Current Practices in the Use of Alternative Dispute Resolution

DETAILS

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CURRENT PRACTICES IN THE USE OF ALTERNATIVE DISPUTE RESOLUTION

This report was prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Charles Pou, Jr., Attorney, Washington, DC. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

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The Problem and Its Solution

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report is a new paper, which continues NCHRP's policy of keeping departments up-to-date on laws that will affect their operations.

Applications

Alternative Dispute Resolution (ADR) policies and procedures have been widely developed in both federal and state government sectors in the last 25 years, particularly in the areas of environment, contracts, right of way, and, to a lesser extent, in torts. Considerable information about these policies and procedures is available online or can be obtained by contacting federal ADR offices directly. National ADR organizations, such as the U.S. Institute for Environmental Conflict Resolution and the American Arbitration Association, have promulgated model rules and procedures that have been incorporated into federal and state policy and regulations. Information concerning these rules and procedures is available directly from the national organizations or on agency Web sites. However, information about state and private transportation ADR may not be as accessible or found in a central location.

The project examines four areas to determine current practices in the various state transportation departments:

- Environment,
- Contracts,
- Right of way, and
- Torts.

The results of these surveys and analysis have been included in this Legal Research Digest—a compilation of the ADR practices in 32 responding state transportation agencies.

This digest should be helpful to all persons involved in transportation dispute resolution, specifically administrators, attorneys, program officers, contracting officers, environmentalists, and risk managers.

TRANSPORTATION RESEARCH BOARD
OF THE NATIONAL ACADEMIES

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CURRENT PRACTICES IN THE USE OF ALTERNATIVE DISPUTE RESOLUTION

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I. OVERVIEW OF ADR PROCESSES

A. What Is ADR, and How Does It Work?

During the past quarter-century, alternative dispute resolution, or "ADR," processes have become an integral part of the way that many public agencies, business entities, courts, and others deal with conflicts. ADR processes cover a spectrum of techniques involving various combinations of negotiation, facilitation, mediation, and evaluation processes that enable parties in conflict to resolve issues in lieu of traditional forms of adjudication—i.e., court litigation and formal administrative processes.

Overview of ADR Processes and Neutrals' Roles. ADR encompasses an array of approaches, which the parties in conflict employ to achieve a resolution of issues in controversy. Most are "consensual" in nature—i.e., participation is voluntary, and (excepting binding arbitration) the goal is a voluntary agreement or consensus on action to be taken. Some experts include processes of direct communication between parties, such as *dialogue* and *negotiation*, within their definition of ADR. This report adheres to the more widely used definition of ADR as "assisted negotiation" or "assisted decision making." Thus, *facilitation* and *mediation* are terms for the assistance of an ADR neutral in negotiation efforts. Other litigation-related ADR procedures, including *early neutral evaluation* (ENE) and *minitrials*, tend to be somewhat more structured than mediation and facilitation, and often involve a neutral with considerable subject-matter expertise. *Arbitration* is an ADR process in which the neutral is asked to hear facts and render an opinion, which may be binding or nonbinding.[1]

ADR generally involves a third-party neutral who will (depending on the type of ADR involved):

- Assist the disputing parties in designing and conducting a negotiation process to find mutually acceptable solutions to their disputes,
- Provide expert advice, or
- In binding arbitration, directly resolve the dispute.

In accomplishing these roles, most ADR neutrals will seek to move parties from "positional," "rights based," and "power based" approaches toward "interest based" methods of negotiating.[2] The role of the neutral will vary depending upon what ADR process is used, who the parties are, what they want out of a situation, and what they expect the neutral to do. Excepting arbitrators, typically the role of the neutral in ADR includes the following:

- Guiding the course of the negotiations and seeking to establish a structure that enhances communications among the parties.
- Promoting a candid exchange regarding prior events and the parties' perceptions and attitudes, and encouraging parties to think creatively about ways to resolve their differences.
- Holding both joint sessions among the parties and separate, confidential meetings with each party ("caucuses") where they are able to discuss candidly their positions and consider alternatives.
- Using sensitive information obtained in caucus to help the parties shape the negotiations to reach settlement more effectively.
- Helping parties to identify their interests, exploring ways in which those interests might be synthesized, finding information that could advance discussions, and helping parties understand what their realistic alternatives are.
- As negotiations reach critical points, or impasse, floating trial balloons, engaging in shuttle diplomacy, and serving as an agent of reality who helps parties understand what may happen if negotiations fail.

In more "evaluative" ADR processes, like ENE, minitrials, and nonbinding arbitration, the neutral may help the parties to gain an understanding that will let them

[1] The rubric "alternative dispute resolution" (ADR) originated because all these processes were viewed collectively as alternatives to formal court litigation. Binding arbitration is an "ADR" process because it is an alternative to litigation; it differs substantially from other, consensus-seeking ADR processes (such as mediation) in which the neutral's goal is to help the disputing parties negotiate their own solution. ADR is a name that many in the field are not comfortable with; some prefer "consensual dispute resolution," "collaborative dispute resolution," or "appropriate dispute resolution," but ADR is the term that, for better or worse, has become most widely used.

[2] These approaches gained attention in Roger Fisher and William Ury's *Getting to Yes: Negotiating Agreement Without Giving In* (3d ed. 2003) (audio/unabridged). Fisher and Ury suggest employing an "interest-based" (or "principled") framework for negotiation that they believe is most likely to produce a wise decision efficiently and improve (or at least not damage) relationships among the parties. Among the principles they propound are:

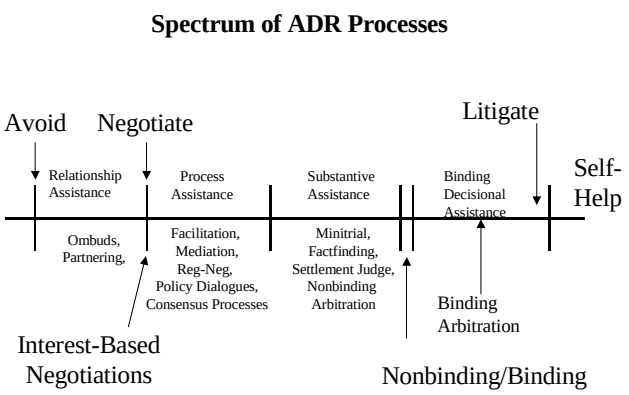
- Conflict Is Natural and Can Be a Positive Resource.
- Respect People; Attack Problems.
- Positions Are Just the Tip of the Iceberg.
- Discover the Underlying Interests.
- Invent Options for Mutual Gain.
- Develop Agreements Based on Objective Standards.

negotiate more realistically than if left to their own devices. He or she may, for example, advise parties who come to negotiations with unwarranted expectations of success as to the strengths and weaknesses of their case and help them to understand from the perspective of a neutral how a situation might play out—the downside risks as well as the upside possibilities. The neutral may also aid the parties in identifying key information that would affect their cases and help them structure limited discovery or exchanges to enable them to obtain enough data to negotiate with a firmer foundation.[3]

B. ADR Processes

Conceptually, the various ADR processes fall along a spectrum, shown in Figure 1:

Fig. 1. Spectrum of alternative dispute resolution processes.



Processes like negotiation that fall at the spectrum's left end are those in which all parties retain the greatest amount of control over the decision and have the most involvement in shaping its substance. Self-help and other "power-based" approaches lie at the spectrum's extreme right, and may be highly coercive for one or more parties. Litigation—also near the right edge—involves a judge who tells one or both parties what they have to do under the law, whereas unassisted negotiation, near the left end, involves the parties working together to craft a solution.

ADR and consensus decision processes fall in the middle of the spectrum. Most of them lie between unassisted negotiation among the parties and binding processes involving third-party decision makers. They are in essence "assisted negotiation" (again, excepting binding arbitration). Many of these ADR processes are relatively recent inventions, at least in the United States. While mediation of labor–management disputes and binding commercial arbitration go back into the early years of the 20th century, they have been adapted to many other kinds of cases in recent years.

Other ADR processes (like the minitrial and early neutral evaluation) have come into existence and use only in the last two or three decades.

Parties select an ADR process from this range of options in light of their needs in a given case. The main processes that have been used in litigation settings are defined[4] as follows:

- *Facilitation*—A third party assists with process management, often including process design, communications, document management, and running meetings. As with all ADR processes *except* binding arbitration, all substantive decisions remain with the disputing parties. Facilitators are often used to run workshops and technical sessions, focusing on involvement, education and structured feedback, rather than reaching formal agreements.
- *Mediation*—A third party with no binding decisional authority provides all the facilitation services to run good meetings and also actively assists parties to reach agreements on the substance via interest-based negotiation. In addition to smaller two-party cases, mediators are often used in negotiated rulemakings, other multiparty consensus processes, and settlement of complex litigation.
- *Early neutral evaluation*—In ENE, an example of a type of nonbinding arbitration, a third party with no binding decisional authority renders an expert opinion of likely litigation outcomes, based on presentations and initial filings, and may also play a mediative role.
- *Minitrial*—Within a structured settlement process, the parties seek to reframe the issues in controversy from the context of litigation to the context of a business problem. In a minitrial, typically a somewhat more formal procedure than mediation or ENE, attorneys for each party make summary presentations to a panel consisting of a neutral advisor and nonlawyer representatives from each party who possess settlement authority. The panel hears and evaluates evidence relating to an issue in controversy. The neutral may thereafter meet with the principal representatives to attempt to mediate a settlement and may, if requested, provide an advisory opinion to aid the negotiations.
- *Med-Arb*—In this hybrid process, mediation is followed by arbitration (binding or nonbinding), if necessary.
- *Arbitration*—The equivalent of court litigation, arbitration does not have the same formal court processes or evidentiary rules. In arbitration, a third party considers the arguments and evidence submitted by each side and then renders a decision; the arbitral decision typically is binding on the participants, but can be non-

[3] *See* Wayne Brazil, *Early Neutral Evaluation or Mediation? When Might ENE Deliver More Value?,* 14 DIS. RES. 10 (2007).

[4] A glossary defining many of the terms employed in this report can be found in Appendix A.

binding or advisory if so specified or agreed ahead of time. Arbitration is often used in disputes that involve a limited number of parties and narrow issues.

While ADR processes most often occur in the context of litigation or agency adjudication involving named parties, they, and similar facilitated processes, are also used elsewhere. These include contracting agencies' use of partnering to avoid claims, ombudsmen's efforts to resolve citizens' complaints, and agency development of rules, policies, or plans involving numerous participants who represent a broad array of interests. All of these processes—especially policy dialogues, negotiated rule-makings, and consensus processes—have many characteristics of ADR; they are useful to promote information exchange or collaboration in connection with inter- and intra-agency work groups, or for purposes of involving the public. Transportation authorities have used some of these methods to streamline decision making and conserve scarce public resources, as well as to avoid the costs and delay of formal adjudication. This report describes some of these ADR-like activities without going into substantial detail.

C. Why Use ADR?

Parties employ a specific ADR process from the above range of options in light of their needs in a given case. In various settings, ADR processes may enhance the negotiation outcome quality, workability, and acceptability; minimize operational delays; and yield long-run savings in time and money. ADR may be able to help disputants in several ways:

- *Promote Creative, Party-Driven Solutions*
  - ADR affords the flexibility to reach objectives not available through litigation; productive solutions can be crafted in ADR that a judge or regulatory agency lacks the power to order.
  - ADR improves the flow of information among parties to yield creative, technically superior outcomes.
  - Parties retain greater control over the outcome.
- *Promote Efficient Decision Making and Implementation*
  - Scarce resources can be more efficiently utilized.
  - Moving from formal hearings to ADR may decrease regulatory lag, increase efficiency and effectiveness, and foster more productive and cooperative relations.
  - Implementation of policies will be easier due to enhanced understanding and buy-in of affected interests.
  - ADR enhances party commitments to comply with agreements they have developed.
- *Save Time and Money*
  - ADR can avoid lengthy and expensive litigation that requires large allocations of internal resources to be diverted.
  - ADR often minimizes operational delays and the associated erosion of project economics.
- *Preserve Relationships and Avoid Disruptions*
  - While litigation will yield a "winner," it often damages relationships; ADR fosters a more "solution oriented" atmosphere to solve the immediate problem and maintain a future working relationship.
  - ADR means less disruption for executives, managers, and supervisors; morale and public relations benefit.
  - Mediation and other forms of ADR promote certainty and can be private and confidential.
  - ADR reduces future litigation and instills greater long-term trust and understanding.
- *Benefit Even Without Full Settlement*
  - Even when the parties do not resolve a conflict entirely, many of them report benefits from engaging in the process.
  - Parties may agree on issues that can be dropped and streamline discovery and handling of issues taken forward to agencies or court.
  - Parties often gain a clearer understanding of their case and others' positions and underlying interests, leading to more efficient hearings.
  - A neutral's insights into the issues can give a fresh perspective on litigation strategy and positions.

Parties employ the ADR process from this range of options in light of their needs in a given case.

