: the Office of Conflict Resolution, the Center for Conflict Resolution Education, and the Office of Strategy Development.[192] All mediators have extensive experience in both dispute resolution and, usually, labor relations. Once hired, they participate in a five-week training program on FMCS services followed by extensive monitoring on the job.

The National Center serves as an ADR resource for Environmental Collaboration and Conflict Resolution ("ECCR") cases. Its eleven employees conduct mediations, facilitations, and trainings. They are experienced neutrals, who are hired based on a combination of experience and education in conflict resolution and environmental issues. Biographies of all the staff are on the agency website.[193] To leverage its resources, the National Center issued a call for proposals for a training contract. The National Center also maintains a roster for self-referrals, discussed below.

189. *Mediator Profile/Application*, FED. MEDIATION & CONCILIATION SERV.

190. ACUS Ombuds Report, *supra* note 68, Part 4, at 12 (noting the importance of job descriptions and qualification, without recommending a single job qualification).

191. *The Mediators*, NAT'L MEDIATION BD., https://nmb.gov/NMB_Application/index.php/the-mediators/ (last visited May 3, 2024).

192. *See Division of Agency Initiatives*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/aboutus/agency-departments/division-of-agency-initiatives/ (last visited May 13, 2024) [https://web.archive.org/web/20220814232610/https://www.fmcs.gov/aboutus/agency-departments/division-of-agency-initiatives/].

193. *See About Us: Meet Our Staff*, UDALL FOUND., https://www.udall.gov/AboutUs/MeetOurStaff.aspx (last visited May 3, 2024).

b. Interagency Agreements

Some agencies enter into agreements with other agencies to provide neutrals and/or ADR training either through a standing program or through orders for a service on a case-by-case basis. In general, the interagency agreement function is overseen at the requesting agency by a program manager who acts as the gatekeeper to the ADR process and contacts the supplying agency when a neutral is needed. Due to federal budgeting and contracting requirements, interagency agreements usually are renewed each year and the annual renewal process includes a review of performance. Quality control is maintained through various feedback mechanisms such as debriefing of participating staff and surveys to outside participants.

Interagency agreements to obtain the services of external neutrals have been used to avoid conflicts of interest (or appearances of conflict) when an agency has an interest in a dispute or is a party to a dispute. For example, in environmental disputes, agencies can have a conflict or appearance of a conflict if they are potentially financially responsible for damage resulting from their activities or can have claims that compete with those of private entities that require them to step out of the ADR process. There also can be interagency cross-jurisdictional issues, that is, where more than one agency has jurisdiction to decide an issue arising in a matter, such as permitting. Also in such cases, there may be a need for specific expertise that another agency has.[194]

Another reason agencies obtain the services of external neutrals through interagency agreements is to assure neutrality. Outside parties in conflict with an agency may feel that the agency's personnel cannot be genuinely neutral. Outside parties also may be concerned about agency contractors whose continued relationship with the agency depends on a good evaluation of their performance.

Small agencies and those with a relatively small demand for ADR have reported that interagency agreements to obtain the services of external neutrals or training have been useful because they are less expensive and easier to administer than private sector contracts and create few, if any, conflict issues. Moreover, the receiving agency can often arrange for training for program staff from trainers that understand how federal agencies function. For example, one agency with a relatively new administrative enforcement ADR program contracted with the FMCS to provide it with mediators and to train program staff who would be participating in the mediations on the agency's behalf.[195] Interagency agreements also sometimes supplement in-house mediators when caseloads fluctuate. The FMCS mediators supplement ADR personnel from the Department of Education's Office of Hearings and Appeals, for example.[196] The FMCS mediators also supplement ADR staff that mediate federal sector employee discrimination complaints within its Office of Hearings and Appeals, when needed.[197]

In some instances, agencies have preferred not to use interagency agreements where, for example, neutrals need subject-matter expertise, including the expertise to know that a particular case is not suitable for ADR. Other agencies have preferred to develop in-house ADR expertise.

194. Interview with Stephanie Kavanaugh, Deputy Director, National Center (Dec. 21, 2020).
195. Interview with Kartar Khalsa, Deputy General Counsel, PBGC (Apr. 12, 2021).
196. *See* Survey response from Department of Education, Dec. 2021.
197. Interview with Stephen Ichniowski, *supra* note 151.

c. Private Contractors

We found two general types of contracts used by agencies to obtain private neutrals. The first is what is basically an on-call service contract under which services can be ordered during the contract period. The second type of contract is a standalone and separate contract with an individual neutral or neutrals.

An Indefinite Delivery Indefinite Quantity contract ("IDIQ") is the vehicle used for on-call services. Awards are usually for a specified number of base years with renewal options (generally limited to five years in total). The government places task orders against a basic contract for individual requirements. Exact dollar amounts for minimums must be named when the contract is awarded. An IDIQ can be awarded to multiple vendors.[198]

IDIQs are efficient vehicles for larger programs. The EEOC ADR program is quite large; according to the EEOC's 2020 Annual Report, 9,036 mediations were conducted during fiscal year 2020.[199] EEOC also uses an IDIQ contract methodology for placement on its contractor roster and the field offices have authority to decide who qualifies and how many people to keep on the roster. There is a maximum of thirty-one mediations any one contact mediator can be assigned and an annual cap on compensation.[200] DOI and EPA both use IDIQ contracts to supplement their federal staff neutrals. The contracts are overseen by full time contracting officer representatives and thus subject to the record-keeping, reporting, and evaluative requirements of federal acquisition regulations.[201]

When the agency has a role in selecting the neutral for a particular case, it may choose to contract directly with individuals. This is the approach taken by the NMB for arbitrators in railroad labor disputes involving what are termed "minor grievances" where arbitration is compulsory and the NMB is required to fund arbitrator services. The NMB maintains a prequalified roster of arbitrators. To qualify for the roster, an arbitrator must have issued at least five awards in labor-management disputes; have ten years of substantive experience in labor-management disputes in the airline or railway industry; and ten years of experience in relevant matters arising in dispute resolution in these industries. The arbitrator must also be a member in good standing of the American Academy of Arbitrators. The NMB reviews the status of arbitrators on the roster annually. When parties to a covered dispute request an arbitrator, the NMB furnishes a panel from which to choose, and ultimately issues a certificate of appointment and a compensation letter to the selected arbitrator, explaining their status as an independent contractor, and setting the rate of compensation and expenses.[202] Biographies of all roster members are on the NMB website.[203]

198. *See* Federal Acquisition Regulation, 48 C.F.R. § 16.505 (2000).

199. U.S. EEOC, FISCAL YEAR 2020 AGENCY FINANCIAL REPORT (2020), https://www.eeoc.gov/fiscal-year-2020-agency-financial-report-us-equal-employment-opportunity-commission.

200. Interview with Stephen Ichniowski, *supra* note 151.

201. *See* 48 C.F.R. § 16.505.

202. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-B-305484, NATIONAL MEDIATION BOARD—COMPENSATING NEUTRAL ARBITRATORS APPOINTED TO GRIEVANCE ADJUSTMENT BOARDS UNDER THE RAILWAY LABOR ACT (2006).

203. *See Arbitrator Resumes*, NAT'L MEDIATION BD., https://nmb.gov/NMB_Application/index.php/arbitrator-resumes/ (last visited May 3, 2024) [hereinafter "*Arbitrator Resumes*"].

For these agencies, contracting with ADR professionals has been an effective way to obtain the services of skilled and experienced neutrals on an as-needed basis. They have been shown to be useful because they can be scaled up and down in response to demand and the budgetary environment. One difficulty with contracts, however, that agencies have noted is the need to competently oversee the contracts and maintain sufficient knowledgeable personnel to make decisions about suitability of cases for ADR. Management of the contractual system, a role that typically remains with agency staff, has required leadership and expertise.

d. Rosters

Some agencies have leveraged their resources to expand access to ADR by creating rosters of neutrals. These are listings of pre-qualified individuals from outside the agency that parties can choose to serve in their case. They may be independent contractors with the agency, or contract directly with the parties.

