

2000

Turning the Ship of State

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Recommended Citation

Jeffrey M. Senger, *Turning the Ship of State*, 2000 J. Disp. Resol. (2000)

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Senger: Senger Turning the Ship of State Turning the Ship of State

Jeffrey M. Senger*

In his thoughtful article on the future of ADR, Professor Frank Sander notes, “On Monday, Wednesday and Friday, I think we’ve made amazing progress. On Tuesday, Thursday and Saturday, ADR seems more like a grain of sand on the adversary system beach.”¹ In the federal government, I believe things are somewhat better than that. Perhaps five days out of seven I am impressed with the progress of the government in implementing ADR, particularly in the last ten years, which I will describe below. The other two days, like Professor Sander, I become more discouraged as we run into one of many barriers, which I will also describe below. The United States government is a big ship that doesn’t make tight turns, but there has been remarkable progress in this field.

I. FEDERAL ADR LAW AND POLICY

The 1990s have clearly been the most productive decade in history for government ADR.² The enactment of a number of laws in the past ten years has changed the nature of the way the government handles conflict. It is heartening that this has been a true bipartisan effort, with bills passed by both Democratic and Republican Congresses and signed into law by both Republican and Democratic Presidents.

A. Congressional Legislation

The decade of success began when Congress passed the Civil Justice Reform Act of 1990 (“CJRA”), which required the Judicial Branch to develop plans to reduce cost and delay in civil litigation.³ The statute specifically recommended ADR as a case management principle.⁴ A legislative report accompanying the Act indicates Congress was just beginning to see the benefits of ADR: “[T]he last [fifteen] years have witnessed the burgeoning use of dispute resolution techniques

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1. Frank E.A. Sander, *The Future of ADR*, 2000 J. DISP. RESOL. 3, 3 (2000). I gather that on Sundays, even as active a scholar as Frank Sander takes a day off.

2. 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.

3. 28 U.S.C. §§ 471-482 (1994).

4. *Id.*

other than formal adjudication by courts. . . . [S]tudies of various ADR programs have shown generally favorable results.”⁵

That same year, Congress required the Executive Branch to consider ADR as well, passing the Administrative Dispute Resolution Act of 1990 (“ADRA”).⁶ This statute required each 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.”⁷

The hortatory language in this bill was even stronger than that in the CJRA:

[A]dministrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes; . . . alternative means of dispute resolution have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious; . . . such alternative means can lead to more creative, efficient, and sensible outcomes; . . . [and] the availability of a wide range of dispute resolution procedures, and an increased understanding of the most effective use of such procedures, will enhance the operation of the Government and better serve the public.⁸

It is difficult to state the case for ADR more directly and powerfully than Congress did here.

The ADRA did have some bugs. For one, Congress in 1990 was not convinced of the importance of confidentiality to ADR processes, and it left a substantial gap in this area. While dispute resolution communications were generally treated as confidential, the ADRA did not include an exemption from the disclosure requirements of the Freedom of Information Act (“FOIA”).⁹ Therefore, any citizen could request copies of any federal records of confidential dispute resolution communications merely by filing a FOIA claim with the agency. Congress left a similarly large loophole in the arbitration provisions of the Act. While the government was authorized to use binding arbitration, Congress gave agency heads the unilateral authority to vacate any award within thirty days.¹⁰ Thus, binding arbitration was not binding at all, at least where the government was concerned. Not surprisingly, private parties were unwilling to enter into arbitration under these

5. S. REP. NO. 101-416, at 6 (1990).

6. Administrative Dispute Resolution Act (“ADRA”) of 1990, 5 U.S.C. §§ 571-584 (1994 & Supp. IV 1998).

7. *Id.*

8. *Id.* § 571 & note (Congressional Findings).

9. *Id.* § 552. See also Philip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 ADMIN. L. REV. 315 (1989).

10. ADRA of 1990, 5 U.S.C. §§ 575, 580-581 (1994 & Supp. IV 1998).

rules.¹¹ Finally, Congress showed it was not completely confident in the value of ADR, because it made the Act an experiment and set it to expire after five years.¹²

Fortunately, the experiment went well, and, after a one-year legal hiatus (which practitioners essentially ignored), Congress reenacted the ADRA in 1996.¹³ It also fixed all three of these critical bugs. In the new Act, confidential communications between the parties and the neutral are explicitly exempted from FOIA.¹⁴ The government no longer has an “escape clause” allowing it unilaterally to back out of a binding arbitration award.¹⁵ Finally, the ADRA is now a permanent law without an expiration date.¹⁶ ADR is now a fixed feature of the federal administrative landscape.

Two years later, Congress turned its attention back to the judicial branch with the Alternative Dispute Resolution Act of 1998.¹⁷ This law required 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.”¹⁸ Congress did not need to require ADR programs in the courts of appeals, because every federal circuit court in the country (except the Federal Circuit) already had an active ADR program.¹⁹ Indeed, some district courts also already had effective ADR programs, though by no means all.²⁰ This Act will help ensure that every federal court will be moving closer to being a “multi-door” courthouse, providing ADR as part of its dispute-resolving services to the public.²¹

By this time Congress appears to be fully convinced of the value of ADR, writing in the introduction to this Act that ADR

11. See McClellan, *supra* note 2, at 17.

12. ADRA of 1990, 5 U.S.C. §§ 571-584 (1994 & Supp. IV 1998).

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

14. *Id.* § 574(j).

15. *Id.* §§ 575, 580-581.