D. Factors Affecting the Utility of ADR Methods

Decisions as to engaging in ADR involve judgments relating to an individual case. Factors indicating that an ADR or consensus process is more likely to be useful include these:

- A limited number of interests will be significantly affected.
- Appropriate individuals/entities exist who can represent those interests and are willing to participate.
- The situation involves diverse, complex issues.
- Issues are known, mature, and ripe for decision.
- No party will have to compromise a fundamental value to reach agreement.
- The outcome is in doubt: there is countervailing power.
- Parties view negotiation as being in their interest.
- The agency is willing to rely on the process, provide resources, and participate.
- There is not good ongoing communication between the parties.
- There is a deadline or some need to reach a timely agreement.

Several factors suggest that a consensus process is less likely to be appropriate:

- There is a need for a judicial precedent to clarify the law or guide future conduct.

• Negotiations will substantively affect persons who are not present and who cannot be effectively represented.

• There is a need to focus public attention or make an example of a "bad actor."

• The transaction costs of a consensus process exceed those of traditional methods.

• There may be an urgent need that requires an immediate remedy and does not permit time to negotiate.

• There is a severe imbalance of power between the parties, which could make face-to-face negotiations unfair.

II. TRANSPORTATION AGENCIES' USE OF ADR

A. Overview

Transportation decision making ranges across an array of activities, including policy development, rulemaking, transportation planning, project planning, project design, permitting, construction, and maintenance. These activities often raise contentious environmental, economic, aesthetic, preservation, property rights, compensation, and other concerns that can trigger fervent reactions and serious conflicts.

The continuing growth of litigation since the 1960s, including the significant increase in multiparty and multidistrict lawsuits, has increasingly placed demands on limited agency and judicial resources. In some jurisdictions, this has led to an increased awareness and acceptance of ADR among agency lawyers and program managers as a means of addressing litigation and other conflicts. Nonetheless, the survey undertaken for this report indicates that the number of transportation agencies that have emphasized, or even considered systematically, their use of ADR is not large.

This report draws on several sources:

• The results of a survey questionnaire (see Appendix B) that was sent to all state departments of transportation (DOTs) and several key federal entities involved in transportation-related conflicts (e.g., U.S. Department of Transportation (USDOT) and some of its major modal administrations, U.S. Environmental Protection Agency (EPA), U.S. Department of Justice (DOJ), and U.S. Institute for Environmental Conflict Resolution (IECR));

• Online sources and print articles discussing governmental ADR and transportation decision making; and

• Follow-up interviews with representatives of (1) approximately a dozen surveyed transportation entities whose questionnaire responses presented data of special interest and (2) ADR provider organizations and others with particular experience or expertise in transportation issues.

Approximately 35 state and federal entities responded with some information (see Appendix C). Overall, survey results indicate that in most transportation agencies ADR has received relatively little attention and has had limited use to date. Most jurisdictions indicated that they have made some use of ADR, though in over half of the states that responded this use was limited to one or two of the targeted areas of activity (environmental decisions, tort claims, contracting, and right-of-way (ROW) acquisition). Approximately one-third of state agencies surveyed did not respond to the questionnaire; follow-on spot checks with several of these found relatively little activity within those entities. Among those jurisdictions that did reply, many responses indicated ADR use to be limited to specific areas of activity and largely ad hoc—i.e., undertaken primarily in response to court mandate or outside requests or to address a particular difficult situation.

A few transportation agencies have established integrated systems for considering and using ADR broadly and systematically; these include most notably Oregon and Florida. Several others have created systems for using or encouraging use of ADR and similar methods in selected settings. For example:

• FHWA has emphasized collaborative and consensus-building processes in project planning and encouraged states to follow suit;

• Several states (e.g., Florida, Oregon, and Washington) have made great use of mediation and related consensus-building processes to develop transportation policy and plans, or to avert or resolve environmental litigation;

• DOTs in Arizona, California, Ohio, Texas, and other states have actively encouraged partnering processes and other dispute avoidance methods, mainly in contract administration;

• Arbitration of contract claims, while shunned in some jurisdictions, has become the norm for handling some, or even all, claims in a considerable number of states; and

• Several states, including Florida, Missouri, Utah, Oregon, and Washington, have sought to build mediation, expert evaluation, and ombudsman processes into their approaches to acquiring property for highway ROWs.

B. Environmental Conflicts

General. The continuing growth of environmental disputes since the 1960s, including the significant increase in multiparty and multidistrict lawsuits, has led to an increase in the demand placed on limited agency and judicial resources. In some jurisdictions, this has led to increased attention to using ADR in resolving disputes regarding pollution of the environment, preservation of natural and historical environments, wildlife protection, environmental justice, land use, insurance, and other environmental conflicts.

The term "environmental ADR" is hardly a precise one. It is often viewed as any intervention between conflicting parties or divergent viewpoints to promote rec-

onciliation, settlement, compromise, or understanding in conflicts over environmental, natural resources, or public lands issues and related economic and social concerns. As used in this digest, environmental ADR means mediation and other approaches that employ a third-party neutral to aid parties to work together effectively to reach a mutually acceptable resolution of the issues in a dispute or controversy involving transportation decisions that may significantly affect the environment. In some cases, this assistance has been directed toward establishing rules or policies to govern future conduct, and in others it has been directed toward settling either broad or specific disputes arising out of past events or proposed future activities.

Defining Terms. Focusing systematically on "environmental ADR" presents challenges due to the fact that public involvement processes, collaboration, consensus-building, and ADR have much in common and are arrayed cheek-by-jowl along a conflict-handling spectrum that ranges from dispute avoidance through prevention, negotiation, conciliation, mediation, other facilitated ADR, advisory ADR, decisional ADR, litigation, and self-help. Much "public involvement" activity clearly is not ADR (e.g., an information exchange that seeks improved communication and understanding, develops lists of concerns or options, or develops better definitions of problems or issues). But, an agency that decides to go further to involve some representatives of the public in its decision-making may consult in various ways, negotiate generally about options and priorities, share decisions concerning data-gathering and analysis, or even seek agreement (or "consensus") in which representatives of the agency and all significantly affected entities, on behalf of their constituencies, concur on a specific proposed rule or final action, policy, or approach. At some point along this range of activities—regardless of the label, type of public issue being discussed, or venue—people representing different interests engage in finding a mutually agreeable solution that works for all through negotiation, assisted by someone acting impartially who manages the process—i.e., ADR.

Environmental ADR processes range across a spectrum of activities, from relatively informal processes such as technical sessions, workshops, and stakeholder groups that function essentially as sounding boards or advisory groups to generate options and gauge convergence and divergence among stakeholders, all the way to formal, consensus-seeking processes where agencies may even publish proposed settlements reached during ADR as proposed agency policies or rules. While these differences can give rise to confusion, it is clear that ADR and consensus decision-making processes have played significant roles in enabling improved transportation planning, resolving environmental litigation, and handling other environmental controversies stemming from transportation decision making. It may be helpful to think of environmental ADR as occurring "upstream"—uses that involve broad policy questions and very large numbers of affected interests (e.g., in long-range planning)—or "downstream"—in litigation or other disputes involving named parties or more localized or specific issues.

Survey Results Overall. The survey for this study found that about half of the transportation agencies surveyed had engaged in some form of environmental ADR. Much of this activity occurred in court-referred settings or on a sporadic basis. One fairly common set of answers was along the lines that "Environmental ADR is pretty new to us…. Not a lot of use to date." Some responses of this tenor were accompanied by expressions of dissatisfaction with ADR in these cases (e.g., with one or more mediators who lacked familiarity with the topic in dispute or whose contribution was seen as offering little more than the parties themselves could bring to unassisted negotiation), while others simply reflected caseloads that had not required third-party aid. Nevertheless, a large number of agencies reported having made at least some significant beneficial use of environmental ADR processes. Florida, Oregon, and Washington appear to have employed ADR most frequently in this area of activity.

Environmental ADR has been employed at all levels (state, regional, local) and developmental stages of the long sequence of transportation decision making. These decision-making stages include the following:

- *Planning* by DOTs and local governments to identify broad, long-term transportation needs, consider factors that may impact transportation investments, and prioritize projects in light of financial constraints.
- *Project development*, where specific transportation needs are identified, a project is defined more clearly, alternative locations and design features are developed, environmental reviews occur, and environmental impact is considered.
- *Design work*, in which a concept is developed and given detail, leading to plans, specifications, and estimates.

The following examples are among those reported:

- *Transportation Planning by Florida DOT (FDOT)*—A 5-month facilitated process was used to update FDOT's state transportation plan. The process involved a steering committee of representatives from 22 relevant agencies and stakeholder groups, with assistance from three 25-member advisory committees, and produced a final report that was adopted unanimously by the steering committee.
- *I-5 Corridor Strategic Plan*—After a bi-state leadership committee considered the problem of growing congestion and recommended development of a plan for the I-5 corridor—a critical component of the regional and national economy—the governors of Oregon and Washington established a task force with equal representation from the two states. In a consensus-building process, this task force of political, business, and community leaders met monthly for 18 months. Using extensive community involvement and facilitation, it

adopted a final plan, which it presented to state and local government agencies for formal endorsement. The Southwest Washington Regional Transportation Council; Ports of Portland, Oregon, and Vancouver, Washington; Oregon Transportation Commission; Multnomah County; city of Portland; and the transit agencies in Portland and Vancouver all endorsed the plan.

- *Bridge Repair and Replacement*—FDOT funded a symposium to address issues relating to rehabilitation and replacement of bridges. Over a 2-day period, representatives from public and private agencies concerned with bridge development agreed to 11 proposals to better manage bridge development cases in the future.
- *Route 41 Construction Project*—The Sarasota County Commission and FDOT formed a task force to recommend improvements to US 41, a busy and dangerous highway in Sarasota. The commission also appointed an advisory committee of 30 property and business owners along the highway to assist. After 14 meetings, 2 surveys, and a public hearing, the Task Force agreed on a proposal to control left turns and U-turns and the use of high-profile landscaping. The commission endorsed the proposal with no public dissent.
- *Bryan Park Interchange*—A tentative proposal to construct a fly-over on I-95 that would encroach on a Richmond public park aroused area residents' concern. It led to a 2-year consensus-building process, convened by the Virginia DOT (VDOT), to seek agreement between the agency and citizens concerned about traffic congestion, safety, and the impacts of interstate traffic on Bryan Park and adjacent neighborhoods. The process resulted in consensus recommendations by a citizen advisory committee that were endorsed by VDOT.[5]

The next section of this digest summarizes major policies affecting transportation agencies' use of environmental ADR; discusses environmental ADR use and case studies illustrating how these methods have been used in transportation policy development, planning, and environmental decision making; and discusses some recurring issues in agencies' use of ADR in cases with environmental implications.

Environmental ADR Policies

Federal agencies have been proselytized about the value of ADR from many sources, including (1) Section 1309(c) of the 1998 Transportation Equity Act for the 21st Century (TEA-21), requiring the USDOT to establish an ADR procedure; (2) the environmental conflict resolution (ECR) executive order and environmental streamlining order, with their commitments to develop these types of procedures; (3) EPA's inclusion of ADR as a major regulatory strategy; and (4) the Administrative Dispute Resolution Act of 1996, encouraging ADR use and requiring appointment of dispute resolution coordinators. At the state level, a few state agencies have responded to legislative (e.g., Florida) or executive mandates to employ ADR either generally or in environmental settings.[6]

FHWA ADR Under TEA-21.—FHWA responded to TEA-21 by developing a policy and set of procedures that define a project-level ADR system for assisted and unassisted conflict management and dispute resolution processes to help transportation and resource agencies conduct a coordinated environmental review process. Intended to improve the environmental review process for transportation projects by reducing delays and improving the integration of project development and the requirements of the National Environmental Policy Act (NEPA), the system includes these elements: procedural guidance,[7] specific procedures for elevating interagency disputes to higher levels, a roster of qualified neutrals, and workshops in the application and use of ADR during project development. The guidance and associated workshops were developed in collaboration with the IECR[8] and others.

Federal Environmental Conflict Resolution Initiative.—In November 2005, the Office of Management and Budget (OMB) and Council on Environmental Quality (CEQ) issued a joint memorandum on ECR[9] that urges agencies to "develop strategies to prevent or reduce environmental conflicts and generate opportunities for constructive collaborative problem solving when appropriate." The Memorandum includes a description of "Basic Principles for Agency Engagement in Environmental Conflict Resolution and Collaborative Problem Solving." The program is designed to provide practical insights to agency officials and employees as to how to use ECR successfully. It directs departments and agencies with environmental responsibilities to submit to OMB and CEQ an annual report documenting their ADR planning and implementation efforts and encourages agency leadership to promote collaborative processes. The Memorandum sets forth several basic principles for agency engagement in ECR and collaborative problem-solving. In early 2006, OMB and CEQ formed a staff-level implementation steering group to

[5] STUART LANGTON, ROBERT JONES & HAL BEARDALL, FLA. DEP'T. OF TRANSP., RESOLVING TRANSPORTATION CONFLICTS IN FLORIDA: WHAT HAVE WE LEARNED? (2001), http://consensus.fsu.edu/staffarticles/Transportation_DR.pdf; National Policy Consensus Center, *Case Studies: Transportation. Collaboration.*(2003), http://www.policyconsensus.org/casestudies/docs/Transportation_Case_Studies.pdf.

