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Earl F. Nelson Memorial Lecture

ADR and the Federal Government: Not Such Strange Bedfellows After All

Daniel Marcus and Jeffrey M. Senger***

The topic of these remarks is “ADR and the Federal Government: Not Such Strange Bedfellows After All.”¹ It is a pleasure to discuss this topic at the law school that is the recognized academic leader in this field.² As the title suggests, many of you might not expect that the government would be the kind of place where alternative dispute resolution (“ADR”) would take hold. You might think of the federal government—even the Justice Department—as a tradition-bound bureaucracy that resists change and new ideas.

These suspicions would be misplaced. Under the leadership of Attorney General Janet Reno, we have made tremendous strides in the last eight years, placing us in a position where we can say that the Justice Department and the federal government, as a whole, are at or near the front of the ADR parade, rather than lagging behind.

Part of the reason for this progress is necessity. The Department of Justice is the nation’s most prolific litigator in the federal courts. One of the responsibilities of the Associate Attorney General is to oversee the Department’s civil litigation in the Civil, Civil Rights, Antitrust, Tax, and Environment and Natural Resources Divisions. The United States or its agencies are parties in nearly one-third of all federal district court civil litigation.³ With a docket like

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2. See *Law Specialties: Dispute Resolution*, U.S. News & World Rep., Jan. 2001, available at <http://www.usnews.com/usnews/edu/beyond/gradrank/gblawsp1.htm>.

3. The Executive Office for United States Attorneys reports that 79,433 civil cases were filed or responded to by United States Attorneys in fiscal year 1998. 1999 U.S. ATT’Y ANN. STAT. REP. 76. The Administrative Office of the United States Courts reports that 256,787 civil cases were filed in the United States district courts in fiscal year 1998. STAT. DIV., ADMIN. OFF. OF THE U.S. CTS., JUD. BUS. OF THE U.S. CTS.: 1999 ANN. REP. OF THE DIRECTOR 16 (1999), available at <http://www.uscourts.gov/judbus1999/judbiz-part1.pdf>.

this, we have learned the value of an organized, strategic effort to settle cases. Other government agencies face similar challenges in the administrative arena.

Now, the government even may be leading the private sector in this field. One sign of this is that private industry is starting to use ADR programs modeled on those of the government. The front page of *The New York Times* business section recently featured an article about the former General Counsel of the United States Postal Service, who had spearheaded the Postal Service's ADR program for workplace disputes, which produced what the *Times* called "spectacular" results.⁴ A major law firm recently hired her away from the government to implement similar ADR programs for corporate clients nationwide.⁵

These remarks will cover some of the barriers we have had to overcome in this field, some of the successes we have had, and some of the lessons we have learned as we have set about changing the litigation culture of the government. Encouraging the use of ADR in the Justice Department and in the government has not been easy, and we still have a long way to go. The Justice Department, in particular, historically has had an adversarial culture that has been difficult to overcome. There are a number of reasons for this.

First, our society long has glorified the warrior, and Justice Department attorneys have followed this pattern. Real litigators, the traditional litany has it, do not settle cases. They try them. While there is a rich tradition celebrating trial lawyers in movies, television, and literature, ADR has been largely ignored. Gregory Peck⁶ and Calista Flockhart⁷ are famous for parts as courtroom lawyers, not mediators. Scott Turow never wrote a book about early neutral evaluation.⁸

At the Justice Department, this adversarial mentality⁹ shows itself among managers and lawyers alike. One supervisor recently complained that too many cases were being settled in his office. Others resist the use of ADR by arguing that it will somehow inevitably result in the government paying more money than it should to resolve a case. Some of these attorneys seem to distrust their own ability to settle a case judiciously and in the best interests of the United States if ADR is involved, or simply to cease using the process in a particular case if it is unproductive.

A second problem is that the litigation mentality has been around so long that it has become institutionalized. The belief that trials are better than settlements

4. Mickey Meece, *The Very Model of Conciliation*, N.Y. TIMES, Sept. 6, 2000, at C1.

5. *Id.*

6. *See TO KILL A MOCKINGBIRD* (Universal Pictures 1962).