16. *Id.* §§ 571-584.

17. 28 U.S.C. §§ 651-658 (Supp. IV 1998).

18. *Id.* §§ 651-652. For a comprehensive overview of the use of ADR in federal district courts as of 1996, see ELIZABETH S. PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS 50-54 (1996) (providing a district-by-district description).

19. For a thorough description of the use of ADR in federal courts of appeal as of 1997, see ROBERT J. NIEMIC, MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS (1997). A procedural rule in the circuit courts of appeal also encourages settlement. FED. R. APP. P. 33.

20. Several procedural rules in the district courts also encourage settlement. FED. R. CIV. P. 16(a), 16(c), & 26 (f).

21. See John Bickerman, *Great Potential: The New Federal Law Provides Vehicle, If Local Courts Want to Move on ADR*, DISP. RESOL. MAG., Fall 1999, at 3. Professor Sander was the originator of the concept of a “multi-door” courthouse at a 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (commonly referred to as the “Pound Conference”), though he disclaims credit for coining the term. Frank E.A. Sander, *Varieties of Dispute Processing, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 65 (A. Leo Levin & Russell R. Wheeler eds., 1979).

has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements; . . . [ADR] may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently.²²

The next step will be to encourage Congress to allocate additional funds to support these new ADR programs, rather than require courts to fund programs out of their existing budgets.

B. Presidential Orders

Recent U.S. Presidents have also been active in promoting ADR. In 1991, President George Bush issued an executive order calling on government counsel to be trained in dispute resolution techniques, noting that ADR can “contribute to the prompt, fair, and efficient resolution of . . . claims.”²³ However, paralleling the uncertainty Congress also showed at the beginning of the decade, Bush said these procedures were not to be used unless unassisted negotiation had failed: “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”²⁴

In 1996, President Clinton removed this qualification and issued an executive order that endorsed ADR with greater enthusiasm.²⁵ In particular, it required the following:

[L]itigation counsel shall make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial. . . . Where the benefits of Alternative Dispute Resolution (“ADR”) may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the parties. . . . To facilitate broader and effective use of informal and formal ADR methods, litigation counsel should be trained in ADR techniques.²⁶

C. Department of Justice Policies

One of the greatest friends to ADR in the government has been Attorney General Janet Reno.²⁷ A person who believes strongly in the value of ADR (or

22. 28 U.S.C. § 651 note (Supp. IV 1998) (Findings & Declaration of Policy).

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

24. *Id.*

25. Exec. Order No. 12,988, 61 Fed. Reg. 4729 (1996).

26. *Id.*

27. An earlier Attorney General, Griffin Bell, also promoted ADR during his term in office. Bell was instrumental in funding the first Neighborhood Justice Centers in the 1970s, which provided ADR at the community level. See Lawrence B. Solum, *2020 Vision: A Plan for the Future of California's Courts*,

“Appropriate Dispute Resolution,” as she calls it²⁸), the Attorney General has worked tirelessly to ensure the government uses these processes wherever appropriate. When she created the Department’s dispute resolution office in 1995, we were hoping she would provide a spark to our efforts. Instead, she has provided a blowtorch.

Reno first issued a Department of Justice order in 1995 to promote the broader use of ADR, ordering training for all civil attorneys and requiring each litigating component to publish an ADR policy statement in the Federal Register.²⁹ These policy statements are extensive and provide a valuable guide into ADR practices at the Justice Department.³⁰ They include factors favoring and disfavoring the use of ADR for specific types of cases, descriptions of available ADR techniques, criteria for selecting an appropriate technique, and procedures to be followed in the use of ADR.³¹ Each litigating component in the Department published its own individualized guidelines.³²

The Attorney General also published a forcefully worded statement on behalf of the entire Department in the Federal Register:

Our commitment to make greater use of ADR is long overdue. Clearly, our federal court system is in overload. Delays are all too common, depriving the public of swift, efficient, and just resolution of disputes. The Department of Justice is the biggest user of the federal courts and the nation's most prolific litigator. Therefore, it is incumbent upon those Department attorneys who handle civil litigation from Washington and throughout the country to consider alternatives to litigation.³³

Critically, the Attorney General backed up this commitment by creating a \$1 million fund to pay for mediators. Department of Justice managers around the country have reported that this was the single most effective way to get them to use ADR, as they no longer had to pay mediator fees out of their own office budgets. The Attorney General has also followed through on the commitment to provide training. Over the past four years, we have given ADR training to more than 1600

66 S. CAL. L. REV. 2121, 2162-64 (1993). Bell made a statement at the time that is notably similar to remarks Attorney General Reno makes now, more than twenty years later: “[T]raditional procedures of the courts are generally too slow and costly to be useful in resolving relatively minor disputes. . . . [T]he adversary process is not always the best mechanism for resolving such disputes.” Griffin B. Bell, *The Pound Conference Follow-Up: A Response From the United States Department of Justice*, 76 F.R.D. 320, 321 (1978).

28. Janet Reno, *Address to the Society of Professionals in Dispute Resolution, in DISPUTE RESOLUTION AND LAWYERS* 76 (2d ed. 1997).

29. Memorandum from the Department of Justice to all Offices, Boards, and Divisions (Apr. 6, 1995). This memorandum is available at the following website: U.S. Department of Justice, *Promoting the Broader Appropriate Use of Alternative Dispute Resolution Techniques* (Apr. 6, 1995) <<http://www.usdoj.gov/crt/adr/agorder.html>>.