[6] *See* Section IV.D of this report.

[7] Among the principles in the guidance are to improve skills through training and coaching; resolve disputes early and at low levels; recognize agency needs, missions, and legal mandates; use third-party neutrals to assist in problem solving and dispute resolution; and elevate disputes to break impasses or resolve higher-level issues.

[8] Established by Congress in 1998, the Institute assists in the resolution of environmental, natural resources, and public lands disputes where a federal agency or interest is involved.

[9] Memorandum on Environmental Conflict Resolution, Nov. 28, 2005, http://www.whitehouse.gov/ceq/joint-statement.pdf.

guide implementation of the Memorandum. Led by CEQ and IECR, the group comprises staff from CEQ, OMB, EPA, and the U.S. Departments of Transportation, Energy, Interior, Navy, and Justice.

Environmental Streamlining.—ADR has been a significant part of recent "environmental streamlining" mandates for expediting large, multijurisdiction projects raising complex issues. Environmental streamlining—defined broadly as "completing reviews and permitting in an efficient way, while ensuring that projects are environmentally sound"—entails establishing realistic timeframes for transportation and environmental resource agencies to develop selected major projects, work cooperatively to adhere to those timeframes, and thus reduce processing time for environmental documents.

FHWA and state DOT streamlining experiments have drawn upon a variety of practices to expedite environmental reviews, including use of ADR, development of programmatic agreements, flexible mitigation, integration of planning and project development processes, context sensitive designs, and expenditures on technology, training, and staff. State DOTs have used ADR neutrals to provide conflict assessment, facilitate interagency partnering agreements, design conflict management processes, and mediate streamlining disputes. A number of streamlining successes have been summarized and collected on FHWA's Web site.[10]

Use of Environmental ADR in Transportation Settings

Mediated Policy Development.—Consensus processes like negotiated rulemaking emerged in the 1980s as an alternative to traditional procedures for developing environmental and other public policies and proposed agency regulations. The essence of these processes is that in certain situations it is possible to bring together representatives of an agency and the various affected interest groups to negotiate the text of a proposed rule or policy. The negotiators try to reach a consensus through a process of evaluating their own priorities and making tradeoffs to achieve an acceptable outcome on the issues of greatest importance to them. If they achieve a consensus, the resulting rule is likely to be easier to implement and the likelihood of subsequent litigation is diminished. Even absent consensus on a draft rule, the process may be valuable as a means of better informing the regulatory agency of the issues and the concerns of the affected interests.

Negotiated rulemaking and similar processes supplement rulemaking under federal and state administrative procedure acts. This means that the negotiation sessions generally take place prior to issuance of the notice and the required opportunity for the public to comment. The Negotiated Rulemaking Act of 1990 established a statutory framework for federal agencies to formulate proposed regulations by using negotiated rulemaking, and a few states have adopted analogous laws.[11]

State agencies have occasionally employed negotiated rulemaking in transportation-related settings. When the Oregon DOT (ODOT) began to see a significant increase in opposition to the department's decisions on the siting and construction of access points to state highways (i.e., "access management"), ODOT sought to draft new regulations to deal with the issue in response to requests from legislators. The issue was controversial, and ODOT's initial efforts to develop new regulations for siting highway entrances failed due to political opposition from environmental, commercial, and other groups.

After its first, unsuccessful attempt to develop these rules in the traditional way—via notice-and-comment rulemaking—ODOT decided to try negotiated rulemaking and began a process to work with interested parties to develop agreement on proposed rules that balanced the need to provide safe and efficient travel with the ability to allow access to individual destinations. After discussing the process with the Oregon Transportation Commission, the body that would formally adopt any rules, ODOT hired a neutral to guide the negotiated rulemaking and convened an Access Management Advisory Committee with representatives of more than 30 interests likely to be affected by the rules (e.g., developers, realtors, the business community, environmentalists, city and county governments, and other state agencies).

The Committee adopted a set of ground rules to guide its process, shared information to develop a full picture of the issue, and sought public input on specific access management issues. Committee members worked in a series of meetings over a 5-month period to develop a set of consensus draft rules. The Committee then circulated the draft to all interested parties for comment and, following receipt of comments, agreed to a final proposed rule that it forwarded to the Transportation Commission. Because all the key interests were involved in developing the access management proposal, the final committee draft generated little controversy, and the Transportation Commission formally adopted it as the agency rule.[12]

Public Involvement.—Recently, considerable attention has been given to employing collaborative public involvement approaches to developing solutions at earlier stages. They seek to involve the public earlier, more continuously, and more effectively via a two-way dialogue than traditional "one way" planning methods do; incorporate the interests and perspectives of a variety of stakeholders; and permit projects to be built expedi-

[10] *E.g.,* http://www.environment.fhwa.dot.gov/strmlng/es3stateprac.asp (Last visited Feb. 13, 2008).

[11] AMERICAN BAR ASSOCIATION (ABA) SECTION OF ADMINISTRATIVE LAW & REGULATORY PRACTICE, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK (ch. 18) (2000).

[12] Policy Consensus Initiative, *States Mediating Change: Improving Governance Through Collaboration* (2001), http://www.policyconsensus.org/publications/reports/docs/MediatingChangeCollaboration.pdf.

tiously while meeting environmental, economic, and community objectives. Whether or not these approaches are technically ADR, they often employ mediation and similar consensus building to foster exchange of knowledge, improved information, and better project outcomes, and, in any event, they have enough in common with ADR processes to warrant mention.

These collaborative approaches have sometimes served to improve the substance of transportation decisions, increase public ownership of solutions, and enhance agency credibility in project planning, development, NEPA review, and impact mitigation. They take many forms and include efforts like FHWA's Context Sensitive Solutions and Environmental Streamlining and Stewardship initiatives. Among the states that have made significant use of these processes are Florida,[13] Maine, Oregon, and Washington.

A 1991 Maine referendum enacted the Sensible Transportation Policy Act (STPA) and created a planning process to provide public involvement opportunities that addressed the diverse transportation needs of Maine citizens. Because the referendum had generated a large amount of controversy and the STPA encouraged "ongoing public involvement," the Maine DOT (MDOT) decided to use a consensus-building approach to decision making under STPA. It chartered a steering committee called the Transportation Policy Advisory Committee (TPAC) and invited representatives of approximately 60 key stakeholder groups, many of whom had vigorously participated in the referendum from opposing points of view. The committee's goal was to devise the process for implementing STPA, including the basic groundwork for the development of the Regional Transportation Advisory Committees (RTACs). MDOT hired an outside neutral to help the group reach consensus.

TPAC identified five basic types of stakeholder groups, broadly categorized as business/commercial, municipal offices/planners, environmental/land use, alternative modes, and general public. Upon TPAC's recommendation, MDOT created eight RTACs consisting of 15 to 20 members each, chosen from the five basic groups. MDOT conducted training sessions for all 180 RTAC volunteers on group processes and the use of consensus decision making. Relying on this training and guidelines established by the TPAC, each RTAC selected a chair and set up its own ground rules, with the objective of providing MDOT consensus advice on regional priorities and transportation goals that drew on public input for creative solutions. The RTACs addressed highway project issues pertaining to land use goals and needs, environmental concerns, alternative transportation options, demand management, social and economic implications, improvement priorities, and long-term planning.

The RTACs' results were mixed. Given that obtaining consensus on often-complex decisions required a considerable amount of time, some of the groups' decision making was often rushed. Also, interaction between the committees and MDOT was not always well-planned, and determining the RTACs' role in the existing infrastructure of MDOT presented challenges. The role of the regional committees remained ambiguous, especially as regards to policy development versus more end-stage policy/project approval.

MDOT has reported that the process led to better decisions due to better and earlier communications among the parties. MDOT has announced its intent to develop and disseminate "how to" guidance documents for those working on project planning and development activities that unify procedures and documentation of NEPA, STPA, and Section 404 of the Clean Water Act. In a related development, the Augusta River Bridge project is cited as an example of the benefits of MDOT's more integrated, open processes. The city of Augusta sought to build a new bridge, but had been bogged down for 20 years as several studies were done without agreement on where the new bridge should be located. Establishment of a public advisory committee allowed MDOT to obtain agreement among key parties for the first time on a Purpose and Need Statement.

ADR in NEPA and Other Regulatory Decision Making.—Collaborative methods and ADR processes, especially mediation, have been applied with considerable success during the NEPA evaluation process for specific transportation projects to help stakeholders resolve potential problems and issues that would, if not addressed, cause delays, fragment agency reviews, and perhaps lead to litigation. These approaches have been applied in many contexts and can vary greatly in scale, purpose, and intensity. They may include a broad range of activities: defining the purpose and assessing need for a project, developing a proposal for an action, identifying impacts and issues, generating alternatives, analyzing alternatives, or determining a preferred alternative. A few states like Florida[14] have engaged in substantial use of ADR and collaborative processes for these purposes, while other states' DOTs have made more occasional use. The two cases described below involve two efforts to mediate actual agreements for action in longstanding controversies—in some ways, the most challenging of these goals.

Maryland InterCounty Connector.—The InterCounty Connector (ICC) project is a proposed 18-mi, six-lane multimodal expressway linking two major business corridors north of Washington, D.C. After five decades of political stalemates, public controversy, and three separate NEPA studies, the ICC—one of 15 high-priority transportation infrastructure projects under Federal Executive Order 13,274: "Environmental Stewardship and Transportation Infrastructure Project Reviews"—received approval from FHWA for the plan, satisfying environmental, economic, and community requirements to build the highway. Some have hailed the intergovernmental coordination process used to reach this result—in which the planning phase was completed in

[13] LANGTON ET AL., *supra* note 5.

[14] *Id.*

3 years—as a model for large, controversial transportation projects.

A unique project planning and dispute resolution process was developed for the ICC to meet both streamlining and NEPA requirements. The main goals of this process were (1) to build agency agreements by working to develop a shared understanding of the problems to be solved, the alternative methods of solving them (including transportation alternatives), and the advantages and disadvantages of the alternatives, and, if possible, to reach consensus on the preferred alternative; and (2) to reach agreement on the components of the draft and final environmental impact statement for the project and on the related studies and regulatory conclusions. The process also integrated the requirements of two permitting agencies, the U.S. Army Corps of Engineers and the Maryland Department of the Environment; their permits were issued after the Record of Decision was signed.

As part of this project, the relevant agencies agreed to participate in an expedited issue resolution process facilitated by an ADR neutral. An Interagency Working Group (IAWG) of federal, state, and local agencies was formed and met regularly throughout the project planning process to raise and resolve project issues early. The IAWG's efforts were closely monitored by a group of interagency principals to resolve issues and avoid the need for formal dispute resolution. A draft environmental statement was completed in 18 months—far quicker than the usual years-long process. In November 2007, a federal judge cleared the way for the road's construction after 50 years of controversy. Calling the ICC "among the most important, most controversial, most complex and most discussed transportation and environmental projects undertaken in the Washington, D.C., metropolitan area," the judge upheld the Maryland State Highway Administration's Environmental Impact Statement against environmental challenges and found that the federal government's approval of the project was within "the bounds of reasoned decision making."[15]

St. Croix River Crossing.—Another longtime transportation controversy involved FHWA and the U.S. Department of the Interior in how to improve transportation between Stillwater, Minnesota, and Houlton, Wisconsin. Beginning in the 1950s, the towns, which are connected by a historic lift bridge over the St. Croix River, began discussing ways to meet three separate goals—enhancement of transportation services across the river, historic preservation, and protection of a river that had been designated "wild and scenic." In 1995, a proposal to build a new bridge and remove the lift bridge was accepted, but then successfully challenged in court.

By 2000, gridlock among more than a dozen federal and state agencies[16] led some affected parties to request the assistance of the IECR. IECR's initial assessment determined that a negotiated agreement could be feasible and, based on IECR recommendations, a collaborative problem-solving process was set up. After several preparatory meetings focusing on defining the independent, neutral role of the mediators and exploring how a stakeholder group would work, the group began meeting in mid-2003. At the first meeting, the group defined its membership as including 27 stakeholders representing 7 federal agencies, 6 state agencies, 4 local governments, and 10 private advocacy groups. They adopted an "operating agreement" that defined the process's purposes: first, to facilitate a common understanding among the stakeholders of the transportation, environmental, and historic preservation issues; second, to define the various solutions to these issues and explore their advantages and disadvantages; third, to arrive, if possible, at a consensus agreement, defined as one that all group members could support; and fourth, if full-group consensus proved impossible, to reach agreement among the core agencies with regulatory authority.[17]

At one point, the stakeholders set aside the question of whether a new bridge should be built and focused instead on what it should look like if one were built. A bridge architect, who was also an artist, attended and discussed configuration and design possibilities. The architect was able to translate the stakeholders' visions into sketches, leading to an exchange that left participants "knowing a lot more about bridges and being able to conceptualize what a new bridge could look like."

