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WASHINGTON, D.C. MOVEABLE FEAST: THE ODDS ON *LEVIATHAN*— DISPUTE RESOLUTION AND WASHINGTON, D.C.'S CULTURE

Christopher Honeyman and Carrie J. Menkel-Meadow***
with 21 colleagues

The field of dispute resolution has benefited enormously from a great wave of enthusiasm during its first two decades. But "youth's a stuff will not endure," and the first flush of ardor is an uncertain basis for confidence in the long term. Now, there is reason to believe that our field, like its predecessor professional fields, is vulnerable to the incentive structures built in to both academic and practice careers.[1] At the same time, what we think of as a national (or larger) movement may be increasingly affected by local cultures.

Washington, D.C. has a particularly strong local culture, and we thought it might be an ideal "test bed" for a first attempt to examine the career and other influences that may trump national

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[1] Conflict resolution has had the immense but unrepeatable benefit of drawing from a "bank" of research discoveries and practical knowledge in many older fields, accumulated over many years, which turned out on second examination to have conflict resolution applications. But after two decades' vigorous effort to use them, these "accounts" have been largely drawn down. The rate of new discoveries from any given discipline may yet be maintained, but it is inherently more likely that cross-disciplinary and multi-institutional approaches will become the predominant sources of truly fresh and significant work. Such efforts are not easy to mount and sustain. Some of the obstacles are predictable: In particular, there is evidence that patterns of typical job pressures, both in practice and academia, are leading to a narrowing of the sources of inspiration and wisdom most professionals are using. *See* Christopher Honeyman et al., *Here There be Monsters: At the Edge of the Map of Conflict Resolution*, THE CONFLICT RESOLUTION PRACTITIONER [hereinafter "MONSTERS"] (Office of Dispute Resolution, Georgia Supreme Court 2001), *available at* www.convenor.com/madison/monsters.pdf; *see also* Christopher Honeyman, *Not Good for Your Career*, NEGOTIATION JOURNAL 14:13-18 (1999). *See also* Christopher Honeyman, *Prologue: Observations of Capitulation to the Routine*, 108 PENN. ST. L. REV. 1 (discussing institutionalization of conflict resolution). *See generally* Association for Conflict Resolution, *Engineering Broad-Based Discussions: Engaging Multidisciplinary Groups to Create New Ideas in Conflict Resolution* (Washington, D.C. 2003) (assessing of a series of three cross-disciplinary, multi-institutional efforts, mounted as part of the Broad Field overall strategy).

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trends in a given locality.[2] Therefore we put together a carefully balanced group of experienced practitioners and scholars for an evening, and posed several questions for an informal inquiry into the "institutionalization" of ADR:

- How does Washington, D.C.'s culture affect people committed to this field who work there?
- What are the career incentives and disincentives, as they relate to dispute resolution?
- How do they operate?
- To what extent do these influences have equivalents elsewhere?
- And most important: If some of the incentives are counterproductive to good practice in the field, what can be done about this?

The sponsoring groups were Georgetown University Law Center, and the Theory to Practice project.[3] Georgetown's law school needs no introduction; Theory to Practice (1997-2002) was a major Hewlett Foundation-funded effort to build better discussions and better working relationships between scholars and practitioners in dispute resolution. The Theory to Practice project has since been superseded by the equally ambitious Broad Field project, also Hewlett Foundation-supported.[4] Theory to Practice had already sponsored a number of new conversations on issues affecting a variety of parts of this sprawling field, and among the techniques the project had developed was a deliberately ephemeral working group known as a "moveable feast."[5] We had learned how much is gained by introducing people to others whose perspectives and knowledge they may have been unaware of; the "moveable feast" is a device for ensuring the most productive possible conversation. As usual with Theory to Practice and Broad Field ventures, this was an informal gathering, intended to be a start to a discussion that will go on to other venues. The discussion we describe here was the first such conversation on the effects of the institutionaliza-

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[2] This article is the first in a series, which immediately includes the two companion articles examining the dispute resolution cultures of San Diego and New York City.

[3] *At* http://www.convenor.com/madison/t-t-p.htm (last visited Mar. 2, 2004.)