7. *See Ally McBeal* (Fox television, originally broadcast in 1997).

8. *See, e.g., SCOTT TUROW, PRESUMED INNOCENT* (1987).

9. *See Leonard L. Riskin, Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-48 (1982).

has infected our programs in a number of ways. For example, the flagship course for decades at the Attorney General's Advocacy Institute has been Trial Advocacy. We fly all of our young lawyers to the National Advocacy Center in South Carolina for a two-week residential training course on how to try a case. In addition, we fly in another twenty-five senior attorneys to be faculty members, hire outside consultants to give presentations, use Federal Bureau of Investigation agents as witnesses, and even bring in five federal judges to preside over mock jury trials. The costs for each two-week course are substantial, and we offer it many times each year.

In contrast, until quite recently, we had no regular courses in negotiation. Attorney General Reno ordered the first negotiation course to be made a permanent part of the curriculum in 1996. The demand was enormous; we had more than four times as many applicants as spaces. Still, it was only a two-and-a-half-day course, without the extensive infrastructure and support given the trial advocacy course. While we continue to offer negotiation training several times each year, the trial course still receives much more attention.

Even the titles of our staff reflect the litigation mentality. Lawyers in the Civil, Civil Rights, Tax, Antitrust, and Environment and Natural Resources Divisions have the official title "Trial Attorney." That is the way they are known in our personnel records and on their business cards. This is their title even though they settle far more cases than they take to trial.

Awards also follow this pattern. We have a number of high-level awards that tend to go to people who have been successful in major trials. One series of awards, the John Marshall Awards, is specifically limited to lawyers who have prevailed in adjudication at the trial or appellate level. These awards carry substantial cash bonuses and are given out by the Attorney General in a formal ceremony in Washington, D.C. Clearly, these awards have a real effect on the culture of the Department. We have worked to change this. Recently, we added a John Marshall Award for the use of ADR.

Another barrier to settlement we face is that many young lawyers come to the Justice Department because we offer trial experience that they cannot get elsewhere. Large firm practice, while lucrative, rarely offers young lawyers the opportunities to try cases like those available at the Justice Department. While negotiation experience ultimately may be at least as valuable, because more cases are negotiated than tried, young lawyers may feel pressure to get trial experience while they are at the Department.

Of course, some of the cases we bring on behalf of the United States involve principles that we cannot compromise, and, thus, settlement is not possible. When fundamental rights have been violated, we have a duty to ensure victims receive full compensation for their harms.¹⁰ For private-sector lawyers, bottom-line,

10. See Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1085-87

business decisions may lead to the settlement of a case because the costs of trying it would be prohibitive. In contrast, when the Justice Department is a plaintiff, we are pledged to fight for some principles despite the cost.

By the same token, some cases in which we are a defendant are also harder for us to settle. While a private company can afford to pay a nominal amount to resolve frivolous litigation in order to get on with its business, this is more difficult for the government. The risk of copycat litigation is much greater for us. If the public learns that the government will pay to settle a frivolous suit, we quickly will be flooded with thousands more cases just like it. In tax litigation, a private party may be willing to compromise a monetary claim, whereas the government may be reluctant to do so—even on a reasonable basis from a risk-assessment standpoint—because of the need to establish a precedent for other cases. Thus, we must litigate some claims that the private sector can avoid. And where a lawsuit challenges the lawfulness of government action, settlement is often out of the question.

Despite all of these obstacles, we have made remarkable progress in changing the culture of the Justice Department and other parts of the government with respect to dispute resolution. One of the first steps has involved the simple recognition of reality. Despite all of the trials that the Justice Department handles each day, we settle vastly more cases than we try, and we always have. In fact, in the civil arena, for every case we take to trial, we resolve more than one hundred others before they go to trial.¹¹ According to the most recent figures, only seven-tenths of one percent of our civil cases ever reach trial.¹² This is actually lower than the national civil trial rate, which a recent study found to be 3.7%.¹³

Acknowledging this fact leads to a number of interesting conclusions. First of all, settlement is clearly not “alternative” dispute resolution, because it is the normal course of events for a lawsuit. Indeed, it would be more appropriate to call trials “alternative” dispute resolution, because so few disputes are resolved that way.