Agencies have used rosters in highly creative ways. For example, some agencies have used rosters to extend their reach, employing individuals outside the agency to help address burgeoning caseloads. The FMCS maintains a roster of about 1,000 arbitrators for labor-management disputes. Admission to the roster requires an application that demonstrates experience, competence, and acceptability in decision-making roles in labor relations disputes or extensive and recent experience in relevant collective bargaining positions. Roster candidates also must demonstrate capability for conducting an orderly hearing and preparing clear and concise awards within reasonable time limits. Applications are reviewed by the agency's Arbitrator Review Board, which makes recommendations to the agency director.[204]

The FMCS oversees the roster to ensure compliance with FMCS policies and its Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.[205] Upon request, the agency provides panels of arbitrators experienced in labor relations the parties can select, and can accommodate requirements such as expertise, fees, and geographic location.[206] The FMCS typically receives more than 10,000 requests for arbitrator panels each year from parties to labor-management disputes.

The International Trade Commission ("ITC") has a unique roster of mediators for unfair import investigations under section 337 of the 1930 Tariff Act. These cases usually involve patent or registered trademark infringement and can be highly technical. The ITC maintains a roster of pre-screened mediators who have agreed to provide a single pro bono session for these investigations. According to the ITC, many of these mediators have served in a similar capacity for the U.S. Court of Appeals for the Federal Circuit, as well as other federal and state court mediator panels. Applicants must demonstrate both intellectual property and mediation expertise. To guard against conflicts, to join the roster a mediator must not be in active practice as counsel or amicus in any matter before the ITC.[207] The Secretary of the

204. *See Information on Joining the Arbitrator Roster*, *supra* note 188.

205. *See Arbitration Policies and Procedures*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/services/arbitration/arbitration-policies-and-procedures/ (last visited May 3, 2024).

206. *See id*. Fees are set by the arbitrators and paid by the parties to the arbitrators; FMCS charges thirty-five dollars to service online panel requests; seventy dollars for manual processing.

207. U.S. INT'L TRADE COMM'N, SECTION 337 MEDIATION PROGRAM; TENTH UPDATE 10 (2019).

ITC helps the parties in mediation selection. Parties may select a mediator from the roster and before approving a mediator, the Secretary inquires into conflicts of interest. Confidentiality is strictly enforced through a standing protective order issued by the ITC, as well as nondisclosure agreements for mediators, parties, and counsel. The mediation is expected to take one day, at no expense to the parties. If the parties require additional days, they negotiate compensation with the mediator.

The EEOC also has a small number of cases (five percent of its caseload) mediated by pro bono mediators.[208] It recruits volunteers from mediators who want to keep their skills current, and therefore the program has a waiting list.[209]

The National Center maintains an online searchable database of over 300 environmental conflict resolution professionals. Applicants must have 200 hours of experience as a neutral in a collaborative or conflict resolution process in environmental, natural resource, and/or public lands issue. There are also requirements for case experience, training, substantive background, and education.[210]

The NMB is also frequently asked to furnish panels of arbitrators from its roster from which the parties select a neutral for airline industry boards of adjustment.[211] These boards are local bodies that adjudicate "minor grievances" involving contract interpretation disputes between labor and management in the airline industry. These arbitrators are paid by the parties.

C. Recommendations

This section makes four recommendations on the topic of ADR participant qualifications for agencies considering or developing ADR programs.

1. Executive Leadership Structure

An agency's ADR programs should be placed within the agency's reporting structure under committed leadership. Without support from agency leadership, some programs have struggled to retain staff, maintain morale, and otherwise improve their practices. Generally, agencies have structured their ADR administrative programs in different ways that appear to work well for them. But to ensure that a program is visible both to agency officials to promote and use, as well as to agency constituents, a program should be placed in a reporting line to committed leadership. Having senior leadership accountable for the program through performance measures and strategic planning goals ensures that it gets the oversight it needs to be successful. Such leadership is also necessary to ensure the program has a place at the table in agency budget decisions. The FERC moved its program to the general counsel's office in 2019 to enhance its visibility and accessibility.[212] Given the

208. Interview with Stephen Ichniowski, *supra* note 151 (noting that EEOC staff handles about 90% of mediations and contractors handle about 7%).

209. *Id.* Some attorneys mediate pro bono to meet ethical expectations of the profession. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (recommending each lawyer provide 50 hours of pro bono service each year).

210. *See National Roster of ECR Professionals – Apply for Roster Membership*, UDALL FOUND.

211. *See Arbitrator Resumes*, *supra* note 203.

212. *See FERC's Dispute Resolution Service Gets New Home,* FED. ENERGY REGUL. COMM'N (June 18, 2019), https://www.ferc.gov/news-events/news/fercs-dispute-resolution-service-gets-new-home.

fundamental duty of independence is central to ombuds practice, those programs may be well suited to run outside of traditional reporting lines.

2. Collection/Sharing of Position Descriptions Across Agencies

Agencies would benefit from being able to share best practices in the creation of position descriptions for their neutrals. Having a central repository, such as the Interagency ADR Working Group, where the examples of the various position descriptions could be housed, would likely be useful. This would give agencies additional tools to tailor their recruiting efforts to the appropriate audience and ensure that they are asking for the right types of talents and expertise. Such a library should include different levels from junior to senior neutrals, to enhance employee retention and promote succession planning.

3. Enhanced Use of Interagency Agreements

Agencies that are considering "dipping their toes" into administrative program ADR but are concerned about resources (either staffing or contractor dollars) might consider using interagency agreements to test the concept with their constituents. As noted above, interagency agreements are sometimes useful such as where subject-matter expertise is not a pre-requisite for neutrals. Whether and how much to use interagency agreements really depends on the types of cases an ADR program would handle, budget and staff at the agency, and the demand for ADR. Interagency agreements may be a good way for an agency to begin to use ADR within its programs. Pilot programs could be staffed through interagency agreements, but those programs could be expanded with agency staff if the size and complexity of the program warrants. Interagency agreements sometimes also function well as a supplement to in-house staff.

4. Creation of Rosters

Agencies that do not have rosters might evaluate whether their programs could benefit from adding a roster of neutrals or replacing their current system with a roster system in light of some of the unique benefits associated with them as discussed above. Rosters also may be useful to supplement established ADR programs staffed by agency employees. Rosters can involve pro bono obligations in appropriate circumstances. Sometimes rosters function purely as a referral mechanism for ADR conducted outside the agency's aegis. In other instances, rosters are contractors. The variety of successful agency approaches show that a roster can be a flexible tool for ADR caseload management and, by seeding more ADR professionals into administrative program disputes, can help normalize ADR as the resort of first instance. The same caveats with respect to interagency agreements and contracting (e.g., maintaining in-house ADR expertise), though, remain applicable for agencies considering rosters.

IV. TRAINING PROCEDURES FOR ADR PERSONNEL

A. Introduction

Training procedures, like other components of ADR programs across the executive branch, vary considerably. Some agencies provide no training and instead rely on the expertise of the individuals that serve as ADR neutrals. Other agencies require extensive training. We asked each agency to tell us about the training it has in place, how often that training is conducted and for whom, what types of topics are covered and by whom, and how such trainings are evaluated. We also reviewed the publicly available reports filed by the environmental agencies reporting on multiple metrics of their ADR program, including training.

The academic and policy literature varies as to the nature and extent of training for ADR professionals that it recommends. In the 1990s, some advocates sought to require licensure, minimum qualifications, and specific educational standards,[213] yet with the exception of basic training in ADR processes and on-the-ground experience for neutrals that handle state court cases, that push appears to have slowed. This change in direction occurred largely to ensure flexibility for specific programs (particularly pro bono programs, such as small claims programs) and diversity among conflict resolvers across not only racial and socioeconomic backgrounds, but also among professional backgrounds (legal, social science, mental health, human resources, etc.).[214] To further complicate the question, little research exists on the effectiveness of training, and the research that does exist does not lead to clear answers.[215]

Despite the lack of clear consensus, some trends have evolved over the last thirty to fifty years regarding training for ADR professionals. These standards draw upon requirements from court programs, state statutes, and professional organizations. The remainder of this section considers those private and public sector trends in the areas of arbitration, mediation, and ombuds practice.

1. Arbitration

Historically, arbitration relied more on arbitrator qualifications in areas such as experience as a trial judge or magistrate to ensure quality as an arbitrator.[216] This trend has largely continued to this day, with arbitration programs focusing more on qualifications than training, except the Financial Industry Regulatory Authority ("FINRA") arbitration roster handling securities disputes.[217]

The FINRA has the least stringent arbitrator requirements, which is intentional to maintain a public roster of arbitrators with no professional connections to the

213. *See, e.g.*, Bobby Marzine Harges, *Mediator Qualifications: The Trend Toward Professionalization*, 1997 BYU L. REV. 687, 714 (1997).