30. Notices: Department of Justice, 61 Fed. Reg. 36,895 (1996).

31. *Id.*

32. *Id.* There are specific statements from the Antitrust, Civil, Civil Rights, Environment and Natural Resources, and Tax Divisions, as well as the Executive Office for United States Attorneys.

33. Notices: Department of Justice, 61 Fed. Reg. at 36,896.

Department of Justice lawyers, both in Washington and in all ninety-four United States Attorneys' Offices around the country.

The Department has begun emphasizing dispute resolution skills in its hiring practices as well, recently adding the following section to the recruiting brochure:

During the past year, the Attorney General has encouraged law schools to offer students a wider variety of courses and clinical opportunities that focus on legal problem solving. The Attorney General believes that future Department of Justice attorneys can better serve the public if they have experience in negotiation, valuation of claims, client counseling, and dispute resolution. Although not a prerequisite for consideration for the Department's Honor Program, course work in legal problem solving can enhance an applicant's credentials.³⁴

In this regard, we applaud the work of schools like the University of Missouri-Columbia, which have incorporated these ideas into its entire curriculum. The Attorney General spoke at the 1999 annual meeting of the Association of American Law Schools and encouraged other schools to follow this lead.³⁵

D. The Interagency ADR Working Group

One of the biggest engines for change in federal government dispute resolution recently has been the Interagency ADR Working Group, which the Attorney General agreed to chair in 1998 at the request of the President. The mission of this group is to promote the use of administrative ADR government-wide and to "facilitate, encourage, and provide coordination for agencies."³⁶ The group began on September 14, 1998, with a kick-off meeting hosted by the Attorney General and the Deputy Director for Management at the Office of Management and Budget. More than one hundred high-level representatives from nearly sixty federal agencies attended this meeting.³⁷

In the year since then, the group has conducted more than fifty training sessions, meetings, and colloquia on all aspects of ADR. More than five hundred representatives from across the government have been participating. Topics have included "Incentives for Federal Employees to Use ADR," "Finding Quality Neutrals," "Designing an ADR Training Program," "Dispute Systems Design,"

34. The Department of Justice recruiting brochure can be found at the following website: U.S. Department of Justice, *Attorney Employment* (last updated Oct. 20, 1999) <<http://www.usdoj.gov/careers/oapm/lab/ae.html>>.

35. Attorney General Janet Reno, Address to the Association of American Law Schools (Jan. 9, 1999). This address can be found at the following website: U.S. Department of Justice, *Janet Reno's Address to the American Association of Law Schools* (Jan. 9, 1999) <<http://www.usdoj.gov/ag/speeches/1999/aals.htm>>.

36. Memorandum from the President of the United States to the Heads of Executive Departments and Agencies (May 1, 1998). This memorandum can be found at the following website: National Partnership for Reinventing Government, *Memorandum for Heads of Executive Departments and Agencies* (May 1, 1998) <<http://www.npr.gov/library/direct/memos/disput.re.html>>.

37. See Joel Achenbach, *Meanwhile, In Other News, Life Goes on in Washington, The Capital's Wheels Keep on Turning*, THE WASHINGTON POST, Sept. 15, 1998, at 1.

"Evaluation of ADR Programs and Outcomes," "Obtaining Resources for ADR Programs," "Overcoming Barriers to ADR," "Ethics, Confidentiality, and Conflicts of Interest," and "Conflict Assessment/Case Selection."³⁸

The group has a website with agendas and minutes from these meetings as well as a large amount of additional material.³⁹ This website has had thousands of hits in the year it has been in existence. People can sign up for email listservs on various topics, which have facilitated active discussions on such topics as mediator recommendations, training courses, and ADR policy.

The President has asked for a report on the activities of the group,⁴⁰ and this report is currently being assembled for submission early in 2000. It will include sections on agency success stories, lessons learned, best practices, and recommendations for the future. The White House has specifically asked to be informed of any barriers to the use of ADR, so that these can be addressed and overcome. When the report is completed, it will be made public on the above website.

The group is also working with the EEOC, which recently issued regulations requiring every federal agency to implement an ADR program for workplace disputes.⁴¹ These new regulations will greatly increase the use of agency ADR, as workplace grievances are among the most common in the government.

E. Research and Evaluation

As we look to the future in this field, additional research and evaluation on the effectiveness of ADR will be essential. Congress and taxpayers insist on documented cost savings in order to provide funding for government programs. Professor Sander as well mentions concern about "the lack of adequate cost-benefit studies" in ADR.⁴² We have been working hard on this issue for the federal government.

At the Justice Department, we have conducted a study of nearly one thousand reporting forms filled out by Assistant United States Attorneys using mediation over the past four years. This research has led to some positive findings. Almost two-thirds of the cases in this study settled during the mediation.⁴³ In those cases that did not settle, almost one-half of the time the attorneys reported that there were valuable results of the mediation nonetheless (such as insight into the other side's point of

38. The topics for these training sessions can be found at the following website: FinanceNet, *Interagency Alternative Dispute Resolution Working Group* (visited May 12, 2000) <<http://www.financenet.gov/financenet/fed/iadrwg/meeting.htm>>.

39. Interagency Alternative Dispute Resolution Working Group, *Interagency Alternative Dispute Resolution Working Group* (visited May 12, 2000) <<http://www.financenet.gov/iadrwg>>.

40. Memorandum from the President of the United States to the Heads of Executive Departments and Agencies, *supra* note 36.

41. 29 C.F.R. § 1614 (1999).