Once we recognize this, it becomes clear that we should focus our discovery motions, and other pre-trial practices on settlement more than on trial because trials are so rare. To be sure, we need to be ready for the one-in-a-hundred case that goes to trial, because it is important that we be fully prepared whenever we

(1984).

11. In fiscal year 1998, United States Attorneys’ Offices took 514 civil cases to trial out of a total of 75,411 civil cases that were terminated during that period. 1999 U.S. ATT’Y ANN. STAT. REP. 72.

12. *Id.*

13. Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 SEATTLE U. L. REV. 433, 443 (1996) (examining all federal diversity cases for 1991-92).

go before a judge or jury. But we should remember that settlement is a far more likely result.

We are now encouraging our lawyers to consider settlement earlier in the life of a case. Too many of our settlements have occurred on the courthouse steps, after we have spent years in attorney time and tens of thousands of dollars in litigation costs. If we could settle cases even several months earlier, that would represent a tremendous savings in time and money given the hundreds of thousands of cases the government handles each year.

Of course, some cases should not be settled until adequate discovery has been undertaken in order to value the lawsuit accurately. But many times, core discovery is all that is needed to determine an appropriate settlement value. At that point, great savings can be achieved by avoiding extensive litigation before a “courthouse-steps” settlement.

In recognition of these realities, the government has moved on multiple fronts to promote the use of ADR in the last decade. Congress passed the first Administrative Dispute Resolution Act in 1990.¹⁴ This Act required every executive agency to “adopt a policy that addresses the use of alternative means of dispute resolution,” “designate a senior official to be the dispute resolution specialist of the agency,” “provide for training on a regular basis,” and “review each of its standard agreements for contracts, grants, and other assistance [to] encourage the use of alternative means of dispute resolution.”¹⁵ This was watershed legislation for the federal government because, for the first time, the law required every agency to promote the use of ADR. As with every new initiative, agencies have taken varying amounts of time to comply with the Act, but the beginnings of the comprehensive federal effort in this area can be traced to this legislation.

Nevertheless, the Act was not without its problems. While it authorized “binding” arbitration for the first time, agencies were permitted to nullify any award within thirty days after its issuance.¹⁶ This effectively gutted the provision, and private litigants were understandably reluctant to agree to arbitration once they learned that the government could back out (and that they could not) if it did not like the award the arbitrator made.¹⁷ The Act also contained no mediation

14. Administrative Dispute Resolution Act of 1990, 5 U.S.C. §§ 571-584 (1994) (amended 1996).

15. Administrative Dispute Resolution Act of 1990, 5 U.S.C. § 571 (1994) (amended 1996).

16. Administrative Dispute Resolution Act of 1990, 5 U.S.C. §§ 575, 580-81 (1994) (amended 1996).

17. See, e.g., Martha W. McClellan, *Coming of Age: Arbitration, Other Forms of ADR, See Massive Expansion in U.S. Agencies*, DISP. RESOL. MAG., Spring 1999, at 17.

exception to the Freedom of Information Act, which provides public access to government documents.¹⁸

Six years later, in 1996, Congress amended the Act to address these concerns.¹⁹ If the government agrees to participate in binding arbitration, it is no longer permitted to reject a resulting award,²⁰ and, as a result, private parties are gradually starting to use this process. In addition, the Freedom of Information Act no longer provides access to documents that are exchanged privately between a party and the mediator.²¹ These changes are welcome ones, and they have increased the effectiveness of ADR in the government.

In 1998, Congress passed additional legislation requiring federal courts to promote ADR. The Alternative Dispute Resolution Act of 1998 requires each district court to “devise and implement its own alternative dispute resolution program,” “encourage and promote the use of alternative dispute resolution in its district,” “require that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation,” and “provide litigants in all civil cases with at least one alternative dispute resolution process.”²² The Act permits courts, in their discretion, to require parties to participate in mediation or early neutral evaluation (though parties must consent to arbitration).²³

This legislation has the potential to reinforce federal agency ADR programs, because the government, as we have seen, is a party in nearly a third of the civil cases in federal court.²⁴ Unfortunately, to date Congress has provided no funds to implement its ADR mandate. Courts are already claiming they are underfunded, and it will be more difficult to create quality ADR programs without additional targeted funds.