[4] *At* http://www.convenor.com/madison/broadfld.htm (last visited Mar. 2, 2004).

[5] *See* Christopher Honeyman, *ADR Practitioners and Researchers in a 'Moveable Feast,'* 17 ALTERNATIVES TO HIGH COST LITIG. 106 (1999); *available at* http://www.convenor.com/madison/moveable.htm (last visited Mar. 2, 2004).

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tion of ADR. As noted above, it has since been elaborated into a series which allows some comparison across "local cultures."

The two dozen people at the working dinner we set up were from diverse backgrounds. A number manage dispute resolution programs in federal agencies or have oversight responsibilities, including professionals from the Office of Special Counsel (an agency set up to protect whistle-blowers), the U.S. Department of Justice, the U.S. Navy and Air Force, and the Office of Management and Budget. Also participating were a cross-section of dispute resolution professionals with extensive experience working with government agencies—both in "domestic" disputes and in diplomacy. A third contingent were scholars from a variety of Washington-area institutions. The group spent most of the time in small groups of five or six, arranged so that each covered a diversity of experience and viewpoints. At each table, a dispute resolution professional agreed to serve as "rapporteur"[6] so that this article could draw from extensive and detailed notes of conversations. We are indebted to all of our participating colleagues, but particularly to rapporteurs Cheryl Nilsson, Peter Steenland and Robert P. Myers, Jr.

Despite the variety of perspectives, we quickly found ourselves in general agreement on a number of points. A relatively brief and preliminary discussion does not seem appropriately depicted by a ponderous and weighty paper, so we will "cut to the chase," give you the group's tentative conclusions and some brief notes as to the reasoning behind them, and invite readers to expand and improve on both.

1. How Does the "D.C. Culture" Affect Those Who Are Committed to the Conflict Management/Dispute Resolution Field and Who Work In It?

The group felt that several dimensions of the "D.C. Culture" have an impact on our field, our work, and our careers. There are still many who do not believe in ADR, and explicit appropriations, as well as corporate support, continue to be minimal. But overall, Washington D.C. was felt to be generally "a good town" for those committed to this work, with jobs available in the field. And some large-scale external events—notably, the huge budget cuts in de-

[6] A person who gives reports (as at a meeting of a learned society). Webster's Ninth New Collegiate Dictionary 976 (9th ed., 1991).

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fense after the fall of the Berlin Wall, which created pressure to change methods and become more efficient in such areas as procurement—have helped the field in places not previously thought amenable, including the military. Another motivation seems to have been the sheer size of potential liability claims against some agencies not traditionally thought of as hotbeds of innovation.

At the same time, the revolving door between government and the private sector is spreading to this field. A number of senior federal managers who have a passing familiarity with ADR are retiring and then joining large management and consulting organizations. Comments typifying this concern included, "[b]ecause ADR is now seen as a profit center by these organizations, it will be more difficult for the smaller, truly expert, ADR providers and consultants to maintain a competitive edge over these larger organizational providers, who have more recognized names" and "[b]ecause many of these 'big name' entities offer only a patina of competence while maintaining a plethora of contacts inside the agency, federal offices may start purchasing inadequate services while more competent providers languish on the sidelines."

The group also recognized that there is a low tolerance for risk in a political climate where second-guessing is endemic and formal accountability is often mandated, particularly with high-visibility issues. Washington, with its emphasis on power, prestige and allocation of money, was seen as a tough environment in which to innovate or experiment. Although most conflict management/dispute resolution processes stress the benefits that accrue to parties when they retain control over the outcomes of their disputes, the necessary corollary to this benefit is the need to accept responsibility for the resolutions they have reached. This can be difficult for officials who tend to be closely watched by "the brass," Congress, outsiders looking at the functioning of public agencies, and others to whom "accountability" may not be an objective concept. In today's climate, it can be tempting to avoid career risks by declining the opportunity to craft settlements, instead referring the resolution of the dispute to a third party decision maker who can be blamed or lauded, depending on the outcome.