214. Stephanie A. Henning, *A Framework for Developing Mediator Certification Programs*, 4 HARV. NEGOT. L. REV. 189, 199–200 (1999).

215. *See* Art Hinshaw & Roselle Wissler, *How Do We Know that Mediation Training Works?*, 12(1) DISP. RESOL. MAG. 21, 21–22 (2005) (discussing the scant available information on effectiveness of training for mediators).

216. Joseph B. Stulberg, *Training Interveners for ADR Processes*, 81 KY. L. REV. 977, 980 (1993).

217. We note that FINRA is a private corporation, not a government agency, but given its regulatory role and its arbitral experience, we discuss its practices for reference.

securities industry.[218] The FINRA suggests that applicants have "five years of paid business and/or professional experience—inside or outside of the securities industry—and at least" two years of college-level credits.[219] After selection to the FINRA roster, arbitrators must complete a mandatory training session, and additional voluntary training opportunities are also available.[220]

By contrast, most private rosters of arbitrators rely heavily on qualifications and secondarily on in-house training. The AAA has extensive requirements to serve on its rosters, including ten years of senior level legal, business, or professional experience, among other qualifications.[221] The AAA also requires in-service training for new arbitrators.[222] The arbitration requirements of other major providers, including JAMS, are not publicly available, and those organizations ask prospective arbitrators to contact their local offices to obtain more information about addition to the roster.

People who wish to become arbitrators can also look to the private marketplace to receive training in arbitration. For example, the ABA Section of Dispute Resolution offers an Arbitration Institute, usually a multi-day training event covering important topics in arbitration practice, such as managing discovery, running hearings, drafting awards, and case management.[223] The AAA makes its extensive training library open to both AAA panelists and the public.[224] These types of programs can also be used to train arbitrators in state or federal programs.

2. Mediation

The greatest amount of literature regarding training exists in the area of mediation, although even the mediation training literature is sparse and inconsistent.[225] Few mediation programs require specific educational backgrounds, but many programs target mediators with degrees in law, conflict resolution, education, or social sciences.[226] The clearest trend in mediation training is the requirement for some sort of mediation training class, usually around thirty or forty hours, although the hour requirement differs from program to program. For mediators who work in specific areas of law, some researchers suggested a core twenty-four hours of mediation training, followed by twenty hours of training in a specialized area (such as court

218. For the purposes of this Article, we consider FINRA's ADR activities to provide useful background information.

219. *Become an Arbitrator Frequently Asked Questions (FAQ)*, FIN. INDUS. REGUL. AUTH., https://www.finra.org/arbitration-mediation/become-arbitrator-frequently-asked-questions-faq (last visited May 3, 2024).

220. *Id.*

221. *Qualification Criteria for Admittance to the AAA National Roster of Arbitrators*, AM. ARB. ASS'N 1 (discussing requirements for inclusion on the roster).

222. *Id.*

223. *See, e.g., Arbitration Training Institute*, AM. BAR ASS'N, https://www.americanbar.org/groups/dispute_resolution/events_cle/arbitration/ (last visited May 3, 2024).

224. *Education Services*, AM. ARB. ASS'N, https://www.aaaeducation.org/courses/ (last visited May 3, 2024).

225. Susan Raines et al., *Best Practices for Mediation Training and Regulation: Preliminary Findings*, 48 FAM. CT. REV. 541, 541–43 (2010) (summarizing the literature on mediator training and qualities of successful mediators).

226. *See, e.g.*, *How to Become a Florida Supreme Court Certified Mediator: A Step-by-Step Guide*, FL. DISP. RESOL. CTR. (Aug. 2023).

mediation or family mediation, etc.).[227] These programs are considerably shorter than other types of professional training – and well short of any training required for most professional licenses.[228]

Mediation training usually focuses on learning the mediation *process* as well as the *skills* necessary to navigate the process. Programs may also include modules on mediation theory, as well as background in law specific to the program. The use of role play exercises is required in most mediation training programs.[229] Role play exercises give new mediators the chance to practice new skills in a low-risk environment. In addition, role play exercises give new mediators the chance to debrief in small mediation groups, as well as large groups as instructors debrief with the entire class. Ethics is also an important training component required in most mediation training programs.[230]

Mediation programs usually require training prior to inclusion on a roster. The FINRA, for example, seeks neutrals with multi-day training (including role play experience) and experience as a mediator among its mediator qualifications.[231] Most court-connected mediation programs involve training requirements.[232] Finally, many mediation programs require continuing education, sometimes called "continuing mediator education."[233]

3. Ombuds Practice

Compared to arbitrators and mediators, many ombuds receive their first training *after* being hired for the position. While mediators and arbitrators in the private sector often serve as independent contractors, ombuds are overwhelmingly employees of the organization they serve. Like other ADR professionals, ombuds come from a variety of professional backgrounds, including law, conflict resolution, human resources, labor relations, social sciences, and other fields.[234]

The ACUS Ombuds Report provides a good framework for best practices in ombuds training. It suggests:

> (a) To promote accountability and professionalism, agencies should provide training to ombuds with regard to standards and practice, whether offered by one of the ombuds professional organizations or working groups, or from within the government.

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227. Raines et al., *supra* note 225, at 545 (describing the recommendation as the "core plus" model).

228. Donald T. Weckstein, *Mediator Certification: Why and How*, 30 U.S.F. L. REV. 757, 760 (1996) (noting that mediation certification is different from mediator licensing and cautioning against using the words interchangeably).

229. Raines et al., *supra* note 225, at 545 (discussing the prevalence of role play activities).

230. *Id.* at 548 (recommending ethics training in mediation programs).

231. *Qualifications & Need per Location*, FIN. INDUS. REGUL. AUTH., https://www.finra.org/arbitration-mediation/qualifications-need-location (last visited May 3, 2024).

232. *Continuing Mediator Education (CME) Reporting Form*, FLA. DISP. RESOL. CTR. (requiring Florida Supreme Court-certified mediators to report 16 hours of continuing education every two years, for example).

233. *See id*.

234. Brian Clauss, *Protecting Civilian Employment and Providing Healthcare to the Citizen Soldier in the National Guard and Reserve Components*, 45 U. MEMPHIS L. REV. 915, 932 (2015) (noting professional backgrounds particularly useful to ombuds work).

> (b) ombuds should identify steps to build general competency and confidence within the office and to provide specific support to ombuds when cases become highly emotional or complex. More generally, as a regular practice to support and improve their skills, federal ombuds should participate in relevant professional working groups or ombuds association training programs.
>
> (c) ombuds offices should consider the use of developmental assignments via details to other agencies or offices, as appropriate, supplemented by mentoring, which can be helpful as part of their training program.[235]

The ACUS Ombuds Report recommends that ombuds be trained and allows flexibility for training either in-house or by a national ombuds organization, such as the International Ombudsman Association ("IOA"). The report ties ombuds training to quality and competency, and recommends continuing education, as well as mentoring and learning from one another.

The IOA offers a popular training for new ombuds. Although the IOA previously offered this course primarily in person, now the training is also available online in synchronous instruction.[236] When the class is in person, it lasts three days. The online version lasts four half-days. The training includes the following elements: understanding the role of an ombuds, active listening skills, trust building, ethics, conflict resolution, and working within organizations to effectuate change.[237]

Many ombuds have training in mediation, as well as training in the role of an ombuds.[238] In some instances, ombuds will mediate disputes, and ombuds with mediation training can provide that service to the individuals in conflict.

B. Agency Practices

About half the agencies interviewed or surveyed (and nearly all of the environmental agencies) have specific training programs and procedures for ADR personnel. Of those, most stated that they hold regularly scheduled training programs whether biennial, annual, or more frequently. Some also include ad hoc training as needed or for new personnel. Among those that do not presently offer any training, at least one noted that it is interested in creating a training program should it receive approval to do so in its next program review.

Agencies involved in environmental collaboration and conflict resolution are required to report on training undertaken for neutrals and the number of people trained to the Chair of the Council on Environmental Quality and Director of the Office of Management and Budget ("OMB") annually, using a prescribed

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235. ACUS Ombuds Report, *supra* note 68, at 64.

236. *Virtual Foundations of Organizational Ombudsman Practice Course*, INT'L OMBUDSMAN ASS'N, https://www.ombudsassociation.org/index.php?option=com_jevents&task=icalrepeat.detail&evid=169&Itemid=115&year=2021&month=09&day=27&title=sold-out--virtual-foundations-course--september-2021&uid=cd39e275aecdf8915e60b731a11c3b66 (last visited May 3, 2024).