42. Sander, *supra* note 1, at 6. Deborah Hensler makes a similar point. See Deborah Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, DISP. RESOL. MAG., Fall 1999, at 15.

43. Memorandum from Jeffrey M. Senger, Deputy Senior Counsel for Dispute Resolution, U.S. Department of Justice, to the U.S. Attorney General (Aug. 18, 1999) (on file with author) (titled *The Value of ADR*).

view, informal discovery, or agreement on some issues).⁴⁴ Attorneys have estimated substantial savings in time and money from ADR as well.⁴⁵

Other agencies report similar success. The Air Force has used ADR in more than 7,000 workplace disputes between fiscal years 1997 and 1999, with a resolution rate higher than 70%.⁴⁶ The Air Force has also found ADR effective in the government contracts area, where they have used it in approximately one hundred contract controversies with a 93% settlement rate.⁴⁷ Of particular note is the agency's recent successful use of ADR to resolve two major contract disputes with claims for more than \$190 million and \$500 million.⁴⁸ The Secretary of the Air Force has recognized the success of these programs and codified them in formal agency procedures.⁴⁹ It is now official Air Force policy to use ADR "to the maximum extent practicable."⁵⁰

The U.S. Postal Service has another leading ADR program in the workplace area, which helps address the needs of the agency's eight hundred thousand employees (more than any other U.S. employer except the military and Wal-Mart).⁵¹ The need for ADR is particularly acute at this agency, where employees filed more than 20,000 informal EEO complaints during 1997.⁵² Postal Service policy is to conduct a mediation within two weeks after a complainant requests it.⁵³ The average mediation takes just four hours,⁵⁴ and 81% of mediated cases are closed without a formal complaint being filed.⁵⁵ Satisfaction is extremely high.⁵⁶ Employees participating in mediation report they are twice as satisfied with the amount of control, respect and fairness of the process as they are with the traditional process

44. *Id.*

45. *Id.* Attorneys were asked to estimate whether ADR saved money compared to what would have happened had it not been used. Thus, while many of the cases settled in mediation might have settled anyway, the attorneys believed it would have taken longer and cost more. Cf. JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT 48-53 (1996) (finding no strong evidence of savings in time or money in six federal districts studied).

46. INTERAGENCY ALTERNATIVE DISPUTE RESOLUTION WORKING GROUP ("IADR WG"), REPORT TO THE PRESIDENT OF THE UNITED STATES (2000) (on file with author). Information regarding the Air Force ADR Program can be found at the following website: Department of the Air Force, *Air Force ADR Program* (last modified Feb. 10, 2000) <<http://www.adr.af.mil>>.

47. IADR WG, *supra* note 46.

48. *Id.*

49. *Id.*

50. This policy memorandum can be found at the following website: Department of the Air Force, *AF ADR Organization* (Apr. 28, 1998) <<http://www.adr.af.mil/afadr/adrorg/htm>>.

51. Lisa Bingham, Address at Wisconsin Association of Mediators Annual Meeting at the University of Wisconsin (Nov. 11, 1999) (on file with author).

52. *Id.*

53. IADR WG, *supra* note 46. Additional information regarding the Postal Service's ADR program is available on their website. United States Postal Service, *United States Postal Service* (visited May 12, 2000) <<http://new.usps.com>>.

54. IADR WG, *supra* note 46.

55. *Id.*

56. See Lisa B. Bingham, *Mediating Employment Disputes: Perceptions of REDRESS at the United States Postal Service*, 17 REV. PUB. PERSONNEL ADMIN. 20, 24 (1997).

(88% satisfaction rate versus 44%).⁵⁷ Both employees and supervisors are equally satisfied with mediation.⁵⁸

Another benefit of the Postal Service program has been that mediation appears to be creating lasting changes in the behavior of people in the workplace. With the increased communication that mediation provides, employees and supervisors may actually be learning to get along better.⁵⁹ In fiscal year 1999, the number of complaints filed dropped by approximately 16%.⁶⁰ This translates into thousands of fewer complaints per year, which represents a huge cost savings. EEO complaints are very expensive to process, and cost estimates range from a conservative \$5,000 for handling a simple case up to \$77,000 for taking a more complicated complaint all the way through to the end of the process.⁶¹ Even using the lower figure, the reduction in complaints is saving millions of dollars each year in processing costs, not to mention the costs in morale and productivity.

II. BARRIERS TO THE USE OF ADR IN THE FEDERAL GOVERNMENT

Like Professor Sander, however, I definitely have days when I feel like ADR is "more like a grain of sand on the adversary system beach." We run into many barriers to ADR in the government, and some are easier to address than others. We have heard many excuses for why ADR should not be used for a particular case or a particular program.

A. The "Litigation Mentality"

One of the most common sources of resistance to ADR is the "litigation mentality."⁶² When conducting an ADR training, I like to read quotes from various hardball negotiators to tease the people in the audience who take an aggressive approach. One of my favorites is from Genghis Khan, who once said, "The greatest joy a man can know is to conquer his enemies To ride their horses and take away their possessions. To see the faces of those who were dear to them bedewed with tears and to clasp their wives and daughters into his arms."⁶³ Of course, my point is that this is an outmoded, 12th century way of dealing with conflict. Nonetheless, I must report that a number of litigators in the back of the lecture hall have enthusiastically cheered, "Go Genghis! That's the way to do it!" I fear these remarks were only partly in jest.