There will always be some percentage of cases that will not work out well. Taking responsibility to craft joint gains agreements thus leaves the negotiators in an exposed position if theirs turns out to be one of those cases. The consequence can be an unadmitted emphasis on "evaluative" processes; top decision makers' day-to-day behavior toward subordinates who have taken such responsi-

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bility may, in effect, push negotiators toward bringing in the kind of neutral who can be blamed for a politically unsatisfactory result, rather than the kind who will emphasize the value to the parties of taking control. This observation fit into a general vein of lament that relatively few top officials were seen as exercising real leadership on the highest and best uses of this field. Along with this leadership problem, the group noted another problem for the field—a pervasive culture of "gaming" behavior. Washington players' habit of using high first demand / low first concession, and related tactics, on every issue in sight creates a tension with the interest-based discussions typical of the best ADR work.

On a more positive note, the group felt that ADR had become one of those rare areas in which agencies collaborate quite effectively. A number of people noted that there is now institutionalized sharing of information across agencies, including regular "best practices" discussions, good Web sites at several agencies, and a general willingness among the ADR professional community to share the results of early programs so that those who come later have been able to learn from the inevitable errors of the early adopters. These trends exist, paradoxically, at the same time as increasing competition in some agencies as to who gets to "do" ADR (along with such budget competition as that might entail) and as an increasing worry among some lawyer groups as to their status and perquisites, now that ADR is taking over more of their traditional sphere.

Those who practice within the federal government felt that their needs are different from private parties and other consumers of such services. If ADR services are sought to resolve a legal dispute, those offering to provide such services must understand the legal context in which the dispute arose, including the many statutory peculiarities that affect litigation involving the United States. Moreover, would-be providers must understand that the federal government is not a monolithic leviathan, but a collection of potentially competing fiefdoms whose members have vastly different cultures, values, and languages. The varying interests of the different "government parties" may thus be more difficult to reconcile than the interests of the purported "disputing parties." Also, some noted that with the town's alternating focus on influencing national and international events, and on "inside baseball" agency- or subagency-specific maneuvering, Washington as a *community* fits neither preoccupation, and it becomes hard to get money or attention for community efforts.

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Finally, there are many in the Washington area who serve in the federal government, not for reasons of power, prestige, or fame, but because they believe deeply in the missions and purposes of the organization to which they have become attached. Public service, and making decisions based on the "public interest," are matters taken with utmost seriousness by these individuals. In light of this strong though sometimes myopic conception of "doing the right thing" (and the personal sacrifice some of these professionals have made in its service) it becomes difficult for some to participate in consensual processes. Concessions and compromise are not always seen as virtuous. And even when the proposed approach to conflict resolution focuses on "enlarging the pie" rather than on dividing it, as modest a step as honest sharing of information and views—the foundation of creating any "elegant" solution—may continue to be viewed by some participants as a surrender of some of the public's available tactics, with no assurance that the public's interest will be served by the result.

2. Are There Career Incentives that Relate to These Concerns, and If So, What Are They?

The group concluded that for those in the federal government, there are few if any material career incentives. Instead, their rewards flow from building close working relationships with others who have similar responsibilities at other agencies, and from the personal satisfaction that results from perceptible shifts in government decision making culture, as agencies respond to our promotion of integrated conflict management systems, problem solving techniques, and dispute resolution programs.

This was seen as similar to the career situation for academics committed to this field, where the biases of existing departments often militate against career rewards for people who work in an inter-departmental, interdisciplinary mode. Like their practitioner counterparts, these "bridge" scholars must currently take their satisfactions from less tangible incentives.[7]

One "old hand" observed that no bureaucracy changes by itself; sometimes change is achieved from outside in, but even more rarely from the top down, "because middle management will kill it." Yet some area academic programs have integrated strategies of

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[7] *See generally* Monsters, *supra* note 1.

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ADR, such as the Institute for Conflict Analysis and Resolution at George Mason University. The fact that ICAR and other Washington area dispute resolution programs have become suppliers of professionals to federal agencies suggests that these attitudes may yet become more institutionalized, as these young professionals move up into positions of more influence.