237. *IOA Foundations of the Organizational Ombuds Course*, INT'L OMBUDSMAN ASS'N, https://www.ombudsassociation.org/the-foundations-course (last visited May 3, 2024).

238. *See* Lawrence D. Mankin, *The Role of the Ombudsman in Higher Education*, 51 DISP. RESOL. J. 46, 48 (1996) (discussing the usefulness of mediation training for ombuds).

template.[239] The 2019 report contains detailed descriptions of ADR training given by agencies or taken by their employees at another agency. The DOI's report characterizes training as a cornerstone of its effort to build capacity for effective conflict management and collaborative problem solving and describes thirty-nine training sessions delivered by the Office of Collaborative Action and Dispute Resolution and its in-house trainers of its foundational course "Getting to the CORE of Conflict and Communication." It also convened a webinar on the use of situation and conflict assessments for ECCR staff.[240] The EPA's report describes its training strategy to strengthen staff's skills and promote the use of environmental collaboration and conflict resolution throughout the agency. In total, 92.5 hours of such training were delivered over the course of eighteen sessions at the EPA's headquarters and six regional offices. Notably, the EPA reported having conducted annual training evaluations for the past twelve years, through both employees and contractors, although it also reported that its activities in 2019 were limited by constrained agency appropriations.[241]

Environmental agencies also reported taking advantage of training offered by the National Center. The National Center offers a certificate in ECCR that requires the completion of five of its courses within a five-year period.[242] Federal employees across the ECCR community (as well as some nonfederal persons) have been certified under the program and feedback for the program has been quite positive.[243] For example, the 2019 ECCR Report by the U.S. Army Corps of Engineers ("USACE") notes:

> Professional certifications are highly valued in an engineering organization like USACE, and the increasing numbers of USACE staff earning the Udall certificate in Environmental Collaboration reflects this importance. Through the annual training, Public Involvement Specialists receive a minimum of one in-person yearly training to build consistent expertise. As a result of strategic investments in these training classes, many Public Involvement Specialists either have earned their Udall certificate or will achieve certification this year.[244]

Outside the environmental area, there is much less transparency about training. Training varies and appears to fluctuate with agency budgets. Some agencies rely on the staff to seek out relevant training that is funded by the agency as the budget allows. The type and amount of training offered may vary based on the size of the ADR program. Some agencies encourage and expect ADR personnel to seek out training on their own to improve their skills. Others only hire individuals with

239. Memorandum from the Off. of Mgmt. & Budget & Council on Env't Quality on Environmental Collaboration and Conflict Resolution (Sept. 2012).

240. DEP'T OF INTERIOR, FY 2019 TEMPLATE ENVIRONMENTAL COLLABORATION AND CONFLICT RESOLUTION (ECCR) POLICY REPORT TO OMB-CEQ (2019).

241.2019 EPA ANNUAL REPORT, *supra* note 143, at 6.

242. *See Certificate in Environmental Collaboration and Conflict Resolution (ECCR)*, UDALL FOUND., https://www.udall.gov/OurPrograms/Institute/TrainingCertificate.aspx (last visited May 3, 2024). The Department of the Interior's web page states that all its trainers are certified by the Office of Collaborative Action and Dispute Resolution. *Id.*

243. Email from Melanie Knapp, Training Program Manager, National Center, to authors (June 3, 2021) (on file with authors).

244. U.S. ARMY CORPS OF ENGINEERS, ENVIRONMENTAL COLLABORATION AND CONFLICT RESOLUTION (ECCR) POLICY REPORT TO OMB–CEQ 5 (2019).

certain levels of training and expertise, such as those that demonstrate they have been certified by a private or public certification program.[245]

Some agencies created in-house training programs. The OSC created its own forty-hour program to train new mediators.[246] The Department of Health and Human Services' Departmental Appeals Board provides ADR training to groups across the departmental offices.[247]

Agencies use a mix of internal or private trainers. Some of the contracts described in the prior section include requirements for training as well as the provision of neutrals. Some agencies rely on the FMCS Center for Conflict Resolution Education for continuing education for their neutrals. The OSC forty-hour program includes participation by some local law professors. Agencies use both online and in-person (hybrid) training, although many acknowledge that the availability of in-person training depends on funding and on conditions such as the pandemic.

As noted in the previous section on selection of neutrals, the FMCS has highly developed training programs for its own staff. In 2021, FMCS launched a two-year certification program for existing mediators called the "Conflict Management Professional," focusing on comprehensive management and prevention services to enhance the ability to work on systemic conflict issues and a larger universe of conflict types.[248]

Two agencies we spoke to use co-mediation, in which a novice mediator is paired with a more experienced mediator which enables the novice to learn both from observing the more experienced mediator and through feedback from the latter. In addition, mediators may be teamed up to deal with more complex and/or multi-party cases. Co-mediation exposes experienced mediators to other techniques and methods and can be a useful practice for continuing mediator education.

The length of training programs also varies. Some are self-directed for mediators or other actors to carry out independently and asynchronously. Others can be as long as one week in-person. There is also a difference in training programs between contract or volunteer professionals and agency staff. Some agencies noted that the staff receive training, but contractors work on their own or provide sufficient credentials.

Several agencies mentioned how funding has affected their ability to carry out trainings. When the agency has the budget to do so, it will bring in external trainers for as many as three different levels of specialized trainings. Those same agencies also vary the mode of training: in some years if funding permits, they will bring staff to the agency headquarters for training whereas in years with a tighter budget, video conferencing will suffice.

Some agencies try to update training to reflect agency needs as new issues arise. Feedback from participants will inform types of training. These agencies have used

245. One agency representative noted that although that agency purports to hire individuals with prior training, many staff enter the program with very little training. There is a significant range of backgrounds and those with little training are not brought up to the level of others.

246. Interview with Jane Juliano, Melissa Liebman & Whitney Sisco, Office of Special Counsel (Feb. 8, 2021).

247. *ADR Training*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/about/agencies/dab/adr-services/training/index.html (last visited May 3, 2024).

248. Survey response from Federal Mediation and Conciliation Service, Feb. 2021; email from Peter Swanson, Director of Office of Conflict Management and Prevention, FMCS, to authors (Aug. 25, 2021) (on file with authors).

survey data from participants to "help us figure out where the needs were for training."

Most agencies find ways to support staff in between trainings such as with monthly phone calls to take up common issues. A minority of agencies noted that each individual ADR staff person is on his or her own as agency management is not equipped to provide that level of support. During the pandemic, many staff were trained in using virtual tools for dispute resolution.

A handful of agencies conduct evaluations of their training programs and procedures after staff complete them. They use different mechanisms to do so such as summary reports, employee surveys, and "internal, informal evaluations." These sorts of strategies have been used by some agencies to determine which offices were struggling with issues. Very few agencies have formal review processes that provide a means for those evaluations to be converted into changes in their training regimes. The EPA, as noted above, is one agency with a formal review process. Notably, the National Center incorporates metrics for measuring the success of its training into the goals of its annual Performance Accountability Report, which are used for the agency's strategic planning.[249]

C. Recommendations

The training across the agencies surveyed tends to be tailored to the individual programs that the agency administers. And, as we have seen, training is vulnerable to budget cuts that can constrain the activities of even the most committed agencies. These factors can adversely affect the quantity and quality of available training, creating a reputational risk not just for the agency but also for perceptions of ADR from the public and from private actors involved in these programs.

One agency director observed that although higher degrees in dispute resolution are deemed sufficient from agency management, the quality of master's degrees in ADR can itself vary, leading to problems with adequate training of new staff. One way to provide a baseline to avoid this haphazard landscape would be to direct more agencies to the interagency training programs that are sustained through their own federal funding. As discussed below, that is part of the reason those interagency centers exist. Therefore, we make the following five recommendations, which are crafted with sensitivity toward resource constraints. We do not make any recommendations for particular ADR modalities, apart from facilitation training across multiple modalities, as such specific advice would exceed the scope of this project but we recommend that such information be made available through an interagency mechanism.

1. Refresher/Interagency Continuing Training

We recommend that agencies seek to add refresher trainings to ensure all participants have the latest available resources or take advantage of the robust training opportunities offered by FMCS and the National Center discussed in more detail below.