The process took 5 years in all and resulted in an agreement to (1) retain the lift bridge as a pedestrian and bicycle crossing, and (2) construct a new bridge for vehicular traffic. To address the natural, social, and cultural impacts of the new bridge, a comprehensive mitigation package was developed that went beyond compensating for the direct impacts of the new bridge (wetland replacement, relocation of threatened and endangered species, and bluff-land restoration). It in-

[15] Audubon Naturalist Soc'y v. U.S. Dep't of Transp., 524 F. Supp. 2d 642 (S.D. Md., Nov. 8, 2007).

[16] FHWA, Army Corps of Engineers, U.S. Coast Guard, EPA, National Park Service, U.S. Fish and Wildlife Service, Advisory Council on Historic Preservation, and the Minnesota and Wisconsin DOTs, Departments of Natural Resources, and State Historic Preservation Offices.

[17] Since the decision-making agencies initially questioned whether they should, or could, share their authority within a consensus-oriented process, they were willing to incorporate the work of the stakeholders only insofar as they themselves did not give up their ultimate authority. To satisfy these concerns and keep the other stakeholders engaged, tiered decision-making rules were established:

> If consensus is not possible, the permitting agencies will work to build a consensus of their own, using the whole group's deliberation as the basis for their work. Finally, if full agency consensus is not possible, the lead agencies may use the group's work to make decisions in line with their regulatory authority and in keeping with the limitations of that authority.

cluded removal of visual intrusions, funding for lift bridge preservation, designation of Stillwater as a historic district, capacity-building for growth management in St. Croix County, and a basin-wide water quality study. The mediated agreement was innovative in that many of the nonagency stakeholders would continue to be involved via oversight and implementation of the mitigation measures associated with the final agreement. At the final meeting, many stakeholders supported the agreement enthusiastically; others gave more tempered endorsements; and a few consented silently, with visible disappointment. One stakeholder group, the Sierra Club, did not officially endorse the final decision.[18]

Some Recurring Issues in Environmental ADR

Complexity and Politics.—Most of the environmental resolution processes described above differ from counterpart ADR methods common in many other subject areas, such as contract disputes or tort claims. The processes described here frequently take place in settings calling for negotiation or collaborative approaches to decisions (work groups, advisory committees, task forces) or in problem-solving forums (negotiated rulemaking), as opposed to formal litigation with named parties. Even where the disputes arise in court or administrative adjudication settings, they often involve many affected parties and jurisdictions—sometimes dozens of groups and individuals with diverse interests. They also may differ from other agency conflicts in additional important ways:

- Participants in these assisted environmental negotiations often represent loosely-knit interest groups and need considerable time to consult with constituents.
- Agreements and ratifications may be more difficult and tentative and sometimes less binding than in other litigation or negotiating processes.
- Members may vary widely in experience, resources, and styles of negotiation.
- Topics of concern often are more global and data issues highly complex.
- Media and legislative interest and open government rules can affect process structures and outcomes.
- Links to formal agency decision-making processes (e.g., notice and comment) can complicate negotiations.
- Political and other aspects of the landscape often loom large and may shift during the course of negotiations.

As a result, many—though certainly not all—environmental ADR processes take longer, necessitate considerably greater prenegotiation planning, and require more resources than, say, a two- or three-party contract minitrial or a tort claim mediation. In addition, as opposed to contract or ROW cases where the ideal neutrals may be those whose strength is substantive evaluation, these conflicts may benefit from utilizing the services of neutrals whose forte is managing large groups through multi-stage processes. Finally, the definition of "success" in many environmental conflicts can be less certain than in most court cases. Many participants agreed that one of the most valuable outcomes of a long-term environmental ADR process was the establishment of greater trust among the participants. In addition, sometimes something less than unanimous agreement—with some participants simply "holding their peace" rather than signing "on the dotted line"—may warrant the substantial effort involved; or, parties may reach concurrence on most factual or policy issues while "agreeing to disagree" or to seek court review on a central legal question.

Conflict Assessment and ADR Process Design's Importance.—Several interview subjects and studies made the point that large-scale environmental mediations and similar ADR processes that involve complex, contentious issues often work best when they begin with a conflict assessment, either by the lead agency or an ADR neutral. They note that a well-designed process is essential if many diverse affected entities are to sort out and order the issues so they can understand and discuss them fully and take ownership of solutions that emerge. This often requires a prenegotiation assessment that involves conferring in confidence with many or most identifiable interests to identify goals and issues, find affected interests whose stake initially may not be immediately apparent, recommend whether collaboration is appropriate and timely, and if so, advise on such things as representation, the "shape of the table," and process design.[19]

This assessment and related advance preparations occur before parties come together to negotiate. They are likely to be critical to a successful outcome because they help to identify the full range of necessary participants and their interests; assess whether "success" is even a possibility and identify reasonable goals; structure information gathering and negotiating sessions to encourage broad participation; achieve preliminary agreement among key participants on the process's ground rules, decision-making standards, and an agenda for an initial meeting; and establish a schedule that provides sufficient time between sessions for adequate follow-up, analysis, and constituent contacts.

Open Government Issues.—Since some environmental ADR processes involve multiple parties and agencies (often federal and state), they sometimes implicate open records or open meetings laws. This may at

[18] Mary Divine, *Sprawl, Water Quality Still at Issue*, ST. PAUL PIONEER PRESS, July 20, 2005, available at http://www.mepartnership.org/mep_whatsnew.asp?new_id=1336 (Last visited Jan. 13, 2008); Dale Keyes, *Status Report on the St. Croix River Crossing Case* (USIECR internal doc., 2005); M. Hughes & J. Erikson, *St. Croix River Crossing Problem-Solving Process: Summary and Final Report* (Final report to USIECR, Aug. 2006).

[19] Philip J. Harter, Notes for DOT/DOI Program on Environmental Conflict Resolution, Oct. 24, 2007.

times inhibit the frank discussions that allow parties to explore options and priorities to maximum effect.[20] At the federal level, this is seldom a problem, partly because the Administrative Dispute Resolution Act usually serves as an exception to the Freedom of Information Act and because the Government in the Sunshine Act[21] applies only when several members of commissions with multiple members assemble at once. In many states, these laws will not likely be problematic, but in a few states—Florida was cited by several experts—attorneys and decision makers should be aware that their meetings and negotiations may be affected and plan accordingly.

Intra-Governmental Coordination and Agreement.—Another recurring procedural issue in environmental ADR is the need for agencies with differing charters and regulatory missions and priorities to reach agreement on difficult policy and planning issues. FHWA's ADR guidance recognizes this in calling for procedures to elevate disagreements to the Secretarial level. Whether or not elevated to the very top, these interagency differences raise significant substantive issues and practical concerns that benefit from advance attention; agencies will benefit from acknowledging that they will inevitably occur and need to be dealt with, if necessary with the aid of a third-party ADR neutral.

Several states have created infrastructures for coordination and collaboration to address interagency conflicts. The Minnesota DOT, for instance, has such a process with the Minnesota Department of Natural Resources. In Massachusetts, reports indicate, early consultation and coordination among agencies is happening more frequently than in the past and helps address issues more effectively. The governor of Massachusetts created a mechanism for bringing certain key state agencies together to improve coordination and focus on mutual priorities.[22]

A North Carolina Interagency Leadership Team (ILT) was established in 2004, with 10 state and federal agencies involved in the planning and development of North Carolina's transportation system to "develop an interagency leadership plan for North Carolina to balance successfully mobility, natural and cultural resource protection, community values, and economic vitality at the confluence of our mission." The ILT members have expressed the view that "it is essential, and possible, to develop future transportation projects in a collaborative, interdisciplinary approach that involves all stakeholders and preserves the scenic, historic, natural environment and community values while efficiently meeting the mobility, economic and safety needs of our citizens."[23] In addition, the federal agency offices and state entities dealing with transportation issues in North Carolina developed a process (Merger 01) for appropriate agency representatives to discuss and reach consensus on ways to meet the regulatory requirements of Section 404 of the Clean Water Act during the NEPA decision-making phase of transportation projects. Agencies involved included the North Carolina DOT, North Carolina Department of Environment and Natural Resources, FHWA, and the Army Corps of Engineers. Beginning in 2001, these agencies began to modify the original NEPA process to incorporate the benefits of their experience and environmental streamlining. The modified 2005 agreement[24] applies to the full spectrum of conflicts and unresolved issues (e.g., permit requirements, permits, certifications, approvals) that arise during the development, design, and permitting of North Carolina DOT projects. It provides specific procedures for elevation to upper management in those cases where Merger 01 process concurrence cannot be reached by members of a project team, and states that in nonconcurrence situations a facilitator should be employed to aid the discussions. When resolution still cannot be obtained, the elevation process (administered by North Carolina DOT and involving a higher-level review board) is initiated.

C. Contract Disputes

Highway construction and related transportation projects are complex, substantial undertakings, and often give rise to numerous misunderstandings and conflicts. Accordingly, ADR procedures, such as mediation, binding arbitration, and minitrials, have proven effective in addressing many conflicts after they arise. In addition, agencies have used partnering and dispute review boards (DRBs) to avoid conflicts before they begin or escalate to formal disputes.

Contracting ADR Policy Guidance. Typically, dispute avoidance and resolution initiatives have been implemented because agency management has seen practical benefit. In a few instances, legislatures (like New Jersey's[25]) have required agencies to include ADR provisions in all contracts involving construction, design, architecture, engineering, or management. Other legislatures have required transportation agencies to employ binding arbitration of some or all contract claims.

At the federal level, the Administrative Dispute Resolution Act of 1996[26] amended the Contract Disputes Act of 1978 to expressly authorize and encourage federal contracting officers to use ADR techniques in resolving contract claims, and the Federal Acquisition

[20] This issue is discussed in greater detail in § IV.B of this report.

[21] 94 Pub. L. No. 409, 90 Stat. 1241 (Sept. 13, 1976), and codified at 5 U.S.C. § 552b(b).

[22] NATIONAL POLICY CONSENSUS CENTER, TRANSPORTATION COLLABORATION IN THE STATES, at 13 (2006), http://www.policyconsensus.org/publications/reports/docs/TransportationCollaboration.pdf.

[23] *Id. at* 17.

[24] http://www.ncdot.org/doh/preconstruct/pe/MERGER01/ConflictResolution.html (Last visited Feb. 13, 2008).

[25] N.J.P.L. 1997, C. 341.

[26] 104 Pub. L. No. 320, 110 Stat. 3870, 5 U.S.C. 571 *et seq*.

Streamlining Act strongly encouraged ADR use, as did Administrative Conference[27] Recommendation 88-3:

> Agencies should adopt policies encouraging voluntary use of ADR in contract disputes. The policies should place the responsibility for implementing ADR with contracting officers, government counsel, and BCA judges. These policies should make clear that superior agency officials will support reasonable settlements reached by means of properly selected ADR methods. The policy should also provide for systematic review of all cases for susceptibility to ADR, specify who has authority to approve the selection of case for ADR, and set forth guidance on documenting the negotiation processes or justifying settlements. Agencies should also consider, as a matter of general policy, offering certain forms of ADR to contractors in specified kinds of disputes (e.g., those involving less than a stated maximum amount).[28]

General. A few transportation entities have established sophisticated contracting ADR systems, such as the Federal Aviation Administration (FAA) at USDOT. FAA's system emphasizes ADR as the primary means for resolution of both bid protests and contract disputes. FAA's Office of Dispute Resolution for Acquisition (ODRA), established as an organization independent of FAA entities responsible for acquisition actions, manages the FAA ADR process. ODRA is authorized, among other things, to:

- Use ADR to settle protests and contract disputes;
- Adjudicate protests and contract disputes on behalf of the FAA Administrator;
- Issue orders and decisions;
- Provide fair and impartial "Findings and Recommendations," supported by the case record and law; and
- Recommend changes to the FAA acquisition system.

ODRA makes its dispute resolution officers available as ADR neutrals, with the concurrence of the parties. In addition, ODRA has established a Web site that includes a guide to the conduct of protests and contract disputes. The Web site contains a user-friendly guide, access to model ADR agreements and forms, specific filing and contact information, and thorough explanations of available services.[29] Since its inception, ODRA has employed ADR techniques in hundreds of cases and helped parties to reach settlements in over 90 percent of the contract disputes and over 50 percent of bid protests handled.

The Range of Contract ADR Processes. In environmental and ROW cases, mediation has tended to be the ADR process of choice. More common in addressing acquisition conflicts have been processes that enable the individuals directly involved at the project level to resolve disputes as early as possible. These avoidance and early resolution processes—e.g., partnering, DRBs—focus on improving information flow and building constructive, cohesive relationships between parties from the start of a contract. They allow problems to be detected early and dealt with before they escalate into claims or other adversarial proceedings that are resource-intensive and more difficult to resolve and that often produce a solution that satisfies none of the parties. A number of state agencies that oversee large construction projects have emphasized partnering procedures, including Arizona, Ohio, Texas, and California.