3. How do These Career Incentives Operate?

This question elicited a grab-bag of comments, not necessarily consistent in their import. Some observed that we seem to be moving toward the requirement that mediators have to be lawyers, even though law training is still predominantly in an adversarial mode and the best mediator for a given case may not be a lawyer. One participant was explicit to the effect that ADR is flourishing as a result of women, arguing that their greater representation in the professional workforce has added a "humanizing dimension." But another felt that in the military in particular, gender, as it related to willingness to engage and try alternative dispute resolution processes, was less a factor than identity as a litigator; age; years in law practice; and status as military or civilian. Some observed that there was not as much collaboration as one would expect from such a field, and also that in the federal government the agencies are so big that they become compartmentalized, adopting ADR in one part and not in others.

Contrary to the observation about the availability of jobs, some felt that it was hard to make a true career of ADR; "In Washington, people active in this field continue to feel like mavericks acting on their own much of the time." Also, the second generation was felt by some to be having more difficulty generating excitement for their programs, now that the enthusiasm characteristic of a founding generation is being replaced by more workaday attitudes, typical of those who come in when the play is already under way. "ADR is like religion—it's hard to pass on to the next generation." Meanwhile, the next generation may have an entrepreneurial tone, which sets it apart from the field-building priorities of the field's pioneers.

Among the incentives supporting ADR, there were observations to the effect that "ADR is sexy right now," and seen as a way to get ahead professionally; also, ADR is seen as "fun," as opposed to the drudgery of much of law practice. And it still enjoys a ro-

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manticized public image, which draws people in. Predicting a continuation of ADR's acceptability despite the problems noted by others, one participant noted that in Washington "once a system is in place, it's hard to dislodge it."

4. To What Extent do the Pressures That Are Felt By People in This Field Have Their Equivalents In Other Fields?

This group did not seem particularly interested in drawing comparisons to or lessons from other fields or other regions of the country. We hope to raise this question again with another group in another setting.

5. If the Incentives or Disincentives Are Becoming Pernicious, What Are the Solutions?

We are glad to report that the plethora of problems Washingtonians described was significantly offset by a long list of answers to this question. First, some observed that the underlying motives and goals that drive people into this field also serve to make them "permanent optimists about the state of the cosmos;" thus, they are not easily discouraged or defeated. Also, the argument was made that as this movement grows, and its processes and techniques become more widely used by very different sections of society, we will see benefits in how people deal with each other and resolve conflict without outside assistance. "These skills will be recognized as essential for a variety of contexts because they are life-enhancing." On a more careerist level, one participant noted that it was in our interest to retain both a sense of optimism and an appetite for the challenges, and that paradoxically, if everyone learned all that we have been teaching, there would be far fewer disputes, and many of us would have to look for work in other fields.

These things said, there was a clear interest among the group with regard to further institution-building in Washington. "Without strong mandates from the top and continued pressure, there would be no change. Sustaining change takes constant vigilance."

The group accepted that a big challenge is balancing the benefits of institutionalization with the inevitable negatives. "We need

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to create institutional settings in order to focus and coalesce; the ADR field needs an identity." In the context of racial strife, the existence of an institution was seen as putting redress in the *system*, as opposed to relying on ad hoc efforts. A focus on institutionalizing ADR in the court system was also advocated in the hopes of diminishing or overcoming the prejudice of the bar; one participant argued that ADR appears to work better in the courts in California, Ohio, Texas and Florida where the courts themselves have worked hardest to institutionalize the system.[8]

The group noted that ups and downs are inevitable. One participant pointed out that currently, interest is down at one conspicuous agency with a longer background than most in this field, while it is increasing at another. A need to keep the field fresh with experiments, together with the need for both leadership at the top and committed individuals at the cutting edge, were seen as keys to keeping this work growing overall. Among the more specific tools advocated were:

- ~ Rewarding people financially, with good internal agency evaluations and promotions for positive ADR work; also, the visibility and incentives connected to these awards programs were seen as useful. An Office of Personnel Management program of this kind received much attention in its first year, and now "every agency wants it." Creating a competition over the "best" ADR program was also advocated.