18. Freedom of Information Act, 5 U.S.C. § 552 (1994 & Supp. IV 1998); *see also* Philip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 ADMIN. L. REV. 315, 335-37 (1989) (discussing the applicability of the Freedom of Information Act to government mediation documents).

19. Administrative Dispute Resolution Act of 1996, 5 U.S.C. §§ 571-584 (1994 & Supp. IV 1998).

20. Administrative Dispute Resolution Act of 1996, 5 U.S.C. §§ 575, 580-81 (1994 & Supp. IV 1998).

21. *See* Administrative Dispute Resolution Act of 1996, 5 U.S.C. § 574(j) (1994 & Supp. IV 1998).

22. Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658 (Supp. IV 1998).

23. Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658 (Supp. IV 1998).

24. *See supra* note 3 and accompanying text.

A number of presidential directives also have been helpful in promoting ADR in the government, and they have been increasingly affirmative in their tone and content. In 1991, President Bush issued an Executive Order requiring that government attorneys be trained in ADR, noting that it can “contribute to the prompt, fair, and efficient resolution of claims.”²⁵ However, the order included a significant caveat, recommending ADR only if traditional negotiations have broken down. The Bush order states: “Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal or structured Alternative Dispute Resolution (ADR) process.”²⁶

In 1996, President Clinton withdrew this caveat and promulgated an Executive Order that required government attorneys to propose the use of ADR in appropriate cases.²⁷ Clinton ordered that “[w]here the benefits of Alternative Dispute Resolution (‘ADR’) may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the parties. . . .”²⁸

More recently, in a May 1, 1998, Presidential Memorandum, President Clinton was even more explicit: “I have determined that each Federal agency must take steps to promote greater use of mediation, arbitration, early neutral evaluation, agency ombuds, and other alternative dispute resolution techniques. . . .”²⁹

A Statement of Administration Policy on a then-pending bill, issued by the White House on October 24, 2000, went further, stating: “The Administration encourages the appropriate use of ADR to the maximum extent practicable.”³⁰

At the Justice Department, Attorney General Reno also has gone to great lengths to ensure that ADR is used in all appropriate cases. Five years ago, she formally established an Office of Dispute Resolution to coordinate this work in the Department.³¹ She then established a permanent source for the funding of neutrals

25. Exec. Order No. 12,778, 56 Fed. Reg. 55,195, 55,196 (Oct. 23, 1991).

26. Exec. Order No. 12,778, 56 Fed. Reg. 55,195, 55,196 (Oct. 23, 1991).

27. Exec. Order No. 12,988, 61 Fed. Reg. 4729, 4729 (Feb. 5, 1996).

28. Exec. Order No. 12,988, 61 Fed. Reg. 4729, 4729 (Feb. 5, 1996).

29. Memorandum from the President of the United States, to the Heads of Executive Departments and Agencies (May 1, 1998), *available at* <http://govinfo.library.unt.edu/npr/library/direct/memos/disputre.html>.

30. Memorandum from the Executive Office of the President, to the Office of Management and Budget (Oct. 24, 2000), *available at* <http://www.whitehouse.gov/omb/legislative/sap/106-2/hr3312-h.html>.

31. See Memorandum from the Office of the Attorney General, to all departmental litigating divisions and all U.S. Attorneys (Apr. 6, 1995) (This memorandum is titled *Promoting the Broader Appropriate Use of Alternative Dispute Resolution Techniques*. In the memorandum, the Attorney General creates the position of “Senior Counsel for

in a Department-wide account, so that managers need not pay for it out of their own budgets. By removing this economic barrier to the use of mediation, Attorney General Reno has made it much more readily available to our attorneys.