ADR processes to resolve bid protests and contract claims that arise in agency contracting have tended to rely less upon mediators offering process assistance and more on procedures that feature subject-expert neutrals employing evaluative approaches. In these ADR processes—like ENE, minitrials, and nonbinding arbitration—a neutral aids the parties in determining what an appropriate substantive outcome should be. The neutral assists the parties in a structured exchange of information and, after the presentation, may advise the parties on the strengths and weaknesses of their respective positions. The neutral helps the parties understand the downside risks as well as the upside possibilities from the perspective of a disinterested, knowledgeable third party, and in many cases offers a written opinion. In these ways, the neutral can help the parties gain a deeper, more realistic understanding that will let them negotiate more effectively.

Partnering. Partnering has become a common practice on large construction projects both within and outside of government, and many transportation agencies have used it in large or complex projects. Technically, partnering is a dispute avoidance process, rather than a dispute resolution method; it entails committing to use a process that seeks to change the attitude and the relationship between parties to a long-term contract or other relationship to promote recognition and achievement of mutual beneficial goals. The rise of partnering is directly related to the growth in claims and litigation regarding construction contracts. Partnering began to gain currency in the late 1980s when the Army Corps of Engineers started using it to avoid disputes and reduce the cost of delivering public facilities.

In partnering, key managers for a project typically meet early on in a workshop setting to establish cooperative working relationships, identify common objectives, and agree on what will be needed to achieve those objectives and solve problems. The workshop is run by a facilitator who ensures that all issues are brought out into the open. A critical feature of partnering is to iden-

[27] The Administrative Conference of the United States was an independent federal agency in the Executive Branch established in 1968 to advise and assist regulatory agencies and the Congress on administrative law and procedure matters.

[28] Administrative Conference of the United States, Recommendation 87-11, *Alternatives for Resolving Government Contract Disputes*, 52 Fed. Reg. 49,148 (Dec. 30, 1987).

[29] ODRA's rules of procedure are set forth in 14 C.F.R. pts. 14 and 17, Procedures for Protests and Contract Disputes. Further information concerning the ODRA ADR process can be found on the ODRA Web site at http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc70/. (Last visited Feb. 13, 2008).

tify the dispute resolution process that will be used on the project, designate key players in the process, and delegate authority to solve problems to the lowest level. Follow-up meetings are held at regular intervals to evaluate goals, objectives, and concerns. These meetings not only provide an update on the project, but may include discussions on quality, communication, issue resolution, team and work relationships, schedule, and outstanding issues discussed at previous partnering sessions. In construction project settings in particular, partnering typically involves getting all the parties to:

- Acknowledge at the outset the reality that problems and disputes will occur,
- Try to anticipate the kinds of problems most likely to arise,
- Establish real time or jobsite techniques designed to get conflicts resolved as quickly and informally as possible during construction, and
- Design a "backstop" system of ADR techniques or other dispute resolution procedures as a final resort for dealing with disputes that do arise.[30]

Several state transportation agencies (including those in Arizona, California, Florida, Ohio, and Texas) have made major commitments to using partnering processes in a variety of settings. For example, the *Field Guide to Partnering on Caltrans Projects* states, "Caltrans and the Construction Industry are committed to making partnering the way we do business." The director of the Ohio DOT's 2001 strategic initiatives committed the department to "embrace Partnering with contractors to improve quality and to reduce disputes." This focus was reiterated in the department's Vision 2006 plan. A partnering manual was developed jointly with the Ohio Contractors Association to ensure the process's success.

According to the Texas DOT (TxDOT), partnering has been an institution since 1996, when a new policy required partnering to be used on all agency construction projects. Two options were available: "formally" partnering utilizing a designated project facilitator and "informally" partnering using project personnel to facilitate. This mandatory use policy has since been changed, and the decision whether to partner or not is now vested within the TxDOT districts. TxDOT's Office of Continuous Improvement serves as the agency's partnering expert, and awareness of the Partnering Program and its goals is widespread and pervasive.

Arizona's DOT (ADOT) has established a Partnering Team responsible for the overall management, evaluation, and success of ADOT's Partnering Program, including interactions with ADOT's customers, engineers, suppliers, and other agencies and entities. ADOT's Partnering Program provides services for approximately 200 partnering workshops per year for highway construction and other internal teams. The Partnering Team manages the state's contract for partnering facilitation, training, and consultation services; educates agency personnel and others in the process; and supports an industry-wide Partnering Advisory Committee consisting of 17 stakeholder groups. The advisory committee provides stakeholders a forum to address partnering issues and ensures the continued dissemination and evaluation of partnering principles and procedures.

Partnering results for transportation projects appear to have been positive, though difficult to quantify. A 1995 survey by the American Association of State Highway and Transportation Officials (AASHTO) Construction Subcommittee found that 46 state transportation agencies were using partnering, and, despite the fact that 28 states had been using the technique for less than 2 years, 34 believed that partnering had reduced claims. While partnering is believed to reduce contract disputes and litigation, documentation for this perception is not substantial. ADOT estimated that its partnering and ADR processes accomplished a 13 percent reduction in the agency's contract administration costs and a time savings of about 5 percent. Before the start of partnering, according to ADOT, issues were typically resolved through mediation, arbitration, or litigation. Now, most issues are resolved within partnering processes, reducing the number of claims going to post-completion resolution processes and resulting in an estimated additional annual savings of $5 million. These savings are significant when compared to the small price of the agency's ADR efforts, which is estimated at about 0.2 to 0.3 percent of the total project cost.[31] It has also been suggested that partnering fits especially well with design–build contracts' schedule compression and "overarching theme of single-point responsibility for the owner."[32] The time and expense of "formal" partnering has led to increasing use of informal partnering practices that seek to capture the best elements of the partnering movement cost-effectively.

Dispute Review Boards. Many state DOTs have used DRBs to assist in resolution of contract disputes.[33]

[30] Minnesota DOT's facilitated partnering spec is a worthwhile overview and can be found on the following Web site: http://www.dot.state.mn.us/const/tools/documents/FACILITATEDPARTNERING_000.doc.

[31] Report of the Texas Performance Review, *Disturbing the Peace* (ch. 8, Cross-Government Issues) (1996), available at http://www.window.state.tx.us/tpr/tpr4/c8.cg/c821.html (Last visited Feb. 13, 2008). For another perspective on a state DOT's partnering activities, *see* DAVID ROGGE, ANDREW GRIFFITH & WESLEY HUTCHINS, IMPROVING THE EFFECTIVENESS OF PARTNERING, Report to Oregon Department of Transportation and FHWA (2002).

[32] JAMES J. ERNZEN, GINGER MURDOUGH & DEBRA DRECKSEL, PARTNERING ON A DESIGN-BUILD PROJECT: MAKING THE THREE-WAY LOVE AFFAIR WORK 202 (Transp. Research Bd., 1712 Trans. Res. Rec., 2000).

[33] According to a 2006 AASHTO Construction Subcommittee survey and the survey for this report, this technique has been used in Alaska, Cal., Colo., Del., Fla., Haw., Me., Mass., N.D., Pa., and Wash.

DRBs are commonly found on larger, more complex projects. The DRB process is regarded by many as capable of both preventing disputes and achieving early consensual resolution, as it involves trusted expert neutrals who have the confidence of the parties and whose objective decisions when conflicts arise can administer a "dose of reality."

A DRB typically involves the creation of a three-member standing committee that meets on a regular basis to review and resolve all project disputes before they become formal claims. Drawing from the experts in the type of construction involved, generally each party will choose a member, and then those two members will jointly select the third member. The DRB members are considered to be "standing neutrals," independent of either party, who become generally familiar with the project, keep abreast of its progress, and are available to render prompt advisory decisions on problems that the parties are unable to resolve themselves. While a DRB may issue written decisions, these decisions are typically nonbinding, and in most cases DRBs serve in an advisory role. For small projects, a one-person "DRB" has occasionally been used, with that expert chosen jointly by owner and contractor and operating under the same principles.

Transportation agencies have used DRBs on numerous large bridge, tunnel, or other construction projects. Promoters of DRBs claim a remarkable level of success in avoiding lengthy and expensive formal arbitration and litigation. According to the Dispute Review Board Foundation, among the hundreds of completed projects using DRBs, 60 percent had no disputes and 98.8 percent were completed without arbitration or litigation. According to the Foundation, state transportation agencies using DRBs over a dozen times included those in California, Florida, Hawaii, Massachusetts, and Washington. Caltrans began requiring DRBs for all contracts greater than $10 million in January 1998. The use of DRBs for smaller contracts is optional but encouraged. Florida DOT has used DRBs extensively for projects over $10 million. The disputes have ranged in size from relatively small claims up to $6 million, with contractors and FDOT claiming an approximately equal number of victories. To date there has been very little litigation regarding DRB recommendations in Florida.

One of the most high-profile projects utilizing DRBs was the Boston Central Artery Tunnel project, or the "Big Dig." More than 24,000 issues were raised to DRB members on that project, with 500 meetings of the DRB and 31 formal hearings held.

DRB supporters suggest that these processes can save time and money in large construction projects because disagreements are either avoided or settled as they arise during the project. Further, DRBs offer a forum for subcontractor complaints. Despite DRBs' history of widespread usage, several transportation agencies stated their intention to move away from using them in the future. They cited construction DRBs as being expensive, even when they are not used, and relatively cumbersome. These agencies indicated that henceforth they would use mediation or arbitration in place of DRBs.

Intra-Agency Contract Dispute Resolution Processes. Numerous agencies have contract claims processes that are either in-house or that involve agency hiring of an expert outside investigator. Some interview subjects described these processes as "halfway to ADR." A number of these claims procedures are incorporated into the agencies' construction contracts, while others have been established legislatively. A few (like South Dakota) employ an expert outside adjuster—who is similar in some ways to an ENE neutral, but who is selected by the agency and whose report goes directly to the agency—to recommend an appropriate resolution to the secretary of transportation; in most cases (about 10 investigations annually in South Dakota), interviews indicate, this recommendation assists the agency and contractor to reach a negotiated result.

The Vermont Agency of Transportation's Transportation Board was established statutorily to perform various regulatory and quasi-judicial functions relating to transportation, including providing appellate review for contractor claims and certain other transportation issues and conducting public hearings. The board's seven members are appointed by the governor, and their "interests and expertise lie in various areas of the transportation field."[34]

The in-house process in Texas is less judicial. There, a contractor seeking additional money or time for its work—or who otherwise cannot reach an agreement with TxDOT's local district office representatives—submits a claim to TxDOT's Contract Claims Committee. TxDOT's Claims Committees—the exclusive remedy at law for the resolution of a contractor claim against TxDOT—are comprised of three members appointed by the department's executive director; they are usually department engineers, selected on a rotating basis, from districts that do not have a current contractual relationship with the contractor making the claim. The Contract Claims Committee receives detailed reports from the contractor and the responsible Department office, meets with the contractor and the local district engineer, and may offer an opportunity to informally discuss the disputed matters in an effort to resolve the claim consensually. Communications made in order to seek resolution during this process are protected from later use. Absent consensual resolution, the Committee then issues a proposed disposition, which the contractor may accept or reject. Interviews suggest that an average caseload for the Committee process is 20 claims annually, with about 75 percent settled during the process. A contractor who rejects the proposal may seek to appeal to the State Office of Administrative Hearings.

Many of these internal appeals processes have some of the characteristics of ADR—e.g., informality and opportunities for structured negotiation, often informed by expert opinions—but tend to lack other key ADR

[34] 19 V.S.A. § 3.

components, most notably impartial third parties who are trained in assisting negotiation and selected by (or at least acceptable to) all disputants. Thus, while some agency personnel described their offices' processes as being "like mediation" or "similar to nonbinding arbitration," a number of contractor representatives have used more unfavorable descriptions; two Austin attorneys who represent contractors in the TxDOT process have called it "The Trail of Tears" containing "potential traps and biases that, unsurprisingly, tend to lean in TxDOT's favor."[35]

Other Governmental Entities. In addition to internal review procedures, in several states central offices of administrative law judges or boards of contract appeals may conduct hearings related to some transportation contract claims; these generally include conducting preliminary conferences and issuing decisions (either final or, in some states, proposed ones for the referring agency's consideration). The Maryland State Board of Contract Appeals, for example, adjudicates bid and contract disputes between state government and contractors or vendors doing business with the state (except disputes over procurement of architectural and engineering services). Issues before these boards generally include preparation and interpretation of bid specifications, qualifications and selection of bidders, the bidding process, quality of performance, compliance with contract provisions, compensation, claims and change orders, termination, and any other matter that cannot be resolved.

These entities' authorizing laws or rules seldom address ADR explicitly. However, some of these executive branch offices (e.g., in California and Texas) also provide ADR services in transportation, construction, and other cases. Texas's State Office of Administrative Hearings, for example, has an ADR coordinator and employs approximately 20 administrative law judges with experience arbitrating, mediating, or facilitating complex public policy dispute resolution processes.