- ~ Emphasizing the role of teaching and training (publicly expressing the value of ADR skill development in law school curricula, and in the workplace, as well as providing practical opportunities to use ADR at various levels).

- ~ Doing everything possible to enlist top agency officials' commitment, and persuading the major organizations within this field (AAA, the ABA, the newly consolidated Conflict Resolution Association) to work together as advocates for ADR—specifically, to lobby for appropriations to support ADR and to create public awareness of ADR—were seen as critical, though the group recognized that open lobbying could be contrary to the current bylaws (and tax status) of some of the organizations.

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[8] *See, e.g.*, Sharon Press, *Institutionalization of Mediation in Florida: At the Crossroads*, 108 PENN. ST. L. REV. 43-66 (2003).

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- Greater efforts to show agency officials how ADR creates "good returns." The group recognized that this requires proof—metrics, measures, and quantification—and will demand practitioner-scholar collaboration alongside greater access granted to researchers. It will also require grappling with a host of criteria beyond the ADR "rate," the amounts claimed and paid, settlement rates, and other relatively crude measures which now get almost exclusive attention not because they are the best measures of effectiveness, but because they are the easiest to measure when only minimal resources have been devoted to the problem.

The last of these cannot be overemphasized: It was seen as particularly important that we find ways of establishing and *demonstrating* results. This naturally led to the concluding issue:

6. What Do We Need to Know?

Among a host of possible areas where we lack information and expertise, these questions stood out to this group:

- Do voluntary approaches or mandates work best to enlist more users of ADR?

- What are good measures for the accountability we believe is necessary?

- How do we monitor quality control effectively? (And related questions: Are some agencies "dumbing down the process" with too much weak activity? Are proposals to "credentialize" only going to lead to a narrower range of providers, without the solid scientific foundation necessary to assure that the credentialed are the talented?)

- To which cases, and how often, does the "traditional" model of negotiation apply? (One participant argued strongly for a negotiation theory that sees multiple issues in almost everything, including "two party, one issue" pricing games—because once these are analyzed, there are invariably issues over timing, type of payment, how payment should be made, and other factors often ignored by the exercises' writers. In this view, the scope for problem-solving approaches expands more greatly than generally recognized.)

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- What is a "win," anyway? If lawyers win a lawsuit but everyone is left so angry they refuse to do business again, how can we "cost" that so as to give what we believe is the qualitative superiority of ADR processes some harder numbers? (One participant observed that a reason why there was rapidly increasing interest in ADR in military procurement arms was that "[m]ilitary procurement is all repeat players, it's different than other environments. . . .The cultures need to be allowed to influence each other—Boeing and Lockheed *need* good business relationships; NASA, too. The Air Force now recognizes there are no perfect contracts; something will go wrong somewhere.")

PROBLEM SOLVING AND CONFLICT RESOLUTION AS THE NEW CULTURE

It is not happenstance that we end the notes above with observations about a change of culture in (parts of) the armed forces. We believe the attitudes toward ADR, and the sheer quantum of successful cases, now being evidenced in at least some elements of the military structure,[9] exemplify the changes our colleagues have long argued for throughout Washington's culture. That results are beginning to be felt seems obvious to us; that Washington is a very long way from being able to claim that problem solving is the *prevailing* culture is equally clear. Yet with real dialogue that enlists both dispute resolution's academic and its practical adherents, we have the chance to amass the strength and sophistication to argue convincingly for the program resources, training and career rewards needed to encourage the best practitioners we can locate, and for the controlled experiments and evaluation studies that will prove to the skeptical that our best programs are delivering the goods.

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[9] *See* Major Patrick E. Tolan, Jr. USAF, *The Role of Alternative Dispute Resolution in Resolving Air Force Contract Disputes*, 40 A.F. L. REV. 89 (1996) (noting that since the enactment of the Administrative Dispute Resolution Act of 1990, the military, notably the Air Force, has made major efforts to incorporate ADR in its contract disputes).