57. See IADRWG, *supra* note 46.

58. *Id.*

59. See Jonathan F. Anderson & Lisa Bingham, *Upstream Effects from Mediation of Workplace Disputes: Some Preliminary Evidence from the USPS*, 48 LAB. L.J. 601 (1997).

60. IADRWG, *supra* note 46.

61. See FinanceNet, *Overview* (visited May 12, 2000) <<http://www.financenet.gov/financenet/fed/iadrwg/va-eval.html>>.

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

63. JOHN MCC. TREANOR, *ALTERNATIVE DISPUTE RESOLUTION IN THE FEDERAL GOVERNMENT* 21 (1996).

Many people perceive ADR to be soft, “touchy-feely,” and something more appropriate for people holding hands at a Zen Buddhist retreat than for litigants in a federal lawsuit.⁶⁴ Government litigators are no exception. One manager recently told us that he is distressed because his lawyers are “settling too many cases.”

Dealing with this element of the legal culture is often an uphill fight. The government, like the country as a whole, has a long tradition glorifying the lawyer as a warrior. I started my career as a trial lawyer at the Justice Department, and there was nothing like the excitement in an office when someone was in trial. Supervisors would provide daily reports of how the trial was going, praising the clever things the lawyer did that day. At the end of the trial, win or lose, we would have a big staff meeting to talk about what happened. A lawyer who lost a trial still received some respect for fighting the good fight. A lawyer who won generally received an award and cash bonus at the end of the year.

In contrast, a lawyer who negotiated a settlement received little fanfare. The settlement might only be mentioned in a weekly written report. Even if the result was better than we ever would have received from a jury, there was not much glory in settling a case.

Yet another factor here is that a lawyer who settles a case before trial misses out on courtroom experience. The opportunity to try cases is a key reason some young attorneys come to the Justice Department, sacrificing lucrative salaries in the private sector. Negotiation experience, while it can be at least as important in the long run, is not valued as highly.

In this regard, all of the laws and proclamations from Congress, the President, and the Attorney General have been helpful in changing the culture. We have worked internally to address this issue by changing attorney performance evaluations to measure and reward not just trial skills but also settlement skills. We also have created a new department-wide award called the John Marshall Award for use of ADR, which includes a cash bonus and is presented by the Attorney General.

B. Fear of Looking Weak

Some people tell us they are afraid that even offering ADR to the other side is akin to confessing that their case is weak and they are worried about it.⁶⁵ They fear that a plaintiff will see the offer of mediation as signaling a blank check on the part of the government. We advise lawyers to say the Attorney General has asked them to consider mediation in all appropriate cases, and that is what they are doing. We also tell them that there is plenty of room to represent a client zealously in a mediation, and participating in mediation is by no means the equivalent of abject submission. This fear should be reduced as ADR becomes more institutionalized, and as more organizations and judges require parties to consider it.

64. See Richard C. Reuben, *The Lawyer Turns Peacemaker*, A.B.A. J., Aug. 1996, at 54, 55-56.

65. See, e.g., Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in *BARRIERS TO CONFLICT RESOLUTION* 27 (Kenneth J. Arrow et al. eds., 1995).

C. Perception of ADR as a Passing Fad

Another source of resistance is skepticism based on the view that ADR is the latest “flavor of the month,” a fad that will pass by if people merely wait long enough. Government employees get tired of repeatedly being told what to do from headquarters, and in fairness, there are a lot of new directives coming out of Washington each month. Not surprisingly, we have found this resistance particularly prevalent in offices outside of the Capital. When we travel, we often encounter people who view us as out-of-touch “Beltway Bureaucrats” who spend too much time coining three-letter phrases like ADR and not enough time doing real work.

Some of these people seem to feel that when we teach them ADR, we are impliedly criticizing the way they have been doing their jobs up to this point. These people feel they have already learned everything there is about negotiation, and there is nothing a mediator could do to settle a case that they could not do better on their own.

There is only so much we can do to counter these perceptions. As Yogi Berra said, “If people don’t come out to the ball park, who’s going to stop them?”⁶⁶ However, we hope that as ADR continues to thrive and build momentum, it will become more mainstream and less newfangled and “alternative,” and this type of resistance will fade. Recent research on structural and psychological barriers to unassisted negotiation, which we discuss in our training, has also been helpful to us.⁶⁷ These studies have shown that it can sometimes be difficult for people to negotiate effectively on their own no matter how experienced they are, and a mediator can be uniquely helpful in facilitating a settlement.

D. Lack of Experience

Sometimes we face simple inertia based on lack of experience. Lawyers who have been doing their job for twenty years or more sometimes do not want to change or are concerned about what would happen if they did. They are reluctant to try something new that they may not be very good at, or that may not turn out well. Often the young lawyers fresh out of law school are more accustomed to ADR than the senior managers, which can add to the awkwardness of the situation.

Giving lawyers ADR experience is the best way to counter this barrier. As Professor Sander notes, research has shown that the most influential factor in inducing lawyers to use ADR is prior experience.⁶⁸ We have therefore made sure that every training session includes a realistic roleplay exercise. We put participants into small groups and conduct simulated mediation sessions with professional mediators. The results have been exceptional. Participants regularly rate the roleplay in evaluations as the highlight of the course.