At the federal level, Boards of Contract Appeals (BCAs) have provided ADR services for nearly two decades.[36] Until recently, USDOT's Board historically has been the Department's prime contracting ADR provider, apart from the FAA's unique ODRA system. The USDOT BCA offered ADR services (especially minitrials and expedited hearings for small claims) in both contract and noncontract matters to the Department and its operating administrations. Since January 2007, contract disputes involving USDOT and most other nondefense executive agencies have been heard by the newly-formed Civilian Board of Contract Appeals (CBCA), to which board judges and other personnel at those entities were transferred.[37]

The USDOT BCA was a longstanding advocate of the use of ADR in contract disputes. In 1988, it was the first federal BCA to amend its rules to specifically provide for ADR processes.[38] Among the most widely-used ADR methods at the Board were evaluative mediation and summary trials. The newly-formed CBCA encourages and actively assists parties to consider using ADR at all stages of a contract controversy: preappeal, postappeal, and posthearing. While participation in CBCA ADR is always voluntary, the Board encourages its use whenever the parties believe that a neutral third person may promote settlement. The Board typically encourages parties to contact a CBCA judge to learn more about ADR, and often begins the process by holding a phone conference to describe the ADR process, discuss the issues to be resolved and useful roles the ADR neutral facilitator might play, and talk about what type of ADR would work best.[39]

Both parties must jointly request ADR from the Board's Chair, and they may request that a particular CBCA judge serve as their ADR neutral (subject to caseload and availability). Before the start of ADR proceedings, the parties sign an ADR agreement establishing guidelines for the ADR method selected. The CBCA ADR policy encourages party creativity in adapting or combining ADR processes, but sets forth several specific options. These include facilitative mediation, evaluative mediation, minitrials, nonbinding advisory opinions (similar to ENE), and summary binding decisions (similar to binding arbitration). If ADR is not successful, the judge who served as the ADR neutral will totally withdraw from any future CBCA consideration of the matter unless the parties request otherwise.

Minitrials. Although minitrials have been widely used for two decades to resolve contract claims in the private sector and at some federal agencies (e.g., Army Corps of Engineers and some agency BCAs),[40] the sur-

[35] Matthew Ryan & Ryan Nord, *The Trail of Tears: TxDOT Claims and Procedures*, State Bar of Texas Construction Law Conference (March 2006), http://www.aaplaw.com/publications/trailoftears.pdf.

[36] The Contract Disputes Act of 1978, 41 U.S.C. §§ 601–613, directs boards of contract appeals to provide informal, expeditious, and inexpensive ways to resolve contract controversies.

[37] *See* 71 Fed. Reg. 65,825 (Nov. 9, 2006). The CBCA's Web site is located at http://www.cbca.gsa.gov and its ADR policy may be found at http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA_ADR.htm.

[38] 48 C.F.R. § 6302.30.

[39] An ADR Committee for the CBCA—five judges with particular ADR expertise—has taken several recent actions to incorporate into practice before the CBCA. These include drafting an ADR rule and a "user friendly" ADR Notice describing ADR at the Board to be distributed to those who have filed contract appeals with the CBCA, as well as to any parties who express interest in pursuing ADR options before a matter may be the subject of a formal contract appeal. The Committee is preparing content for an ADR Page to include descriptions of available ADR techniques, sample forms (i.e., Request for a Neutral, ADR Agreement, ADR Settlement Agreement), and links to other Federal ADR Web sites of interest.

[40] For an indepth examination of the workings of contract claims minitrials, *see* Eldon Crowell & Charles Pou, *Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation*, Report to the Administrative Conference of the U.S., 1987 ACUS 1139, 1155 *et seq.* (vol. II), *re-*

vey for this report revealed few examples of their use by state transportation agencies. Pennsylvania's DOT used a minitrial to settle a construction claim on the Schuylkill Expressway project. Each party was represented by a principal participant possessing the authority to settle the dispute. FHWA also had a representative at the minitrial with the authority to approve any settlement reached by the parties.

Mediation. Several agencies' standard specifications include mediation options. Vermont's is fairly typical, providing:

> If the Contractor appeals a decision by the Director pursuant to Subsection 105.02, prior to the Transportation Board hearing the claim, the Agency and the Contractor may agree to submit the claim to mediation before a mediator acceptable to both parties. The costs of mediation shall be shared equally by the Agency and the Contractor.[41]

The New York State DOT's standard specifications provide for either mediation or nonbinding arbitration, at the option of the agency. They state that the department's chief engineer may specify an ADR process to be used for unresolved disputes in the contract closeout process. The contractor is required to provide the chief engineer (also known as "the gatekeeper") a brief description of the contract work and identify the contractor's preferred method of dispute resolution. After review, the chief engineer advises the contractor to proceed to one of the following: (1) a contract closeout meeting with the Construction Division, (2) a facilitated contract closeout meeting with the Construction Division or (3) a DRB. The expenses of the facilitator, DRB, or any other method are equally shared by the department and the contractor.[42]

In fact, the facilitator in the New York State DOT process appears to play the role of a mediator, his or her job being to "try to bring the parties to a mutually agreeable resolution of the disputes." The one- or three-person "DRB"—which appears less a classic DRB than a nonbinding arbitration panel—may assist in resolving disputes arising out of the performance of the contract and also make a recommendation for resolving the disputes.

Binding Arbitration. Although a recent emphasis on other, more consensual ADR methods has tended to relegate arbitration to the back burner for many disputes, binding arbitration persists as the contractual remedy of choice in many public and private construction contracts. Several states have established arbitral processes, each with slightly divergent features, and in some states, binding arbitration is the exclusive avenue for many or most contract claims (e.g., North Dakota). In others (e.g., Connecticut, Florida, Minnesota, Ohio, Rhode Island), it is an option. Ohio law, for example, authorizes its DOT to include in any construction contract a provision for "binding dispute resolution"—i.e., arbitration—of any subsequently arising claim; this process may then be employed if all parties to the controversy agree. Arbitration in Florida and Rhode Island is mandatory for claims below a specified amount ($100,000 in Rhode Island, $250,000 in Florida) and permitted for larger ones if both parties agree. In Minnesota, districts can opt for a binding arbitration clause for disputes over less than $75,000 in design–bid–build projects. Two of the more well-developed arbitration programs are those in California and Mississippi.

California. California's Public Works Contract Arbitration (PWCA) Program, established initially by Governor's Executive Order and then codified in 1981, is among the most highly institutionalized and widely used arbitral system. PWCA provides "a fair and equitable resolution of disputes between public agencies and contractors in an attempt to reduce congestion in California courts."[43] Except where all parties agree (after a claim has arisen) to have the claim litigated in a court of competent jurisdiction, PWCA is the exclusive remedy for claims arising out of contracts let under the provisions of the State Contract Act.[44] While the program does not encompass all state government contracts for goods and services, it generally includes public works projects in excess of an indexed dollar threshold, currently about $120,000.[45] Typical caseloads in recent years have been 20 to 25 cases, according to Office of Administrative Hearings (OAH) records, though some cases remain active for several years.

A PWCA Committee sets standards for, and certifies, program arbitrators and makes recommendations respecting the program's arbitration practice and procedure. The California OAH—a division of the Department of General Services—assists by administering the program. The PWCA Committee consists of seven members:

- Three public members appointed by the Governor ("each of whom shall have at least ten years' experience with a general contracting firm engaged, during that period, in public works construction in California.");
- Three government members appointed by the directors of the Departments of General Services, Transportation, and Water Resources; and
- The Director of the OAH (nonvoting).

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printed in 49 MD. L. REV. 183 (1990); *see also* FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK (Marshall Breger ed. (ABA Section of Administrative Law & Regulatory Practice, 2001)).

[41] Vermont Agency of Transportation, Standard Specifications for Construction 2006, § 105.20, Claims for Adjustment, http://www.aot.state.vt.us/conadmin/2006StandardSpecs.htm (Last visited Feb. 13, 2008).

[42] *See* New York State Department of Transportation, Standard Specifications § 105-14(H)(2), May 4, 2006.

[43] http://64.233.169.104/search?q=cache:IDgCZa4QeZIJ:www.oah.dgs.ca.gov/PWCA%2BProgram/+california+contract+arbitration&hl=en&ct=clnk&cd=3&gl=us&client=firefox-a (California Office of Administrative Hearings) (Last visited Feb. 13, 2008).

[44] CAL. PUB. CONT. CODE §§ 10100 *et seq*.

[45] CAL. PUB. CONT. CODE § 10105(b).

To be certified, arbitrators must know California construction law and have substantial experience in large, complex projects with federal, state or local governmental agencies. Extensive experience in the resolution of disputes arising out of such projects is desirable.[46] Regulations to implement the program have been adopted jointly by the Departments of General Services, Transportation, and Water Resources.

Arbitration is conducted by a single arbitrator selected by the parties from the PWCA Committee's certified list. A simplified claims procedure is available by election of either contractor or agency on claims less than $50,000 or by agreement of both parties on claims exceeding $50,000. The costs of conducting the arbitration are split equally by the parties. While the filing fee, witness fees, and costs are not shared, the arbitrator may allow the prevailing party to recover its costs and necessary disbursements, other than attorney's fees, on the same basis as is allowed in civil actions. Reasonable attorney fees may be recovered in certain circumstances (e.g., when substantial evidence establishes that a party has acted frivolously or in bad faith in its demand for or participation in the arbitration.)

Mississippi. All construction contracts are potentially subject to binding arbitration. A three-member State Transportation Arbitration Board (one agency-appointed, one contractor-appointed, and a third appointed by agreement of the other two) has mandatory jurisdiction over conflicts involving $750,000 or less arising out of the construction or repair of highways or buildings; parties to contracts for these services may jointly ask to use the board to arbitrate larger claims. Board decisions include findings of fact and conclusions of law and are final, subject to limited judicial review. Also, if either party to a construction contract involving the Mississippi Transportation Commission requests an arbitration clause, the Mississippi Code requires its inclusion.[47]

Arbitration: Recurring Issues and Trends. Binding arbitration—both generally and in construction settings—has become increasingly controversial in many circles in recent years.[48] As mediation's popularity has grown, some entities, including several state transportation agencies, have found they prefer it and have moved toward more consensual forms of dispute resolution, since mediation allows them to solve their own problem and retain control over the outcome. (A few state DOT survey responses went so far as to recommend against establishing arbitral options and expressed strong preferences for collaborative processes.) In particular, mandatory binding arbitration of consumer and workplace cases—where parties are obligated by statute or contract to seek relief exclusively through arbitration—has been widely criticized as unfair and sometimes even an unconstitutional denial of right to court or agency access.[49] However, the criticism has hardly been limited to these areas, and has extended to arbitration of construction and other business conflicts. The critiques of arbitration center in part on arguments that arbitration has become discovery-laden and increasingly expensive relative to litigation, and that its restrictive review standards may prevent appeals of bad decisions. Arbitration has often been characterized as a "split the baby" kind of process, one that maintains the adversarial atmosphere of court proceedings that can serve as an obstacle to resuming future business relationships.

D. Right-of-Way Conflicts

Background. ROW acquisition is a concern common to all state transportation departments. Real property acquisition is often necessary for completion of highways, airports, parks, and other public projects, and transportation departments and other government entities may exercise the authority of eminent domain—the right to appropriate private property for public use—to obtain property.

The Fifth Amendment to the U.S. Constitution and most state constitutions require that just compensation be paid when eminent domain is used. Typically, the basis for deciding what compensation is fair are negotiations that follow an appraisal—i.e., a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion of a property's value, supported by the presentation and analysis of relevant market information. If negotiations fail, the governmental entity may seek condemnation of the property—that is, seek a court determination of just compensation.

ROW ADR Policy Guidance. While the AASHTO *Right of Way and Utilities Guidelines and Best Practices*[50] and FHWA's *Real Estate Acquisition Guide for Local Public Agencies* [51]—basic references for public transportation agencies and others—encourage consid-

[46] CAL. PUB. CONT. CODE §§ 10240.5, 10240.7, and 10245.3; *see also* CAL. CODE REGS. tit. 1, § 1395 (Standards and Qualifications).

[47] MISS. CODE § 65-1-89 (revised July 2007).

[48] *E.g.,* Terry Carter, *Arbitration Pendulum: Mandatory Arbitration Agreements, Once an Easy Pass, Come Under More Scrutiny*, A.B.A.J. 14 (May 2003), available at http://www.tlpj.org/News_HTM/arbitration_pendulum_050103.htm (Last visited Feb. 15, 2008); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers and Due Process Concerns,* 72 TULANE L. REV. 1 (1997).

[49] *E.g.,* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?,* 57 STAN. L. REV. 1631 (2005).

[50] "Avoid or minimize condemnation litigation to the greatest extent possible…. Use mediation to settle acquisitions that have entered eminent domain processes. Mediation may save time, money and may eliminate many of the costs and delays inherent in eminent domain procedures." American Association of State Highway and Transportation Officials, Standing Committee on Highways, Strategic Plan 4-4, *Right of Way and Utilities Guidelines and Best Practices* (2004).