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POSTSCRIPT

The three years and more that have elapsed between the Fall 2000 initial Moveable Feast in this "local cultures" series, and this publication, have not been uneventful — especially in Washington, D.C. The delay provides an opportunity to note briefly some features of life in dispute resolution that were not so visible earlier. The most striking of these, in a town in which policy generally seems up for grabs every four years, has been the *continuity* of the field's general and growing acceptance by key players, regardless of party, at least at the mundane level at which most people's disputes actually take place. A quick example: An inquiry by then-Attorney General Janet Reno as to what she could do to promote ADR in the government *without spending any significant money* (itself an illustration of the oft-misunderstood Washington reality of how little actual power a supposedly influential "player" may in fact possess) was circulated by the Justice Department's tiny but energetic dispute resolution office among key members of the Theory to Practice project.[10] The top suggestion that came back was to create an awards program for federal agency programs that do ADR particularly well; the plaque costs very little, but in addition to buttressing people who have taken the risks noted above in holding out for quality, it generates opportunities to highlight the potential of the field all up and down the line. Not only the recipients, it was felt, appreciate the gesture, but their bosses, who naturally have an incentive to trumpet the successes of their agencies, share in this approval; meanwhile, the recruitment of judges for the competition provides an opportunity for strategic influence-building and familiarization among officials who might otherwise give little attention to this work. With regard to Washington, it took several years before the first awards were issued, in a White House ceremony. Even though by that time the high-level appointed officials handing out the prizes, and others on the dais, were all appointed by an Administration that was supposedly radically opposed to the creations of its predecessor, one of the authors, observing this scene, thought these officials looked quite happy to be thus engaged, and appeared pleased with the progress of the field and with their agencies' roles in it.

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[10] *See generally* Attorney General Janet Reno, *Prepared Remarks: Interagency Alternative Dispute Resolution Working Group* (Sept. 14, 1998), *at* http://www.usdoj.gov/adr/agenda/renospch.htm (last visited Feb. 12, 2004).

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The theme of "continuity once the initial hurdles had been crossed" has played out in many ways. It is one of the more heartening elements in an era in which, at the highest levels of disputing, governmental understanding of the purposes and value of conflict resolution seems open to question. (We will not delve here into September 11 and its aftermath for the highest-stakes conflicts in Iraq, Afghanistan, and the U.S. as a whole; clearly, at the top levels of the Administration, conflict resolution work enjoys less resonance than in the 1990's. But that is anything but a "local culture" story.) Yet simultaneously with turmoil in the highest-profile conflict settings, there seems to have been more accretion than loss in the more local, bread-and-butter conflict handling with which most professionals in this field are daily concerned. The military, in particular, has demonstrated a high degree of continuity in its commitment to dispute resolution processes at least for its secondary concerns, such as contracting,[11] and is beginning to see the broader uses;[12] the courts have lately acquired a sophisticated expert-advisory panel for use in devising and upgrading their dispute resolution programs (materially aided by a large Hewlett grant); a conservative Congress seems closer than ever before to passing legislation creating a national consensus council, to help minimize the number of issues on which Congress's fractiousness will be the dominant mode of discourse; agencies large and small continue to create and enlarge more dispute resolution programs than they shrink or terminate; even the gargantuan Homeland Security Administration has sought consulting services from among this field's expert practitioners. In short, on many levels, though stopping short of the highest, a conservative era has turned out to mean, for our field, *preservation* of many directions and initiatives created earlier, rather than reaction.

We look forward to further opportunities to pursue these themes with our Washington and other colleagues—and to encouraging more groups of dispute resolution practitioners and scholars elsewhere to undertake their own assessments, so that our field will be able to build up a sophisticated and honest overview of the state of dispute resolution throughout our nation.

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11 *See generally* Tolan, *supra* note 9. *See also* Major Michael B. Richardson, *The Department of the Navy's Equal Employment Opportunity Complaint Dispute Resolution Process Pilot Program: A Bold Experiment that Deserves Further Exploration*, 169 MIL. L. REV. 1 (2001) (discussing the use of ADR practices to settle equal opportunity workplace complaints).

12 *See* Brig. Gen. C.J. Dunlap, Jr. & P.B. McCarron, *Negotiation in the Trenches*, DISP. RESOL. MAG., Fall 2003, at 4-7.

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