Following these lines even further, Professor Sander argues that mandatory mediation rules can be valuable because they force people to use ADR, and once

66. BASEBALL QUOTATIONS 150 (David H. Nathan ed., 1991).

67. See, e.g., BARRIERS TO CONFLICT RESOLUTION (Kenneth J. Arrow et al. eds., 1995).

68. Sander, *supra* note 1, at 6.

people have tried it, they will use it again more readily.⁶⁹ At the Justice Department, we have found that mandatory mediation programs have some disadvantages. First, they have been less effective in settling cases. In voluntary mediation, 71% of our cases have settled, while in court-ordered mediation, only 50% have settled.⁷⁰ It is unclear whether this difference is due to the voluntariness of the program or some other factor (for example, perhaps the voluntary cases are less difficult, the mediations are taking place at a more appropriate time in the case, or the mediators are more experienced). This finding is also at odds with earlier research on this topic.⁷¹ Nonetheless, the difference is stark. Further, in surveys, some of our attorneys noted resentment at being forced into a process they did not want to use.⁷²

E. Negative Experience

We have also encountered resistance from people who have used mediation once and had a bad experience. For example, on some occasions a mediator has downplayed the role of the lawyer and spoken mostly with the client, or even applied pressure to the client to settle against the advice of the lawyer. Many lawyers are control-oriented, and the prospect of losing control in a mediation is upsetting to them. I understand this complaint, and indeed when I was serving as a trial lawyer, a mediator once sought to bypass me and advise my client to take what I thought was an unwise deal. Professor Sander points to this type of problem as well, noting, "The fact is that in ADR [lawyers] lose control, particularly in flexible procedures like mediation. Mediation is not like court where lawyers are in total control and the clients just observe (or sometimes don't even do that)."⁷³

We seek to counter this perception by reminding lawyers that the greatest loss of control comes not when you mediate, but when you begin your opening statement to the jury. That is when you have truly put your matter into someone else's hands. In contrast, you can always walk out of a mediation that is not going well, an option you do not have in a trial.

69. *Id.* at 8.

70. Memorandum from Jeffrey M. Senger, Deputy Senior Counsel for Dispute Resolution, U.S. Department of Justice, to the U.S. Attorney General, *supra* note 43.

71. See Stephen B. Goldberg & Jeanne M. Brett, *Disputants' Perspectives on the Differences between Mediation and Arbitration*, 6 NEGOTIATION J. 249 (1990); Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Consensual Processes and Outcomes*, in MEDIATION RESEARCH 53 (1989); Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, in MEDIATION RESEARCH 9 (1989).

72. Memorandum from Jeffrey M. Senger, Deputy Senior Counsel for Dispute Resolution, U.S. Department of Justice, to the U.S. Attorney General, *supra* note 43. In 1999, I met in Jerusalem with Ronen Schwartz, the director of dispute resolution programs for the Israeli court system, who is implementing an interesting policy in this regard. A new rule there makes mediation optional but requires lawyers who decline it to come to a hearing, with their clients, and explain the decision to the judge. Judges then ask the clients directly why they are refusing mediation. The clients often reply that they would be happy to mediate, but their lawyers are telling them not to do so. Mr. Schwartz reports that this has led to some embarrassment for recalcitrant lawyers, who have then become more agreeable to mediation in the future in order to avoid a hearing. This procedure is an interesting compromise, encouraging mediation while maintaining its optional nature.

73. Sander, *supra* note 1, at 6.

F. Perverse Incentives

Professor Sander notes that perverse incentives sometimes hinder settlement in corporations,⁷⁴ and the government has its share of these as well. Perhaps the most egregious example for the government occurs in employment discrimination cases, which are a big part of the workload of government attorneys. If an agency wants to settle one of these cases at the administrative stage, it must investigate the claim and pay any award out of current operating funds.⁷⁵ If, however, an agency refuses to settle and the claimant files in federal court, the case is transferred to the Department of Justice. Justice then supplies its own attorneys and pays the costs of litigation out of its own budget. Even further, the agency does not have to pay any award that comes from litigation, as all damages or settlement proceeds are paid from a government-wide account called the Judgment Fund.⁷⁶

There are many problems with this system. First, cases are often easiest to settle early on, before parties get hardened into their positions. The adversarial process has a way of pushing parties further apart the longer it goes on, and this is particularly true in emotionally charged cases involving employment discrimination. By the time an agency denies a claim and the case gets to the Justice Department, the best opportunity to settle the claim has often been lost. Second, attorneys' fees grow rapidly as a case progresses, making the case harder and more expensive for the government to settle later on. Third, it can be argued that forcing agencies to pay their own damages would create more appropriate incentives for them to avoid future suits by training and disciplining their employees.

Plaintiffs' attorneys as well have a perverse incentive not to settle early. By statute, attorneys' fees for a Federal Tort Claims Act case that settles at the administrative stage are 20% of the award, while fees for a case settling once a federal court complaint is filed are 25% of the award.⁷⁷ This extra 5% can be significant, and it can place counterproductive pressures on attorneys to avoid settlement at the administrative stage.

The President and the Attorney General have asked the Interagency ADR Working Group to investigate these issues and make recommendations for changes.⁷⁸ There are a number of complicated factors that led to the present system and will also make it difficult to change. For example, agencies do not currently have budget resources to start paying for their own damage claims, and considerable financial restructuring would be necessary to institute a reform in the system. There are also advantages to having settlement decisions made in a centralized way at the Justice Department rather than risking inconsistent determinations by dozens of different

74. *Id.*

75. See 42 U.S.C. § 1981a(b) (1994). When a statute is silent as to the source of payment in a suit involving the government, as is the case with Title VII, payments come from the agency's own operating appropriations.