[51] http://www.fhwa.dot.gov/REALESTATE/lpaguide/reag.pdf.

eration of ADR as a way to expedite and improve ROW acquisition,[52] substantial usage in this regard appears to have been limited to about a half-dozen states.[53] Responses to a survey for an earlier TRB report[54] indicated that in general transportation agencies did not consider mediation to be an especially valuable tool for accelerating ROW delivery.[55] That continues to be the case.

ROW ADR Use Generally. The survey responses for this report indicate that ADR use in ROW acquisition, while not widespread (especially apart from court-annexed usage that tends to occur late in the acquisition process), is growing.[56] In several states, discussed below, mediation and ENE-like processes have begun to help avert litigation, and in Utah, a property rights ombudsman has served to aid landowners in better dealing with the acquisition process. Nonetheless, several state DOTs report having beneficially employed mediation, neutral evaluation, and other ADR methods, and, in particular, several states, including Florida, Missouri, Utah, Oregon, and Washington, have built mediation processes into their approaches to acquiring property. While a high proportion of other states' usage has tended to be in response to court-mandated mediation, these states have employed a more proactive approach to using ADR to reach compensation decisions. For instance, Utah's DOT (UDOT) offers ADR to all property owners at the initiation of negotiations. It also offers to pay for a second appraisal by an appraiser of the owner's choosing, and approximately 4 percent of property owners actually get a second appraisal this way. UDOT reports that ADR has proven faster and less expensive than going to court, and it allows property owners to retain more control over the process and avoid having to share the proceeds with a lawyer. According to UDOT, 99 percent of all cases in which property owners opt for ADR are settled without court proceedings. In part due to the use of ADR, its condemnation rate reportedly has dropped from 23 percent to 7 percent in less than a decade.

A closer look at some other specific ADR uses in ROW acquisition follows.

Mediation. Florida, Missouri, Utah, Oregon, and Washington have reported good results using mediation processes with some regularity to reach compensation decisions in acquiring property. While a high proportion of other states' ADR usage has tended to be in response to court-mandated mediation, these five states appear to have employed a more proactive approach. In most jurisdictions, ROW mediation is used in a traditional manner: as a routine means, often court-mandated, to resolve lawsuits over disputed property value. Occasionally state agencies, like the South Carolina DOT, report informally encouraging mediation of ROW cases before filing a condemnation action.

Washington. Some state DOTs explicitly authorize use of mediation early in the acquisition process and offer guidelines on its use. Washington State DOT employs an innovative approach in which mediation methods are applied to accelerate ROW delivery before cases are filed for condemnation. A mediation acquisition specialist evaluates all cases where negotiations have failed and seeks to employ mediation to reach amicable settlements before proceeding to court.[57]

Oregon. The Oregon DOT's Right of Way Section carries out an ADR program as a tool in resolving negotiation impasses. The section may offer owners the option of mediation using a third-party mediator agreed on by both sides from an approved list maintained by the section. This program is separate from the condemnation program and, as in Washington State, focuses on resolving impasses to negotiated settlements before the start of condemnation. However, ADR can also be used at any point in the condemnation process with the concurrence of the state's department of justice (DOJ). The ADR program's coordinator reports to the operations manager and has extensive legal knowledge and background in eminent domain law, mediation, and negotiations. The current ADR coordinator (a former DOJ condemnation attorney) has responsibilities that include working with regional ROW staff and the DOJ/Oregon DOT liaison to assess whether to offer mediation; acting as the lead contact between the mediator, the DOT, and property owners and their attorneys during ADR; setting up and participating in mediations; working with

[52] The FHWA *Guide* states that agencies' primary goal should be to acquire through negotiation rather than condemnation, and that ADR, particularly mediation, may help agencies in removing communication or other barriers to agreement when confronted with an acquisition dispute.

[53] The FHWA *Guide* notes that mediation may not be appropriate in every contested case, and that a decision to employ mediation should be made on a case-by-case basis. Some of the factors it suggests considering include the property owner's acceptance of mediation, the uniqueness and/or complexity of the acquisition, the specific technical issues in dispute, the agency's historic success in condemnation (or lack thereof), and the potential time and administrative cost savings. For example, it says, because of difficult appraisal and other technical issues involved, mediation may be a particularly worthwhile tool in attaining settlement on parcels encumbered with hazardous waste.

[54] NAT'L. COOP. HIGHWAY RESEARCH PROGRAM, TRANSP. RESEARCH BD., SYNTHESIS REPORT 292, INNOVATIVE PRACTICES TO REDUCE DELIVERY TIME FOR RIGHT-OF-WAY IN PROJECT DEVELOPMENT (2000). The consultant for that report saw a need to develop better methods to advance to settlement when an impasse is reached, and found mediation to be an undervalued way of doing so. He reported a need to identify factors that determine the effectiveness of mediation and other ADR methods.

[55] That survey did not address mediation's effectiveness for resolving value disputes, retaining amicable relations, or avoiding litigation costs.

[56] A few survey respondents characterized as ADR relocation proceedings presided over by a state Administrative Law Judge who ultimately renders a recommended or final agency opinion, but applicable rules indicated these to be more in the nature of judicial hearings.

[57] NAT'L. COOP. HIGHWAY RESEARCH PROGRAM, *supra* note 54.

property owners and other agencies, at the request of the DOT's ROW staff or DOJ, in resolving issues; documenting the mediation process and results; following up on all Oregon DOT obligations resulting from the mediation; and maintaining a list of qualified mediators.

A ROW case can be considered for mediation if negotiations reach an impasse. The file is then forwarded to the ADR coordinator, who determines if mediation is appropriate and if the file is ready to go. The coordinator then contacts the property owner and offers an opportunity to mediate and explains its potential benefits. If the property owner agrees, the ADR coordinator hires a mediator, sets a mediation date, and advises the respective parties of the designated time and place. Generally the mediation itself takes about a day.

According to DOT staff, this process has been highly successful, saving hundreds of thousands of dollars and resolving a high percentage of cases referred. According to one regional supervisor, "The mediation process has resulted in a process improvement on my part. It makes me recognize how to train negotiators better. Mediation saves thousands of dollars. The mediator helps settle the file so we can do our work much faster. There was an improvement in legal fees and a speeding up of the process through the use of mediation."

Florida. In Florida, before an eminent domain proceeding is brought, the condemning authority is statutorily required to negotiate in good faith with the owner of the parcel; provide the owner with a written offer and, if requested, a copy of the appraisal on which the offer is based; and attempt to reach an agreement regarding compensation to be paid. At any time in this presuit negotiation process, the parties may agree to submit the compensation or business damage claims to "nonbinding mediation." If so, they must agree on a mediator from a list of persons certified by the courts, and, in the event that a settlement is reached as a result of mediation or other mutually acceptable dispute resolution procedure, the agreement reached shall be in writing.[58]

Notwithstanding Florida's legislative authorization of early mediation, most ROW mediation in the state occurs in a more traditional manner: as a routine means to resolve court cases over disputed property value that is often mandated by a circuit court. Property owners are required to be present at mediation, which may be their first face-to-face contact with a Florida DOT agent, since owners are frequently represented by counsel before the initial negotiations.[59] Interviews with Florida DOT staff indicate that a large proportion of these cases—several hundred per year—go through mediation, which resolves a high percentage despite a very liberal eminent domain attorneys' fee provision in Florida. ("Mediation works well for us. Very few cases now go to juries.")

Missouri. The Missouri DOT's ROW acquisition manual encourages using mediation to avoid condemnation, and sets forth a policy to offer it in writing to all property owners except in a few situations (e.g., time constraints prevent it, unique legal issues need litigating). The manual contains a set of detailed forms for the DOT, property owners, and interested mediators to use, and offers advice and worksheets for DOT representatives on their preparation for and participation in mediation sessions. In an interview, a department attorney attributed part of a recent decline in condemnation rates to mediation, stating that although initially there was a "good deal of skepticism," Missouri DOT ROW personnel now "can't say enough good about mediation."

ENE. In several states (e.g., Pennsylvania), prior to a trial before a judge or jury, the law provides a process that is analogous in many ways to ENE. In it, the property owner receives a hearing before a board of court-appointed commissioners or "viewers." Both the property owner and the agency are permitted to present information to the board, which is usually comprised of three members drawn from diverse backgrounds and headed by an attorney. The parties' presentations inform the board's eventual determination of just compensation. Once the board makes its decision, the property owner and the acquiring agency each may accept or reject it; respondents from several states stated that the "viewers" process sets in motion a negotiation process that often produces settlements. If either party rejects the award or refuses settlement offers, the court will schedule a trial.

Ombudsman/Other ADR Methods. In addition to the Utah DOT's ADR program, Utah has an Office of the Property Rights Ombudsman, a nonpartisan, neutral entity housed in the State Department of Commerce that deals with takings, eminent domain, land use law, and other property rights issues.[60] Its jobs[61] include advising property owners on their rights, helping them understand the condemnation process, and helping resolve disputes between property owners and Utah governmental entities. The Property Rights Ombudsman's dispute resolution activities include offering free media-

[58] FLA. STAT. § 73.015 (1) and (3) (Eminent domain, Pre-suit negotiation).

[59] *Id.*

[60] As discussed above, ombudsmen are ADR providers who seek to give voice to people who might otherwise be disadvantaged in their dealings with a governmental or other bureaucracy. Ombudsmen perform a range of advisory, reporting, complaint-handling, and resolution functions, and sometimes mediate or otherwise help resolve specific conflicts.

[61] The mission of Utah's Office of the Property Rights Ombudsman is:

- To help property owners, citizens, and government officials understand and protect their civic property rights.
- To encourage state and local government agencies to regulate and acquire land in a manner that is consistent with applicable statutes and constitutional law.
- To resolve property rights and land use disputes fairly, in accordance with existing law and without expensive and time-consuming litigation.

See generally http://propertyrights.utah.gov/index.html. (Last visited Feb. 13, 2008).

tion, facilitating the aforementioned second appraisal process for the property owner, providing an advisory legal opinion that attempts to resolve the dispute in accordance with the prevailing law, or arranging for arbitration (at the request of the property owner) and ordering the condemning entity to participate.

In several other jurisdictions, property rights ombudsman offices with similar missions and authority have recently been established (Connecticut, Missouri) or proposed (e.g., New York, Oregon)—largely in response to the U.S. Supreme Court's recent decision in *Kelo v. City of New London*[62] affording state and local governments considerable authority to condemn private property on behalf of a private developer. The Connecticut General Assembly established the position in 2006, and the governor has nominated the state's first Property Rights Ombudsman. Missouri's legislature created a similar position in the Office of the Public Counsel, which represents consumers in utility cases.

In addition, Senators Orrin Hatch and Max Baucus have introduced legislation aimed at federal eminent domain actions. Patterned after Utah's model, the Empowering More Property Owners with Enhanced Rights Act of 2005, or the EMPOWER Act,[63] would amend the Uniform Relocation Assistance and Real Property Acquisition Policies Act to create a Federal Property Owner's Bill of Rights and a National Property Rights Ombudsman at USDOT. State DOTs and other agencies using federal money would be required to share appraisals with homeowners and landowners, provide contact information for the ombudsman, and mediate or arbitrate disputes between federal agencies and property owners when appropriate. The proposal would authorize the ombudsman to order arbitration proceedings as if it were ordered by a court of competent jurisdiction and to appoint an independent arbitrator who is acceptable to both parties. If one party objected to the arbitrator selected by the ombudsman, the party could choose an arbitrator subject to the approval of the ombudsman, but would have to pay for the arbitrator's expenses. The bill would allow the ombudsman to act as the arbitrator or appoint a panel of arbitrators.

E. Tort Claims

General. Questionnaire responses from over three dozen state and federal agencies, follow-up communications, and library and Internet research found that transportation agency use of ADR in tort claims was not substantial, apart from participation in court-mandated mediation programs. In fact, a considerable majority of state responses to the questionnaire (Appendix B) left the tort claims section completely blank. States that did mention tort claims typically did not indicate widespread or systematic usage.

State Tort Claims. Sovereign immunity has been eroded through the actions of courts and legislatures and now survives in relatively few states. Most states have enacted tort claims statutes that provide for waiver of such immunity for certain types of tort actions and define the conditions under which states, their agencies, and their employees may be held accountable for damages resulting from negligence.

Tort claims involving state highways range from occasional disasters like bridge collapses to more routine problems involving maintenance, slick pavements, edge dropoffs, guard rails, obstructions, and fallen signs or trees. Relatively few state transportation agencies have authority for handling administrative-level tort claims or defending against claimants in court. The following responses illustrate common situations:

- "[We] do not [have an ADR policy]. However, Court rules require in civil cases that ADR be utilized or considered—this includes all tort cases. [We are] represented by the Attorney General and we abide by their policies, rules, etc. for our representation."
- "Although we do not have a formal ADR process for tort claims, the court system requires mediation before going to trial."