249. UDALL FOUND., FY 2020 PERFORMANCE AND ACCOUNTABILITY REPORT 6 (2020).

2. Certification Opportunities

Federal employee neutrals should have career development paths through certification opportunities. States that have certification programs for mediators generally require recertification on a regular basis which requires a certain number of hours of continued mediator education.[250] There can be multiple levels of certification that enable mediators to handle more complex and/or larger cases as well.[251] The ECCR certification program from the National Center is an example of a well-regarded certification program.

The Conflict Management Professional certification offered by the FMCS is a more generalized subject matter training, which can benefit neutrals in enabling them to take on more challenging cases, and benefit agencies in getting better services and possibly helping them retain experienced neutrals. Offering the FMCS certification program to other agencies as part of the FMCS catalog of services could be a more affordable approach for those agencies where resource constraints limited training opportunities.

Certification and specialized education are less prevalent among arbitrators, particularly compared to mediators. Similar types of programs could be instituted for continuing education for arbitrators, particularly as practices evolve. For example, agencies might consider training to build competency in holding proceedings online.

3. Facilitation Training

Many federal mediators and ombuds are asked to work, in essence, as facilitators. Facilitation is similar to—but not the same as—mediation or ombuds work. Facilitators work with large numbers of parties or representative stakeholder groups. Because of the large number of parties, the facilitator may need to be more creative in meeting small groups and finding various participation formats to encourage active participation. Agencies that use neutrals to facilitate should invest in training specific to facilitation, including training offered by FMCS or the National Center. Agencies may also consider training mediators and ombuds in facilitative practice so they can switch roles, if necessary.

4. Ethics Training

A specific recommendation is to ensure that training on ethics for neutrals be conducted at regular intervals. Ethics training should be specific to the type of neutral, i.e., arbitration ethics, mediation ethics, or ombuds ethics. It need not stand alone but rather could be part of a larger training, provided that the neutrals in the program receive ethics training in regular intervals.

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250. *See, e.g.*, SUP. CT. OF FL., AOSC 19-26, ADMINISTRATIVE ORDER: PROCEDURES GOVERNING CERTIFICATION OF MEDIATORS, 12 (2019); *see also, e.g.*, JUD. COUNCIL OF VA., GUIDELINES FOR THE TRAINING AND CERTIFICATION OF COURT-REFERRED MEDIATORS, 11 (2020).

251. *See, e.g.*, *Criteria for Mediator Credentials*, *supra* note 176.

5. Co-mediation and Co-facilitation

Agencies may wish to consider having some cases co-mediated or co-facilitated to enable their mediators to learn from each other and enhance their ability to reevaluate their own techniques. In some specialized cases, learning on the job with a senior colleague may be more fruitful than in those sorts of proceedings where the topics vary considerably or expert knowledge is not necessary. Likewise, in larger ADR proceedings involving multiple actors or communities, shadowing senior colleagues could help junior neutrals and facilitators build confidence. Co-mediation has benefits to parties as well. In large and/or complex cases, a second mediator can ease the logistical burden and ensure that issues are not overlooked and all parties get the attention they require. Agencies that use a co-mediation model should encourage the co-mediators to debrief after each case to discuss their strengths and opportunities for growth. Agencies should create a short list of guided questions to encourage debriefing.

6. Reflective Practice

One important learning technique we did not observe being used in the federal ADR community is reflective practice. Reflective practice arose from research showing a weak relationship between years of experience, reputation, and actual observed mastery.[252] It is a technique designed to enable practitioners to reflect on their assumptions and motivations to move beyond "unconscious competence" to true mastery. Reflective practice groups are composed of mediators who support one another in non-judgmentally exploring the assumptions and motivations that underlie their interventions. A presenter discusses a moment of uncertainty, surprise or discomfort in a mediation and is helped by questions from the group to recognize the reasons for their reactions and methods for dealing with similar situations in the future.

In the federal system, reflective practice groups can be created within an agency, or through interagency groups. There is a substantial body of literature on reflective practice and there are many examples on which programs can build.[253] The State of Virginia's Dispute Resolution Center has published a handbook with helpful guidance and checklists for engaging in reflective practice.[254] The ABA Dispute Resolution Section's Mediation Committee also runs a monthly reflective practice session that is open to all members.

252. *See* Michael Lang & Rochelle Arms Almengor, *Why Case Consultation/Reflective Practice Groups Matter for Mediators*, MEDIATE.COM (Aug. 30, 2017), https://www.mediate.com/articles/langarmsreflective.cfm.

253. *See* Judith Starr, *Author, Author! An Interview with Michael Lang, Author of* The Guide to Reflective Practice in Conflict Resolution, MEDIATE.COM (June 27, 2019), https://mediate.com/author-author-an-interview-with-michael-lang-author-of-the-guide-to-reflective-practice-in-conflict-resolution/.

254. *See* SUP. CT. OF VA. DIV. OF DISP. RESOL. SERVS., MEDIATOR SELF-REFLECTION 1 (2018).

V. ADR CASE MANAGEMENT PROCESSES

A. Introduction

ADR case management is another underexplored area of study that our project sought to unearth. While ACUS has conducted work on case management in agency adjudication, no similar study has examined case management in the ADR context.[255] We asked each agency to address the present contours of its case management system, if any, and the level of robustness of that system. We sought information on the actors involved at the operational and leadership levels of case management. We were also interested in the effectiveness and efficiency of the case management process, especially with respect to any electronic platform in place, any challenges, and opportunities for improvement.

Case management is an important, practical consideration for the orderly operation of any ADR program. Important case management components include, among other things, issues of personnel, software for records and case progression, the ability to conduct conflict checking, and the possibility of use of records for educational and research purposes.

ADR programs employ personnel to manage the flow of cases. Outside of federal agency practice, ADR organizations often deal with hundreds, if not thousands, of cases per year, depending on the organization's reach and the community served. For many programs, case managers are assigned and bear administrative responsibility for each individual case. At the FINRA, for example, all cases, whether arbitration or mediation, are initially assigned a "case manager" at one of its regional offices.[256] Whether the program is a court-connected program, a government program, a program run by an ADR-provider organization, or a community program, case managers may have a wide variety of duties, such as appointing individual neutrals, facilitating conflicts checking, docketing, site logistics, and transmitting agreements, awards, and other types of close-out documents.[257]

Case managers may or may not also be ADR professionals. Although case managers have at least a working understanding of the services provided through their office, they do not necessarily engage in providing ADR services. In some instances, one of the biggest benefits of using case managers may be to provide distance between the parties, the neutrals, and the management of the case. The presence of independent case managers can be particularly useful to handle ethical issues arising out of the conduct of the neutrals without the need to alert the neutral in the first instance.[258]

In addition to good case management personnel, good case management software can be instrumental in running a quality ADR program. Case management software can serve multiple purposes. Primarily, the software keeps an electronic

255. *See generally* Electronic Case Management in Federal Administrative Adjudication, 83 Fed. Reg. 30686 (June 15, 2018).

256. Kristen M. Blankley, *FINRA's Dispute Resolution Pandemic Response*, 13 ARB. L. REV. 27 (2021) (describing FINRA case management).

257. *See, e.g.*, Peter Leibold & Michael Schaff, *Healthcare ADR*, 269 N.J. LAW. 67, 69 (2011) (discussing pros and cons of using case management providers, such as the AAA or JAMS, for arbitration cases).

258. *See, e.g.*, Thomas Kinkade Co. v. White, 711 F.3d 719, 722 (6th Cir. 2013) (describing a situation in which a challenge to an arbitrator was made to the AAA case manager and resolved without having to alert the arbitrator to the potential challenge).

file in one place for the case manager. Secondarily, the software may also include a portal that allows ADR neutrals to follow the progression of a case. The FINRA has a particularly robust system for case management.[259] The FINRA's arbitration cases have portals for both the neutrals and the parties, each with different functionality due to the participants' different roles.[260] This software allows parties to submit documents to the arbitrators, and arbitrators have the ability to upload orders, both of which streamline the process by making it paperless. In recent years, there has also been some commercial software for mediation case docketing.

An important aspect of case management is the detection and disclosure of conflicts of interest. As discussed above, neutrality and disclosure of conflicts are bedrock ethical principles that underpin all ADR programs. Case managers, and case management software systems may serve a role in discovering conflicts of interest, either through electronic conflicts checking or by making ADR professionals' conflicts disclosures a standardized part of the case progression.