76. See 28 U.S.C. § 2414 (1994 & Supp. III 1997) (providing that all settlements of federal court litigation are paid out of the Judgment Fund); 31 U.S.C. § 1304 (1994 & Supp. III 1997) (establishing the Judgment Fund).

77. 28 U.S.C. § 2678 (1994).

78. Memorandum from the President of the United States to the Heads of Executive Departments and Agencies, *supra* note 36.

agencies. Other concerns exist as well. However, we are hopeful that the ADR movement will provide the impetus for improvements in this area.

G. Lack of Funding

In this time of government downsizing, when agencies are repeatedly asked to do more with less, another problem we have faced is inadequate funding. It has often been difficult to find the resources necessary to get ADR programs off the ground. The government ADR program has largely been built by people working on "collateral duty," fitting in their ADR work as best they can. Few agencies have dedicated ADR staffs, which would be important in providing training, coordination, and promotion of mediation in an agency.⁷⁹

Fortunately, this situation may be changing. The Office of Management and Budget has spread the word that ADR is a presidential budgetary priority and that it will look favorably on agency budget requests in this area. Some agencies are gradually adding more ADR positions. Additional research showing the economic benefits of mediation will be invaluable in advancing this trend.

H. Lack of Support

Sometimes support for ADR is lacking at one level of an agency even if it exists at another. We have seen this phenomenon in two ways--in some cases upper management is uninterested while middle management and staff want to move forward, and sometimes the situation is reversed. Both levels need to be enthusiastic for the process to take hold.⁸⁰ If middle managers and staff don't want to use ADR, they will find many ways to avoid it, no matter how often department heads issue guidance and memoranda. It is most often the staff lawyer on a given case who is going to choose whether or not to use ADR, not the immediate supervisor, and not the Attorney General. On the other hand, if upper management won't dedicate resources, a program will not be successful, either. Employees seek recognition and appreciation from their supervisors, and they won't use ADR if it is not rewarded. In a survey we conducted of staff employees asking what the biggest obstacle was to implementing an ADR program in their agency, the highest response was lack of top- and mid-level support (39%).⁸¹

I. Resistance Based on Type of Case

Many people resist ADR by claiming it only works in certain limited cases. We have heard people say, "Our cases involve only money, and ADR doesn't work in

79. Cf. NIEMIC, *supra* note 19 (describing the vital role played in the federal courts by full-time staff dedicated to ADR); PLAPINGER & STIENSTRA, *supra* note 18.

80. See Philip J. Harter, *Negotiating Rules and Other Policies: Pay Close Heed to Structure for Success*, DISP. RESOL. MAG., Fall 1997, at 15, 17.

81. Memorandum from Jeffrey M. Senger, Deputy Senior Counsel for Dispute Resolution, U.S. Department of Justice, to the Office of Management and Budget (July 23, 1998) (on file with author). The second highest response was lack of financial and personnel resources (27%).

these cases.” Interestingly, we’ve also heard, just about as often, “ADR works in cases that only involve money, but not in our more complicated cases.” Frequently people mention equal employment opportunity (“EEO”) cases, as in, “ADR only works in EEO cases” or “We’ve got ADR covered; we already have an EEO mediation program and don’t need anything else.” While we do not argue that ADR is appropriate in every case,⁸² situations where we recommend against it are rare, such as when the government needs a court ruling for a public sanction or a legal precedent.

Attorneys in government enforcement agencies sometimes argue that ADR is inappropriate in their cases because it dilutes the message sent to violators. The idea is that the government can’t compromise on its enforcement cases, because there is no room to negotiate when the public’s interest is at stake. Followed strictly, this approach would mean that a government attorney should make a single, fair settlement offer, and then simply go to court if the other side doesn’t take it.

However, we have found that very few government attorneys, even in the enforcement area, ultimately follow this approach. Most have learned that opposing parties view negotiation as something of a dance and expect movement from the government. Single-offer negotiation is so rare in the world that few people would believe a government attorney who attempted to try such an approach. Once enforcement attorneys admit they do negotiate their cases, we point out that a mediator can sometimes be helpful.

Further, a consensual resolution is often uniquely valuable in an enforcement case. Compliance levels are higher when parties have agreed to settle a case rather than had a judgment imposed on them by a court.⁸³ Consensual settlements allow parties to craft their own settlements using a wide range of injunctive remedies that would be unavailable to a court.

J. Resistance from Opposing Counsel

Other times we run into resistance from opposing counsel. Professor Sander notes, “There are also economic incentives for lawyers to stay with litigation. . . . [I]n the short run lawyers . . . worry whether a more efficient process will mean reduced fees.”⁸⁴ The Attorney General recently talked about dispute resolution at an ABA House of Delegates Meeting and then received a telephone call from a very irate person who said, “You are taking cases from lawyers!”⁸⁵ Indeed, one mediator notes that private sector lawyers sometimes believe that ADR stands for “Alarming Drop in Revenue.”⁸⁶

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

83. See generally NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* §§ 8:01-8:04 (2d ed. 1994).

84. Sander, *supra* note 1, at 6. See Riskin, *supra* note 62.

85. Attorney General Janet Reno, Remarks at the Meeting of the American Judicature Society Chicago Bar Association Standard Club (Feb. 5, 1998). This address can be found at the following website: U.S. Department of Justice, *Alternative Dispute Resolution & Negotiation* (Feb. 5, 1998) <http://www.usdoj.gov/ag/speeches/1998/0205_ag_cgo_htm>.