At Attorney General Reno's direction, we have undertaken a comprehensive ADR training program for our civil litigators. During the past five years, we have trained more than two thousand Department lawyers—both in Washington, D.C., and in U.S. Attorneys' Offices throughout the country. These courses typically have been three-day programs, culminating in role-play mediations with professional mediators we hire for the training. Many participants report that the chance to take part in an actual mediation, after appropriate instruction, is the highlight of the course.

Attorney General Reno also has used the "bully pulpit" of her office to encourage those outside the government to use ADR. She has spoken throughout the country before bar associations and professional groups, and at a recent conference of the Association of American Law Schools.³² In each of her speeches, she notes that "ADR" should stand for "Appropriate Dispute Resolution" because there are many different forms it can take.³³

Some professors wonder if training and emphasis on ADR really makes much difference in the day-to-day work of practicing lawyers. They have expressed a concern that training in law school or in a government agency training program may have little significant long-term effect once people leave the classroom or training center. You will be pleased to know that we have found our ADR training and other programs have made a big difference. When our ADR initiative began in 1995, Justice Department attorneys reported they used ADR in 509 cases that year. As of the last fiscal year, that number had risen to 2,662 cases. Of course, a number of factors account for this dramatic increase over only five years. But we believe that it shows that training and other measures can have a real effect on the way lawyers do business.

We also have found that ADR has been an extremely effective tool for our lawyers. We conducted a study of approximately one thousand cases between 1995 and 1999 in which ADR was used.³⁴ The study was based on ADR

Alternative Dispute Resolution."), available at <http://www.usdoj.gov/crt/adr/agorder.html>.

32. Attorney General Janet Reno, Address to the Association of American Law Schools (Jan. 9, 1999), available at <http://www.usdoj.gov/archive/ag/speeches/1999/aals.htm>.

33. See, e.g., Attorney General Janet Reno, Press Conference in celebration of Law Day (Apr. 30, 1998), available at <http://www.usdoj.gov/archive/ag/speeches/1998/apr3098.htm>.

34. Jeffrey M. Senger, *Evaluation of ADR in United States Attorneys' Cases*, in ADR ISSUES 25 (Jim Donovan & Nancy Bowman eds., Nov. 2000), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab4804.pdf.

evaluation forms completed by Assistant United States Attorneys for civil cases around the country. Almost two-thirds of these cases settled in the mediation session itself.³⁵ Comments made by our attorneys in these cases include the following: “Mediation helped patch up an employee/employer relationship, preventing other foreseeable disputes.”; “The settlement was better and more carefully designed than what a court would have ordered.”; “The case would not have been resolved without ADR. When we started, the parties could not even stand to be in the same room together.”; and, finally, “It was great to bring the plaintiff and the agency counsel together to discuss what allegedly happened. It also encouraged the agency to realize the actual risks of trial.”³⁶

In the cases that did not settle, our attorneys reported that the process, nonetheless, had value half of the time.³⁷ They reported benefits such as the following: “Mediation gave us free discovery and insight into the plaintiff’s position.”; “Mediation gave the plaintiff a reality check and moved negotiations much closer.”; “Mediation showed the court the good faith conduct of the government in dealing with the pro se plaintiff.”; and, finally, “ADR allowed us to express our sadness at [the] plaintiff’s loss while maintaining our view that [the government’s medical] care was adequate.”³⁸

We also asked our attorneys to estimate the time and money that ADR saved in their cases. These figures are necessarily subjective, and we recently have revised our reporting forms to try to capture more accurate data rather than rough estimates. However, even with the flaws, the results, to date, are interesting. Attorneys estimated how much time and money were saved compared to what would have happened if ADR had not been used. Thus, if a case probably would have settled anyway at some point, attorneys took this into consideration in their estimates. On average, the estimated time saved by using ADR was six months per case—that is, the case was resolved six months earlier than it would have been without ADR.³⁹ The estimated litigation expense saved per case was \$10,700.⁴⁰ Finally, the estimated attorney and staff time saved per case was eighty-nine hours.⁴¹

There is, of course, much more to dispute resolution than settling civil litigation. In a larger sense, we work in “conflict management.” For example, the Justice Department has been active, through our grant programs, in promoting community policing and community prosecution. We are very supportive of the

35. *Id.*

36. *Id.* at 28.