Records retention raises unique issues for federal agency ADR case management. In mediation practice, it is typical to destroy notes nearly immediately following the conclusion of the mediation to safeguard confidentiality. Agencies, however, must manage all their records under federal records laws.[261] The National Archives and Records Administration ('NARA") issues general records schedules to provide disposition authority for records common to multiple agencies. These schedules authorize agencies after specified periods of time to either destroy temporary records or transfer permanent records to the NARA (only a narrow category of records is permanent; ADR records, like case records, are generally treated as temporary). "Mission" records (ADR records that are produced as part of an agency's primary mission and thus unique to the agency) are generally not covered in the general records schedules but must be separately scheduled by the agency and approved by the NARA. The NARA is required by law to issue a notice in the Federal Register of a schedule proposing the disposal of unscheduled series of records or a reduction in the retention period of a series already approved by disposal. Members of the public can review and comment on the proposed schedules and the NARA considers the comments and consults with the agency before approving them.[262]

Although some documents generated during an ADR proceeding may be federal records, designation as a federal record does not affect confidentiality. In its 2006 publication, *Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide to Federal Workplace Program Administrators*, the Interagency ADR Working Group discussed the interplay between federal records law and

259. *See* Blankley, *supra* note 256, at 29–30 (describing the online docketing system for FINRA and the differences in the party portals and the neutral portals).

260. *Id.*

261. 44 U.S.C. § 3101.

262. *NARA Schedule Review and Approval Process*, U.S. NAT'L ARCHIVES & RECS. ADMIN., https://www.archives.gov/records-mgmt/scheduling/nara-review (last visited Apr. 10, 2024). The creation of agency records is also governed by the Privacy Act of 1974, as amended, 5 U.S.C. § 552a. The Privacy Act requires agencies to publish a notice in the Federal Register for each system of records they collect. A system of records is any group of information about an individual that is retrievable by personal identifiers, such as name or Social Security number. These notices, called SORNs, are available on agency websites. For an example of an SORN for an electronic system of ADR records, see https://www.govinfo.gov/content/pkg/FR-2012-11-09/pdf/2012-27431.pdf.

confidentiality.[263] While a federal record is being maintained, substantive law on confidentiality still applies.

As discussed in other parts of this Article, ADR programs often collect information and data that may be useful for research and educational purposes. In fact, the ADRA specifically exempts such data from its sweeping confidentiality requirements, and does "not prevent the gathering of information" for such purposes.[264] Some of the national ADR standards specifically call for the study of such information to inform and better the practice and the field.[265] Some scholars have called for increased transparency regarding data collection and consistency of such collection for research purposes, including comparative research.[266] Many agencies currently publish annual reports regarding their programs, including aggregate case information, although such annual reporting does not appear to have requirements for consistency from agency to agency or program to program.

B. Agency Practices

There is considerable variation in case management across the executive branch ADR programs. Given the many levels of case management, we will take each in turn.

1. Intake

Some agencies assign a staff member to serve as a case manager. Not all have formal case manager titles, and in some cases the staff member that oversees the ADR proceeding is also the case manager within the agency's adjudicative process. Other agencies have staff that act as administrators that are quasi-case managers. Typically, among the smaller agencies or programs with as few as three ADR staff, all the management is handled across those three staff members. Still others have clerks that assign case numbers and handle docketing in a quasi-judicial manner. Their roles differ but their primary task is the same: to acknowledge the dispute, and to put the paperwork together to commence the proceedings. From that moment forward, tasks diverge considerably in the way the case is handled.

Agencies apply different case management procedures depending on the type of dispute, the form of dispute resolution, and whether the process is confidential. Some agencies categorize their cases by distinct types whereas others have only a single track. Further, sometimes agency counsel advises the parties on whether to proceed with ADR at all; occasionally, agency counsel serves some other

263. *See* INTERAGENCY ALT. DISP. RESOL. WORKING GRP. STEERING COMM., PROTECTING THE CONFIDENTIALITY OF DISPUTE RESOLUTION PROCEEDINGS: A GUIDE FOR FEDERAL WORKPLACE PROGRAM ADMINISTRATORS 38–43 (2006). Although the guide is addressed to workplace ADR, the legal and practical points apply to ADR generally.

264. 5 U.S.C. § 574(h).

265. *See* AM. ARB. ASS'N ET AL., MODEL STANDARDS OF CONDUCT FOR MEDIATORS: STANDARD IX, 1, 9 (2005) (recommending that a mediator participate "in research when given the opportunity, including obtaining participant feedback when appropriate"); *see also* INT. OMBUDS ASS'N, IOA STANDARDS OF PRACTICE: STANDARD 5.2, 1, 2 (2022) (requiring confidentiality when gathering information for reporting purposes).

266. *See, e.g.*, Nancy A. Welsh, *Bringing Transparency and Accountability (With a Dash of Competition) to Court-Connected Dispute Resolution*, 88 FORDHAM L. REV. 2449 (2020) (discussing information that court-connected ADR programs should be collecting to promote transparency and accountability).

gatekeeping role such as pre-screening. Staff at certain agencies are trained in the review process to determine whether ADR would be beneficial in the settling of a dispute. Some staff noted that their advice may turn on agency resources rather than the facts of the dispute, legal arguments, or the situation of the parties. Elsewhere, that determination is set out in statute.

One agency noted a pre-filing process for its disputes where one of the attorneys in its ADR office will meet with the parties to discuss their situation and to receive feedback. This process allows the parties to have an assessment of their respective positions prior to the commencement of the ADR proceedings.

Management means different things to different agencies. Some are very hands-off following the commencement of the ADR proceedings. Others manage closely all the filings and other materials as well as the needs of the third-party neutral. In most instances, agencies are the keeper of the confidentiality and ethics materials to ensure the integrity of the proceedings. At least one member of staff will carry out the conflicts check process.

Some agencies assign counsel and a neutral to the proceedings while others just take note of the proceedings but allow the parties to identify their own neutral from a roster or suggested list. There may be no engagement at all with the agency after the notification of the dispute.

For those that do involve agency staff as non-neutrals, their roles vary. Some serve informational roles only while others are more involved assisting either parties, depending on needs, or the neutral.

2. Records and Platforms

Most agencies today use electronic records but at least one agency is still using paper records. Among those with electronic records management software, most often they are licensed from a contractor although some have developed their own in-house proprietary systems. Firewalls are critical for ethical reasons. As noted above, agency case files are subject to federal recordkeeping rules. In July 2019, the NARA and the OMB jointly issued guidance on how to maintain and manage electronic records that also applies to ADR programs.[267]

As the ADR Working Group has observed, the individual neutral's notes generally are not subject to disclosure pursuant to an exception in the ADRA.[268] One ombuds explained that he destroys his personal notes quarterly unless a matter is still ongoing, while maintaining basic tracking information in a database that is subject to records retention rules.[269]

Agencies maintain strict separation of case files from other files to protect confidentiality and shield against conflicts of interest. For example, in the EAB process, the settlement judge and the staff attorney assigned to the case must maintain strict confidentiality within the office so that the remaining Board members do not receive information that the parties intend to be confidential that may influence the decision-maker's view of the case.

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267. Arian D. Ravanbakhsh, *New OMB/NARA Memorandum on Transition to Electronic Records*, RECORDS EXPRESS (July 1, 2019), https://records-express.blogs.archives.gov/2019/07/01/new-omb-nara-memorandum-on-transition-to-electronic-records/.

268. 5 U.S.C. § 574(a) (discussing confidentiality afforded to neutrals).

269. Interview with Marcus Stergio, *supra* note 146.

3. Post-dispute Follow-up

Some agencies follow-up or continue to track dispute settlements after the conclusion of the ADR proceeding but not all do. In fact, most consider a case to be successful only where they do not hear from participants after a proceeding's conclusion. In some instances, any follow-up may involve adjudication that is handled by another part of the agency. Some agencies noted that they have case follow-up programs in place but due to limited resources they have not reviewed those, sometimes in several years.

Maintaining records of proceedings following their conclusion could help agencies develop a fuller understanding of the long-term success of their programs and strategies that create enduring solutions for parties. However, most agencies lack resources to maintain close contact and it may be difficult to isolate the variables to draw conclusions from such tracking.

C. Recommendations

The variation among the agencies' ADR programs is greatest when it comes to their case management practices. There are also notable disparities in agency participants' evaluations of their case management experiences. Among survey respondents, about half were very satisfied with the systems that their agencies use for case management. The other half were only mildly satisfied or were neutral. About half of respondents believe that their agency's present practices are very effective for the smooth operation of cases. Among those who feel differently, they have commented that they are not able to identify particular weaknesses. It is difficult for individual agency staff to consider the range of options for case management and to implement them given the competing demands on their time.