86. ANDREW FLOYER ACLAND, *RESOLVING DISPUTES WITHOUT GOING TO COURT* 29 (1995).

Fortunately, government lawyers do not share this particular perverse incentive. Most are altogether happy to settle cases more quickly in order to spend more time on their other matters. Settlements do not reduce the partnership billing share of anyone in the government. Nonetheless, it can be frustrating to have an opposing counsel who does not seem to share this perspective. Ultimately, we may have to rely on private sector clients, weary of delays and high costs, to pressure their attorneys to avoid this attitude.⁸⁷

K. Lack of Settlement Authority

One problem that government attorneys have more often than their private sector counterparts is dealing with limited settlement authority. Many mediators want someone at the table with full authority to settle the matter. However, the Justice Department is involved with some 40,000 civil cases each year, and the Attorney General cannot personally attend every one that goes to mediation.⁸⁸ We have faced private mediators as well as federal judges who were upset with us on this issue, and we have even filed appeals in certain cases where district judges have required the personal appearance of a high-ranking official.⁸⁹

Generally, the best thing a staff lawyer can do in this situation is to prepare for it as much as possible beforehand. By writing settlement memoranda and having discussions with the appropriate supervisors ahead of time, a lawyer can go into a mediation with reasonable authority to handle whatever is likely to take place. Other times, a supervisor can be available by telephone. Overall, we recognize that this can sometimes make mediation more difficult, but we do the best we can with the limitations of the situation.

L. Concerns About Confidentiality

Still another problem for the implementation of ADR is the fear that some people have that the sky will fall if we do not get immediate and final answers to some difficult questions in the field. Confidentiality is one such issue that people on all sides get upset about.⁹⁰ This is a very difficult area to resolve neatly and to

87. Interest in ADR stemming from court delay is a worldwide phenomenon. During a speech I gave in India in 1998, I read the following quote from philosopher Nani Palkiwala: "Legal redress is time consuming enough to make infinity intelligible. A lawsuit is the closest thing to eternal life ever seen on this earth." The audience laughed heartily and told me of delays in their system as long as anything we have in the United States. I have been told of one case in India that has lasted 700 years. Not surprisingly, they were very interested in learning about our ADR programs.

88. The Attorney General has the inherent authority to settle any action involving the United States. See *Halbach v. Markham*, 106 F. Supp. 475, 479-480 (D.N.J. 1952), *aff'd*, 207 F.2d 503 (3d Cir. 1953), *cert. denied*, 347 U.S. 933 (1954); 38 Op. Att'y Gen. 124, 126 (1934). Lower-ranking Department of Justice officials have delegated authority to settle certain cases, depending on the dollar value of the claim. 28 C.F.R. § 0.160-0.172 (1999).

89. See, e.g., *In Re: United States*, 149 F.3d 332 (5th Cir. 1998).

90. Notably, many people involved in these debates seem to take a very "positional" approach, where they believe they are infallibly correct and their opponents are dangerously wrong. This is unfortunate and also ironic, given that this is a profession which is built on ideas of inclusion and an interest-based approach to resolving conflict.

everyone's satisfaction, particularly when the government is involved. For example, if government law enforcement agencies seek access to mediation communications, ADR providers understandably become very concerned because reducing confidentiality could curtail parties' candor and limit the effectiveness of mediation.⁹¹ On the other hand, non-mediators are equally agitated if the government holds that mediation confidentiality automatically prevents public access to evidence of crime. These objections are particularly strong if the evidence is from a taxpayer-funded mediation and involves alleged public fraud, waste, or abuse. Many examples can be imagined in which neither granting confidentiality nor denying it seems entirely satisfactory.⁹² Fortunately, we have found that confidentiality problems in mediation are rare. In the thousands of ADR cases at the Justice Department in recent years, problems with confidentiality have occurred only a few times.⁹³ While confidentiality is a vital issue to resolve correctly, we should remember that in the vast majority of cases it never comes up.⁹⁴

III. CONCLUSION

Overall, despite the many barriers to its progress, ADR has grown impressively in the government in recent years. At the Justice Department, for example, use of ADR has increased dramatically, from 509 cases just four years ago to 1800 cases last year. Indeed, the government may even be ahead of the private sector. These are exciting times in the field, and those who want to see ADR grow have a responsibility to keep up the momentum. As the Attorney General recently said:

We have an extraordinary opportunity. The legal profession has an opportunity to help bring this Nation together; to build understanding, rather than to divide it; to build community, rather than to fragment it; to be the peacemaker and the problem solver, as never before in the history of the profession. . . . In this next millennium of the practice of law, we may know a more peaceful Nation and a more peaceful world.⁹⁵

91. See Harter, *supra* note 9, at 323-24.

92. For an examination of the costs and benefits of varying levels of confidentiality, see Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1 (1995).

93. See *In re: Grand Jury Subpoena Dated December 17, 1996*, 148 F.3d 487 (5th Cir. 1998), *reh'g denied*, 161 F.3d 10 (5th Cir. 1998), *cert. denied*, 526 U.S. 1040 (1999). For a criticism of the United States' position in this case, see Charles Pou, Jr., *Gandhi Meets Elliot Ness: 5th Circuit Ruling Raises Concerns About Confidentiality in Federal Agency ADR*, DISP. RESOL. MAG., Winter 1998, at 9.

94. See also Christopher Honeyman, *Confidential, More or Less*, DISP. RESOL. MAG., Winter 1998, at 12.

95. Reno, *supra* note 85.