37. *Id.*

38. *Id.*

39. *Id.* at 26.

40. *Id.*

41. *Id.*

concept of communities working together to solve problems that can lead to crime if they are not addressed. We have been working to incorporate these philosophies into our neighborhoods and institutions. Community policing and prosecution stress prevention through problem-solving tactics and community-law enforcement partnerships.

Community dispute resolution programs are also making an important contribution. The Justice Department was involved when this movement began in the United States in the 1970s, funding three demonstration programs in Atlanta, Kansas City, and Los Angeles.⁴² Community dispute resolution has grown tremendously since then, and programs exist today in more than five hundred neighborhoods across our nation. Last year, we hired Kathleen Severens as the Director of Community Dispute Resolution to spearhead our efforts in this area.

One important contribution of community mediation has been in the area of restorative justice. The restorative justice approach focuses on the harm caused to individual victims and the community while also emphasizing the importance of communication to help restore and heal those affected by the crime. Offenders have the opportunity to see the human and societal consequences of their actions. They also have a chance to express remorse, to take personal responsibility for what they did, and to try to make things right. Victims have a chance to gain a better understanding of what happened and to tell offenders how their lives have been affected, which, for many, is what justice is all about.

The government's work in the ADR field is not limited to the Justice Department. The Attorney General chairs the Federal Alternative Dispute Resolution Council, an organization of chief legal officers from more than a dozen executive agencies. The Council issues guidance for the entire government on federal ADR policy.⁴³ Through the Council's work, we have seen many agency successes throughout the federal government.

Overall, the executive branch of the federal government now dedicates a total of 410 full-time positions and \$35.8 million to ADR.⁴⁴ If we included people who work on ADR matters on a collateral-duty or a part-time basis, and money spent on ADR from non-dedicated budgets, these figures would be even higher.

42. See Lawrence B. Solum, *Alternative Court Structures in the Future of the California Judiciary: 2020 Vision*, 66 S. CAL. L. REV. 2121, 2162-64 (1993) (discussing Neighborhood Justice Centers).

43. See, e.g., Core Principles for Federal Non-Binding Workplace ADR Programs; Developing Guidance for Binding Arbitration—A Handbook for Federal Agencies, 65 Fed. Reg. 50,005 (Aug. 16, 2000).

44. REP. OF THE INTERAGENCY ALTERNATIVE DISP. RESOL. WORKING GROUP TO THE PRESIDENT OF THE U.S. (2000), available at <http://www.financenet.gov/financenet/fed/iadrwg/presi-report.htm>.

Several success stories are instructive. We referred earlier⁴⁵ to the United States Postal Service, which has one of the largest and most highly regarded ADR programs in the country, either public or private. The Postal Service concentrates its ADR efforts in the workplace arena, as the agency receives more workplace complaints than any other in the government. (There are close to one million Postal Service employees, making it the largest employer in the country after the military and Wal-Mart.) In the last several years, the Postal Service has mediated more than ten thousand informal complaints and resolved eighty percent of them.⁴⁶ On average, mediations in this program took only four hours.⁴⁷ Exit surveys completed anonymously by twenty-six thousand participants show that eighty-eight percent of employees—and a comparable percentage of supervisors—are highly satisfied or satisfied with the ADR process.⁴⁸ These results compare very favorably with the Postal Service's non-ADR complaint process, which had a satisfaction rate of only forty-four percent.⁴⁹

We noted above that dispute resolution in the broader sense is really conflict management. The Postal Service program provides an instructive example. During the period in which ADR has been used in that agency, formal workplace complaints have dropped by more than twenty percent—employees have filed thousands of fewer cases each year.⁵⁰ Postal Service officials believe that this drop is explained by the improved communication that managers and employees have enjoyed through the ADR program.

The ADR method the Postal Service uses is known as “transformative mediation”⁵¹ because it is designed to increase the empowerment of the participants and promote mutual recognition of the causes of the underlying complaints. The hope is that the parties will leave the mediation understanding each other better. The substantial drop in complaints has resulted in savings of millions of dollars in legal expenses and increased productivity, not to mention improvements in morale.