1. External Audit

Across the agencies studied here, costs were a problem but with additional funding, each agency would have several areas for improvement as highlighted above (better electronic platforms, more staff, tracking proceedings following their conclusion). Most of the programs would benefit from an external audit by an outside actor (whether a private consulting firm, a specialized agency, or a trained research team, among others) that could advise them on case management amendments and opportunities. Such a review could assess objectively how the program is administering its ADR functions and could recommend best practices in an area that is presently underserved by existing research. Further, case management tends to be highly targeted to individual programs. A personalized review would help bridge any gaps in information-sharing across agencies intended to improve case management techniques.

2. Software Review

To the extent that agencies are using case-management software, those programs should be periodically reviewed internally (or externally where possible) not

only for efficacy but also for security and ability to maintain confidentiality. Software should have firewalls and encryption that are reasonable for the industry.

3. Ethics Policies

Offices that offer both adjudicative services and settlement services should have clear, written policies regarding the ethical walls between the adjudicative staff and the settlement staff. For example, policies should outline (1) who has access to which materials and (2) how passwords or other protocols ought to be implemented to ensure those walls are constructed. The responses we received indicate that such ethical walls or separation is occurring; we advise that these offices have written policies if none currently exists.

VI. INTERAGENCY MECHANISMS TO FACILITATE ADR AND PROVIDE SUPPORT

A. Introduction

This section describes interagency arrangements in place to support and facilitate ADR. In addition to those mentioned here, we are aware of several informal and formal arrangements maintained by different groups of ADR practitioners in the federal government. Some of those extend beyond the work of this study. Some also are difficult to capture in any documented way. Thus, we focus here on programmatic interagency initiatives.

B. Agency Practices

There are four different organizations or groups with missions that include assisting federal agencies with alternative dispute resolution programs: the Interagency Working Group, the FMCS, the National Center, and the COFO. Each has a different statutory basis, structure, and resource base.

1. The Interagency Alternative Dispute Resolution Working Group

In addition to authorizing agencies to use alternative dispute resolution to resolve issues in controversy in administrative programs, the ADRA of 1996 directed the president to designate an agency or designate or establish an interagency committee to facilitate and encourage agency use of dispute resolution. The designee, in turn, was required to "(1) encourage and facilitate agency use of alternative means of dispute resolution, and (2) develop procedures that permit agencies to obtain the services of neutrals on an expedited basis."[270] On May 1, 1998, President Clinton created the Interagency Working Group comprised of Cabinet departments

270. Pub. L. No. 104-320, § 7(b).

and other agencies with a significant interest in dispute resolution to be convened by the Attorney General.[271]

The Interagency Working Group's mission is 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.[272] The Interagency Working Group also periodically advises the president, through the Director of the OMB, on its activities.[273]

To staff its operations, the Interagency Working Group established a Steering Committee composed of staff-level ADR experts in various agencies.[274] The Steering Committee's role was to staff the Interagency Working Group and support the work of four sections, which include: (1) workplace conflict management; (2) contracts and procurement; (3) administrative enforcement and regulatory process; and (4) litigation. The Attorney General, on behalf of the Interagency Working Group, issued reports to the president for 2000, 2007 and 2016, discussed below.

Through its Steering Committee, the Interagency Working Group was originally actively engaged in providing interagency assistance in the forms of outreach to agencies, publication of guidance, provision of training, and the making of recommendations to further ADR. These achievements were especially impressive because all members were volunteers and the Interagency Working Group lacked a dedicated source of funding. Over the past decade, however, the support provided by and to the Interagency Working Group has dwindled, and the source of its leadership and resources is unclear.

2. The Federal Mediation and Conciliation Service

Although originally created to provide mediation services to private sector labor disputes, the FMCS has grown in both statutory authority and programmatic offerings to play a major role in promoting and supporting the use of ADR across the federal government.

The Taft-Hartley Act created the FMCS to promote labor-management peace and cooperation and to provide neutrals to assist in the resolution of private sector labor disputes.[275] In 1978, Congress expanded the FMCS mission to provide ADR to federal agencies and unions that reach impasse in labor negotiations,[276] and in 1980, extended this authority to encompass labor disputes within the U.S. Postal Service.[277] The ADRA of 1996 further expanded the FMCS's role in federal ADR,

271. *See* Memorandum on Agency Use, *supra* note 36. The Office of Dispute Resolution within the Justice Department's Office of Legal Policy originally represented the Attorney General in leadership of the Interagency Working Group. *See* archived content *Alternative Dispute Resolution*, JUSTICE.GOV, https://www.justice.gov/archives/olp/alternative-dispute-resolution (July 24, 2020).

272. Memorandum on Agency Use, *supra* note 36.

273. *Id*.

274. *See About the Interagency ADR Working Group*, INTERAGENCY ALT. DISP. RESOL. WORKING GRP., https://adr.gov/about-adr.html (last visited May 13, 2024) [https://web.archive.org/web/20201019201952/https://adr.gov/about-adr.html].

275. Taft-Hartley Act, 29 U.S.C. § 172 (1947).

276. Civil Service Reform Act of 1978, Pub. L. No. 95-454, (codified at 5 U.S.C. § 7119(a)).

277. Pub. L. No. 96-326 (1980).

authorizing FMCS to assist agencies with their ADR programs, provide neutrals and training, and consult with the Interagency Working Group on a roster of neutrals.[278] Today, the FMCS provides mediation and conflict resolution services to industry, government agencies and communities.[279] It is the nation's largest independent public agency dedicated solely to ADR and conflict management.[280]

The FMCS provides a wide range of conflict resolution services to other agencies for both workplace and administrative program disputes, maintaining separate programs for each.[281] The services the FMCS makes available for interagency administrative program disputes include assessments and system design, the provision of neutrals, training, and the sharing of best practices through education and outreach.[282] As the FMCS does not receive appropriated funding for this program, it provides these services through interagency agreements that reimburse it solely for staff time.

3. The National Center

The 1998 EPCRA[283] created the U.S. Institute for Environmental Conflict Resolution (which Congress renamed in 2019 as the John S. McCain III National Center) to assist the executive branch in implementing the National Environmental Policy Act of 1969 by providing assessment, mediation or related services for conflicts dealing with the environment, public lands, or natural resources. The National Center is part of the Udall Foundation, an independent federal agency established in 1992 to honor Morris Udall's impact on the nation's environment, public lands, natural resources and support for the rights and self-governance of Native Americans.[284]

The National Center is a small organization, with a staff of eleven federal employees, all of whom are neutrals and case managers. It leverages its annual appropriation through cost recovery from services fees and the use of contracted private sector providers to augment service capacity.

Services offered by the National Center include consultations, assessments, process design, convening, mediation, facilitation, stakeholder engagement, tribal consultation, and other related collaboration and conflict resolution activities. As part of this work, the National Center provides a training program to develop skills and build workforce capacity in collaboration, communication, problem solving, and conflict resolution. In general, environmental agencies request assistance from the National Center when impartiality and process expertise are needed to lead

278. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, sec. 4, § 173(f) (codified as amended at 29 U.S.C. § 173(f)). For a discussion of the ADR work of FMCS in the early years of its expanded mandate, *see* Jerome T. Barrett, *The FMCS Contribution to Nonlabor Dispute Resolution*, MONTHLY LAB. REV. (Aug. 1985).

279. *About Us*, FMCS, *supra* note 12.

280. Mark Fotohabadi, *What is the Federal Mediation and Conciliation Service (FMCS)?*, ADR TIMES (Nov. 6, 2023), https://www.adrtimes.com/federal-mediation-and-conciliation-service/.

281. *See FAQs*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/resources/faqs/ (last visited May 3, 2024).

282. *Alternative Dispute Resolution for Government*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/services/alternative-dispute-resolution-for-government/ (last visited May 4, 2024).

283. Environmental Policy and Conflict Resolution Act of 1998, Pub. L. No. 105-156.

284. *About us*, UDALL FOUND., https://udall.gov/AboutUs/AboutUs.aspx (last visited May 3, 2024).

complex conflict resolution and collaborative problem-solving efforts, especially for interagency cross-jurisdictional issues.

Much of the National Center's work is to support ECCR, a high-water mark for multi-agency collaboration in the field of ADR. ECCR refers to third-party-assisted environmental collaboration as well as environmental conflict resolution to resolve problems and conflicts that arise in the context of environmental, public lands, or natural resources issues, including matters related to energy, transportation, and water and land management.[285] We characterize the federal ECCR community as a high-water mark in inter-agency collaboration in the ADR field because of its sharing of knowledge and resources, and its use of common metrics and reporting, which enables comparisons across agencies of the effectiveness of various approaches. This successful interagency collaboration owes much to the fact that the ECCR community shares a common statutory framework for conflict resolution, leadership from the White House through the Council on Environmental Quality ("CEQ"), and the dedicated resources of the National Center. The federal ECCR community regularly assesses and reports on the value of ADR using both quantitative and qualitative metrics that is it continually refining. ECCR has a relatively long history both inside and outside the federal government, which one official observed has enabled those agencies involved in it to embed its principles into their cultures.[286]

4. Coalition of Federal Ombudsman

The COFO is an interagency forum created to support the work of ombuds. Unlike the Working Group, the FMCS, and the National Center, the COFO is not established by Congress or other law, but it is a voluntary trade organization.[287] The COFO was established in July 1996 by interested ombuds who wanted to support one another, grow the profession, and establish best practices.[288] In 2013, its members adopted a charter, stating that the purpose of the organization is to be the "principal interagency forum that provides collaboration, advice, and guidance on professional Ombuds standards, skills development, program development, and effectiveness."[289] The COFO's purposes include sharing ideas and experiences, working together to create standards applicable to ombuds practice, and generally increase the visibility of the work of ombuds.[290] Membership in the COFO is afforded to any ombuds (or other ADR practitioner), but voting members are limited to ombuds who work for federal agencies.[291]

The COFO has regular meetings, usually monthly, at various locations, including online meetings. The COFO events provide education on ombuds practice, skill building for ombuds, as well as topics such as outreach and public education. The

285. Memorandum from the Off. of Mgmt. and Budget and the Council on Env't Quality on Environmental Conflict Resolution to Executive Branch Agencies (Nov. 28, 2005).

286. Interview with Michael Wolf, Director of Collaboration and Alternative Dispute Resolution, Federal Labor Relations Authority (Sept. 3, 2021).

287. *See* ACUS Ombuds Report, *supra* note 68, at 226.

288. *Coalition History*, INTERAGENCY ALT. DISP. RESOL. WORKING GRP., https://adr.gov/cofo/coalition-history/ (last visited May 3, 2024).

289. *See Coalition of Federal Ombuds (COFO) Charter*, INTERAGENCY ALT. DISP. RESOL. WORKING GRP., https://adr.gov/cofo/charter/ (last visited May 3, 2024).

290. *Id*.

291. *Id*.

organization appears to prioritize ombuds offices learning from other ombuds offices, which is similar to the concept of reflective practice, described above. The COFO website archives past meeting minutes and conference agendas as a resource to ombuds and the public.[292]

The ACUS Ombuds Report noted that the federal ombuds community received a great deal of value from participation within the COFO.[293] The authors noted that as they gathered information from federal ombuds, "COFO was mentioned repeatedly as an essential source of inspiration, innovation, best practices, tough-minded guidance, and reliable support, as well as a forum to which federal ombuds bring their professional concerns."[294]

C. Recommendations

The ADRA of 1996 and the 1998 Presidential Memorandum implementing it envisioned an interagency mechanism to encourage and facilitate the use of agency ADR programs. Indeed, the statute requires agencies, in developing their ADR policy, to consult with the committee or agency designated by the president for this role, and the 1998 Presidential Memorandum created the Interagency Working Group to do so. Although it had some early successes, the Interagency Working Group is no longer fulfilling that role. Our research supports the view that the federal government should not abandon this vision. There is value to agencies in having a centralized hub to pool knowledge and resources, help agencies create ADR programs where warranted, create consistency and transparency in measuring and reporting for those that have programs, and analyze data to make recommendations to improve the effectiveness of agency ADR programs. It is also a more efficient use of federal resources to share basic program building blocks rather than requiring each agency to reinvent the wheel. There are still many programs throughout federal agencies that do not use ADR whose constituents could benefit from it but may never do so without encouragement and assistance.[295]

The ECCR community has had success in these areas, and provides some important lessons learned for other federal agencies. Specifically, the EPCRA of 1998 and implementing executive memoranda together ensured that there was high level leadership, dedicated funding, expert staffing and clear guidance for the development of ECCR ADR programs. Congress created the National Center, authorizing appropriations as well as its ability to charge for its services. The CEQ/OMB Memoranda, most recently that of 2012, laid out policy guidance, a series of principles for agencies to follow, required the development of metrics to measure the benefits of ADR, periodic meetings convened by the head of CEQ and OMB, and required quarterly meetings of senior agency officials under the aegis of the National Center and annual reporting by agencies participating in ECCR.

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292. *See Prior Conferences and Meetings,* COAL. OF FED. OMBUDSMAN, https://adr.gov/cofo/prior-conferences/ (last visited May 3, 2024).

293. *See* ACUS Ombuds Report, *supra* note 68, at 226.

294. *Id.*

295. One official observed that a common understanding of dispute resolution principles, use of consistent terminology, and more education and training across the government is needed to realize the potential of ADR as an integral part of conflict management. Interview with Michael Wolf, *supra* note 286.

Federal ADR at the general level does not have the "belt and suspenders" of ECCR, which explains why interagency support there has lagged. The ADRA of 1996 did not create, much less fund, a resource for agencies to draw on in developing ADR administrative dispute resolution programs. Rather, it directed the president to designate an agency or designate or establish an interagency committee to facilitate and encourage agency use of dispute resolution under its authority. President Clinton created an Interagency ADR Working Group to consist of representatives of the heads of all participating agencies to accomplish the goals set forth in the statute, to be convened by the Attorney General. The presidential memorandum is quite short and does not set guiding principles or provide a structure of the Working Group's activities. Participation is a collateral duty for those involved. There is no funding for the Working Group and no real way for it to influence agencies whose staff are not already participating in its work.

Much can be done within the executive branch to strengthen the framework using ECCR as a model. The president could issue a new memorandum designating an expert agency to advocate for and support ADR in administrative disputes. The obvious candidate would be the FMCS, since the FMCS already has a role in supporting interagency ADR in the ADRA. To bring in executive leadership, a White House office, such as the OMB, could convene agency head meetings on an annual basis and require reports on the progress of ADR in each agency's administrative programs.

Another important lesson from the ECCR Community comes from its use of regular and consistent reporting for the collective assessment of the value of the ADR programs, giving agency officials access to broader data and the ability to evaluate different approaches. Although the 1998 Presidential Memorandum envisioned periodic reporting by the Interagency Working Group on its activities, it did not dictate a timeframe and only three sets of reports were issued in the ensuing twenty-eight years. In addition, the 1998 Presidential Memorandum did not provide any guidance for the content of the reports or authorize the development of any metrics. The ECCR agencies are subject to an annual reporting requirement, with established metrics, and the National Center collates their information to summarize the savings and benefits from the agencies' standpoints. This reporting has been a valuable feedback tool through which the ECCR agencies monitor and assess their results and was used by the senior officials constituting the Federal Forum to develop the 2018 recommendations noted above. As agency strategic planning is tied directly to the federal budget process, having objective metrics that are consistently applied is critical to gaining support for ADR. Whatever form the Interagency Working Group takes in the future, helping agencies develop and implement metrics to measure success should be a priority.

Finally, we have one recommendation for the FMCS. The FMCS has an impressive array of services and the strongest training program for neutrals we have seen in the federal government. Nonetheless, because of its mission as a labor relations agency, some agencies with very different statutory missions may not be as familiar with it and may have concerns about its understanding of their mission areas. Cross-agency details (FMCS employees going to other agencies and employees of the other agencies going to FMCS) could help build the necessary understanding across agency cultures. In addition, placing oversight of the Interagency Working Group under the FMCS would raise its profile and give it more insight into issues across the federal ADR community.

CONCLUSION

This study has reviewed five topics concerning agency ADR programs across the federal government. It has made more than two dozen recommendations both for agencies with ADR programs and for those that may wish to explore the possibility of developing ADR programs in the future. In making these recommendations, we have been mindful of the many challenges agencies face in creating or enhancing existing ADR programs—from budgetary and hiring constraints to workload demands. By showcasing effective practices at individual agencies, and describing the interagency resources available for assistance, we hope this Article makes it easier for agencies to do their work. There remains potential for ADR to enhance agency work throughout the federal government, subject to careful thought and design considerations such as those we have highlighted in this Article.