In the government contracts arena, the Department of the Air Force has used ADR in more than one hundred cases, and more than ninety-three percent have

45. See *supra* notes 4-5 and accompanying text.

46. Meece, *supra* note 4; REP. OF THE INTERAGENCY ALTERNATIVE DISP. RESOL. WORKING GROUP TO THE PRESIDENT OF THE U.S. (2000), available at <http://www.financenet.gov/financenet/fed/iadrwg/presi-report.htm>.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. See generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* (1994).

settled.⁵² The Air Force recently used ADR to settle a \$785 million contract case with the Boeing Company, after attempts to settle the case through unassisted negotiation had failed during the more than ten years the case was pending.⁵³ This is one of the largest contract cases ever settled with ADR.⁵⁴ Another recent Air Force settlement involved a \$195 million contract case with the Northrop Grumman Corporation.⁵⁵ Settlement in both of these major cases was greatly preferable to trials, which would have been extremely expensive and had unpredictable results.⁵⁶ In recognition of the value of these programs, the Secretary of the Air Force issued an order creating an official Air Force policy to use ADR “to the maximum extent practicable.”⁵⁷ As a result, the Air Force is presently executing a Memorandum of Understanding with twenty of its most frequent contractors, committing each party to the use of ADR before resorting to litigation.

The Air Force also has used ADR in the workplace. It successfully has resolved more than seventy percent of the more than seven thousand workplace disputes mediated in the last three years.⁵⁸ The agency’s equal employment opportunity (“EEO”) program, thanks to ADR, is now considerably more efficient than most others in the government.⁵⁹ While federal agencies require an average of 404 days to settle an EEO complaint, the Air Force is averaging only 258 days.⁶⁰

The Department of Health and Human Services (“HHS”) also has found ADR to be vital to managing its dispute process. For example, at one point, the Provider Reimbursement Review Board, which handles disputes with hospitals and other Medicare providers, had a backlog of ten thousand cases.⁶¹ Although the agency had been able to settle ninety percent of its cases without assistance, most of these settlements occurred on the eve of the hearing, after an average of

52. REP. OF THE INTERAGENCY ALTERNATIVE DISP. RESOL. WORKING GROUP TO THE PRESIDENT OF THE U.S. (2000), *available at* <http://www.financenet.gov/financenet/fed/iadrwg/presi-report.htm>.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. Pol’y Directive from the Sec’y of the Air Force, to the Dep’t of the Air Force (Apr. 1, 1999) (Air Force Policy Directive 51-12), *available at* <http://afpubs.hq.af.mil/pubfiles/af/51/afpd51-12/afpd51-12.pdf>.

58. REP. OF THE INTERAGENCY ALTERNATIVE DISP. RESOL. WORKING GROUP TO THE PRESIDENT OF THE U.S. (2000), *available at* <http://www.financenet.gov/financenet/fed/iadrwg/presi-report.htm>.

59. *Id.*

60. *Id.*

61. *Id.*

three years of delay.⁶² After creating an ADR program, HHS has realized considerable money and time savings.⁶³ ADR resulted in the settlement of forty-four of the first forty-eight cases in which it was used.⁶⁴ With these successes, the ADR program has grown.⁶⁵ In 1999, mediation was completed in eighty-one cases and was underway in an additional fifty-three cases.⁶⁶ ADR also has reduced the time required to resolve these disputes from three years to six months.⁶⁷

HHS also has used ADR successfully to resolve large-stakes disputes with state government agencies involving Medicaid administrative costs.⁶⁸ All forty-one states that elected mediation under the Departmental Appeals Board's mediation program successfully have negotiated settlements.⁶⁹ HHS has used ADR to settle cases involving a total of \$2.5 billion in disputed funds over the past five years, saving \$600,000 in transaction costs and reducing time-to-resolution for the average case from two years to nine months.⁷⁰ Moreover, parties have reported that mediation has led to improved relationships between state and federal officials, through fairer and more harmonious settlements.⁷¹

One final example is the Environmental Protection Agency's ("EPA's") use of a variety of ADR processes to facilitate settlement of the General Electric ("GE") Pittsfield case, involving the cleanup of contamination of the Housatonic River in Massachusetts.⁷² The agency used mediation to facilitate settlement discussions among eleven parties, including the EPA, GE, and other state and federal regulatory agencies.⁷³ The case involved multiple issues including the cleanup of contamination and restoration of the environment, and mediators were helpful in helping the parties manage this complex negotiation.⁷⁴ The agency reported that negotiations with such a large group of parties would have been much more difficult without ADR.⁷⁵ The settlement also included many remedies that would have been beyond the power of a court to order, and this flexibility was

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

a valuable advantage of ADR.⁷⁶ As one example, the parties agreed to appoint a neutral facilitator to run meetings of a Citizens Coordinating Council to allow for public input.⁷⁷ Representatives of affected communities participate on the Council.⁷⁸ Also, the settlement provides for the resolution of future technical conflicts through a neutral peer review process.⁷⁹

We need to push even further to institutionalize these collaborative ways to resolve disputes. We have made amazing progress in recent years, but we must work to ensure this progress continues.

While it is gratifying that ADR has become so well established that it is no longer “alternative,” we need to make sure it does not become so mainstream that it gets co-opted by the very adversarial procedures it was designed to replace. Some continuing legal education courses now advertise they will teach lawyers how to manipulate the ADR process to gain a tactical advantage. Instead of sharing interests and working together to fashion creative solutions that satisfy both parties, some people are working to exploit the process for their own ends. When people start to treat ADR as an adversarial game, the process loses the collaborative and cooperative elements that make it different in the first place.

We also need to continue to find ways to counteract the instinctive reaction many lawyers still have to litigate rather than settle. At law firms, litigation departments are often leading profit centers. Many lawyers still seem to believe, as Andrew Acland says, that “ADR” stands for “Alarming Drop in Revenue.”⁸⁰ We need to appeal to lawyers’ better instincts and increase their confidence that ADR makes economic sense for their clients and, in the long run, for them.

Thirty years ago, there were virtually no law school courses in dispute resolution or even in basic negotiation. Today, more than 150 law schools have clinics or courses in these fields, and the University of Missouri-Columbia School of Law ranks at the very top.⁸¹ We encourage faculty members to continue what they are doing. Teach young lawyers the hard realities of a lawsuit. Ensure that they know how to analyze the risks of litigation and how to devise creative solutions that serve their clients’ interests. Tell them what it is like to conduct extensive discovery, engage in motions practice, try the case, produce a judgment, and then find that the judgment was consumed in costs.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. ANDREW FLOYD ACLAND, RESOLVING DISPUTES WITHOUT GOING TO COURT 29 (1995).

81. See *Law Specialties: Dispute Resolution*, U.S. News & World Rep., Jan. 2001, available at <http://www.usnews.com/usnews/edu/beyond/gradrank/gblawsp1.htm>.

And for those of you who are involved in fields other than litigation, we see the value of collaborative approaches outside of the courtroom every day. In supervising thousands of lawyers in twelve different components of the Department, the Associate Attorney General often must settle policy and turf debates among them, as well as help resolve disputes between different agencies within the government. As the Attorney General has noted, we often have five lawyers on one side of a conference table and five lawyers on the other side, with ten different opinions as we try to reach a solution that will serve the interest of the people of the United States. These lawyers are well versed in the law, and they are talented. But, they are not always effective in presenting their views. Some of them are good at talking but not at listening to other people or adjusting, where necessary, to the views of others.

In contrast, some know how to present their case, how to persuade, and how to facilitate problem-solving with their voice and their manner. They look people in the eye and argue for their result, but at the same time they are sensitive to the views of others and work to accommodate them. These are the lawyers who are most productive in resolving disputes.

These principles are important not only in the law but also to society as a whole. We should strive to use collaborative dispute resolution whenever we can and to resort to combative dispute resolution only when we must. Those of you here today are in a unique position to promote this approach. We urge you to remember both what you have learned and what you have taught each other about this field here at the University of Missouri-Columbia School of Law. Continue to promote the cause. Our goal is that the next generation will know a more cooperative and peaceful world.