Mediation. In agencies that have employed mediation, responses suggest that it is viewed mostly in a positive light. One state claims administrator noted that, compared to litigation, mediation offers the agency a better opportunity to communicate effectively with a claimant and his or her attorney. Similarly, an agency litigator observed that, with a good mediator who can manage communications effectively, the agency has a chance to "learn something or get points across to the other side." Others pointed out that a mediator who has the parties' respect can play an important role in influencing each party's expectations in light of potential risks they may face going forward.

The Kansas court-annexed mediation process, which appears to be fairly typical, has been used fairly extensively by the Kansas DOT. A DOT representative estimated that about 80 percent of its tort cases that go to mediation settle either on the day of the mediation session or shortly thereafter. In this process, before the mediation session takes place, the parties submit settlement position papers discussing (usually) the facts of the case; the damages involved; the strengths and weaknesses of their case; and sometimes, percentages of liability and probable damage awards. The parties may also submit exhibits, expert reports, deposition transcripts, or other items they believe will be helpful to the mediator's preparation.

On the day of mediation, the mediator will talk with both parties in joint session, explaining his or her take on the case; overseeing exchanges offers and counteroffers; and playing devil's advocate in the interest of resolution. The position papers and the discussions in mediation are confidential. Neither party is required to reach agreement, but each must (absent extenuating

[62] 545 U.S. 469, 125 S. Ct. 25, 162 L. Ed. 2d 439 (2005).

[63] S. 1883, Latest major action: Oct. 18, 2005, Referred to Senate Committee. Status: Read twice and referred to the Committee on Environment and Public Works.

circumstances) have a person present with settlement authority. While mediators are not required to have any specific formal training or qualifications, most mediators used by the Kansas DOT have practiced law, including litigation, and have mediation training.

A few state entities charged with settling claims for injury or damage arising out of the torts of governmental entities, such as the Mississippi Tort Claims Board, are explicitly authorized to participate with interested claimants in voluntary, nonbinding mediation of tort claims against state agencies. Finally, an occasional survey reply stated that an agency tort officer who handles claims has received some interest-based negotiation or ADR training.

A state in which court-annexed ADR has been employed extensively for transportation tort claims is California, where mediation by Caltrans has increased over the past decade or so. Previously, according to interviews, nonbinding, court-based arbitration was the most common ADR process for tort cases, but relatively few of these claims are now arbitrated. Arbitration's decline has stemmed in large part from its nonbinding nature, which caused it to be used often as "just another step in the litigation process."[64] California attorneys who were interviewed characterized mediation of these claims as very useful, especially compared to arbitration, with one saying, "The better-prepared you are, the better result you'll get." One attorney estimated that a very high percentage of cases mediated (up to 90 percent) were resolved in, or shortly after, the mediation session.

Arbitration. In Missouri, a plaintiff may request arbitration of a negligence claim against the DOT, in which case the agency must submit to arbitration by a panel of three.[65] This system was created in 1999 by a statutory amendment offering little detail that was approved with little discussion and a scanty legislative history. In *Murray v. Missouri Highway and Transportation Commission*,[66] the Missouri Supreme Court rejected the commission's challenge to the arbitration statute. The commission raised one statutory objection and three constitutional challenges to the arbitration requirement, but the supreme court, after examining the state constitution and case law, saw no objection to forcing the agency to arbitrate without its express agreement.

Federal Tort Claims. Survey results indicate fairly little ADR use by FHWA or other transportation agencies under the Federal Tort Claims Act of 1946 (FTCA). That Act waived the defense of sovereign immunity that had previously required victims of government wrongdoing to seek relief via congressional enactment of a private bill and permitted damage actions against the United States for injury, loss of property, or death caused by the negligent or wrongful acts or omissions of federal employees acting within the scope of their employment.[67] Much of the responsibility for determining what redress is warranted lies with federal agencies, since, as a prerequisite for suit, a claim must be presented to the responsible agency, and the agency has a minimum of 6 months in which to act. USDOT and many other agencies now have procedures for the presentation and adjustment of tort claims. They may settle tort claims in any amount, subject to prior written approval by the U.S. Department of Justice for settlements in excess of a specified level and subject to a duty to exercise their settlement authority "in accordance with regulations prescribed by the Attorney General."

In 1990, Congress amended the Administrative Disputes Resolution Act, which prompted the adoption of new regulations under the FTCA to encourage agency use of ADR to resolve administrative tort claims.[68] In amending its regulations on agencies' administrative handling of tort claims to implement this provision, the U.S. Department of Justice cautioned,

> ADR processes should not be adopted arbitrarily but rather should be based upon a determination that use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims. If alternative dispute resolution techniques will not materially contribute to the prompt, fair, and efficient resolution of claims, the dispute resolution processes otherwise used pursuant to these regulations shall be the preferred means of seeking resolution of such claims.[69]

The revised regulations also required an agency, before using an ADR process to facilitate resolution of a dispute in which a claimant seeks any amount exceeding the agency's delegated settlement authority, to submit a substantial justification (including a statement reflecting the claimant's consent to use a specific form of ADR) and obtain written approval from the U.S. Department of Justice (14.6(b)).

Since then, agencies' initiatives to enhance their use of ADR in processing tort claims administratively have

[64] In California, as in some other state courts, a penalty may be incurred if, after a trial de novo on a matter originally decided by an arbitrator, the party appealing an arbitrator's decision to the court fails to improve the party's position in the trial de novo.

[65] MO. REV. STAT. SUPP., § 226.095 (1999).

[66] 37 S.W.3d 228 (Mo. 2001).

[67] It provided that the United States shall be liable in the same manner and to the same extent as a private individual under like circumstances in accordance with the law of the place where the negligent or wrongful conduct occurred. Besides the FTCA, dozens of other "meritorious claims" and other statutes afford an administrative or judicial remedy for certain additional kinds of losses occasioned by federal government actions. These statutes vary considerably as to kinds of claims covered, claimants eligible, remedies available, proof required, and procedures followed.

[68] The ADR Act of 1990 also provided that the Department of Justice could raise any agency's authority to settle tort claims without prior Department of Justice approval from $25,000 to an amount not to exceed "the authority delegated by the Attorney General to the United States attorneys to settle claims for monetary damages against the United States."

[69] Section 14.6(a)(3).

been haphazard. The survey for this report identified no significant use of ADR by federal transportation entities. The director of the DOJ's FTCA staff has recently expressed his belief that the vast majority of tort claims are resolved more efficiently by the administrative claims process than they would be by ADR methods.[70] In his view, "The administrative claims process of the FTCA is a dispute resolution tool that works...better than traditional ADR techniques involving third-party intervention." This is because:

- The administrative claims process begins, and often resolves, a dispute before litigation even starts.
- Third-party ADR is often unnecessary and an additional time and monetary expense, because the focus of the usual FTCA case is resolution and fair compensation, not preservation of the parties' relationship.
- Administrative claims avoid the implementation obstacles of third-party ADR techniques, without the added time and expense of third-party ADR.
- Since the administrative claims procedure is mandated by statute, agencies do not need to obtain the voluntary agreement of a private party to proceed with the resolution process.[71]

Mass Torts Claims Processes. The growing propensity to establish mass claims facilities reflects case management needs, as well as changes in legal doctrine and a sense in some quarters that the civil justice system is not well-suited for certain large-scale personal injury litigation. Some advocates for these processes even suggest that litigation precludes timely community recovery and promotes chronic social and psychological impacts.[72] ADR methods and expedited decision-making processes have figured in some of these claims processes.

While mass claims facilities have mostly addressed employment-related or consumer injuries for which large numbers of claimants might have otherwise sought court relief (e.g., claims based on environmental, product liability, or pharmaceutical injuries), several statutory schemes have been created to handle potential tort claims for injuries from transportation-related disasters. For example, following the October 1989 Loma Prieta earthquake, the California legislature created a procedure to aid the victims of the resulting collapse of the San Francisco–Oakland Bay Bridge and the I-880 Cypress structure. It created a special fund to pay claims arising from that disaster promptly without litigation against the state and without regard to legal liability or fault.[73] Claimants were allowed to file an application with the State Board of Control for compensation based on personal property loss, personal injury, or death, including noneconomic loss, arising from these structures' collapse. The Board had 6 months to evaluate an application. Applicants could seek emergency payments for fixed amounts (e.g., $50,000 for death of a spouse or for death of a parent of a dependent minor). The Board was directed to appoint a person to facilitate the settlement process, subject to rejection by the Alameda County Superior Court.

A similar statutory scheme was created for victims and families after the September 11, 2001, terrorist attacks. The September 11 Victim Compensation Fund was enacted by Congress[74] 2 weeks after the attacks to offer an alternative to litigation (against airlines and others) for eligible family members of the approximately 3,000 people who died and for individuals who were injured. Congress delegated the authority to administer the fund to the U.S. Department of Justice, acting through a Special Master. Kenneth Feinberg—a Washington, D.C., attorney specializing in mediation, arbitration, and negotiated resolution of complex legal disputes—was named to administer the fund, manage all claims brought by victims and their families, and disseminate all public information concerning the fund.

The Special Master established regulations[75] governing payments from the September 11 Victim Fund for economic and noneconomic loss, based on estimates as to how much each victim would have earned in a full lifetime. He also oversaw the claims process. Claimants who accepted a payment offer were prohibited from appealing; those who rejected the offer were able to present their case face-to-face in an informal, nonadversarial administrative appeal. In 33 months, the fund disbursed $7 billion, based on the claims of 2,880 deceased and 2,680 injured victims of the attack. The Special Master estimated that 97 percent of the families of deceased victims who might have sued to recover tort damages opted for the fund instead.

III. LEGAL, POLICY, AND PRACTICAL ISSUES IN TRANSPORTATION AGENCY ADR

A. Agency Authority to Use Settlement Negotiation, Facilitated Decision-Making Processes, and Binding Arbitration

1. Negotiation and ADR Authority Generally. Transportation agencies' ADR use has occurred in a variety of contexts, and in some cases has stemmed from statutes,

[70] Jeffrey Axelrad, *Recent Developments Federal Agency Focus: The Department of Justice, Federal Tort Claims Act Administrative Claims: Better Than Third-Party ADR for Resolving Federal Tort Claims*, 52 ADMIN. L. REV. 1331 (2000).

[71] *Id.*

[72] J. Steven Picou, Brent Marshall & Duane Gill, *Disaster, Litigation, and the Corrosive Community*, 82 SOC. FORCES 1493 n.4 (June 2004).

[73] CAL. GOV'T CODE §§ 997 *et seq*.

[74] September 11th Victim Compensation Fund of 2001, 107 Pub. L. No. 42 , tit. IV, 115 Stat. 230, 237–41 (2001) (*codified as amended in scattered sections of* 49 U.S.C.A. (West Supp. 2005)).

[75] September 11th Victim Compensation Fund of 2001 (Final Rule), 67 Fed. Reg. 11,233 (Mar. 13, 2002) (codified at 28 C.F.R. pt. 104).

executive orders, rules, or other policies that encourage and enable agencies to establish and employ ADR processes.[76] Some of these laws and policies address ADR processes' relationship with the existing legal and administrative framework. It is worth noting, though, that state and federal laws, executive orders, and policies have built on a long history of flexible settlement practice. Typically these new authorities have sought to do little more than clarify and expand existing practices:

- Authorize or require designation of an individual or office to serve as agency ADR coordinator,
- Eliminate any uncertainty as to agency authority to fashion alternate, consensual resolution procedures that make use of neutral third parties,
- Assure that participants understand the confidentiality protections accorded in ADR processes, and
- Offer guidance as to how agencies should proceed regarding novel policy questions that these processes may occasion, such as case criteria for employing ADR; use of (and limits on) binding arbitration procedures; enhanced confidentiality protections; neutrals' qualifications, duties, and selection; judicial review; and relation to other statutes affecting agency decision making or dispute resolution.

ADR usage by state and federal transportation agencies does not appear to have provoked significant legal or other controversy; indeed, some legislation (like the Federal Administrative Dispute Resolution Act) has afforded agencies broad, virtually unreviewable discretion to choose whether and how to employ these ADR processes.[77] The major exception has been agency use of binding arbitration by private arbitrators, which—unlike other ADR methods in which final decisional authority remains with the parties—has given rise to some concerns and constraints.[78]

Flexibility regarding agency ADR decisions is consistent with state and federal agencies' longstanding authority to handle disputes informally in carrying out their statutory missions; their resort to negotiation and most ADR processes is long established.[79] Agencies' discretion extends explicitly to a variety of activities: deciding whether to make policy via rulemaking, adjudication, or other means; determining whether and how to enforce laws and policies; bringing and settling litigation or other proceedings; deciding on appropriate relief; and structuring settlement processes.[80] State and federal agencies' ADR usage fits within their historical freedom to develop the precise manner by which they implement the opportunity for settlement;[81] reviewing courts have consistently recognized agencies' inherent discretion to take actions necessary to conduct such activities[82] and have accorded agencies' procedural choices a high degree of deference.[83]

Even in many states where transportation agencies have not received explicit legislative or regulatory authority to employ ADR, transportation agencies have exercised their inherent powers to enter into agreements to conduct mediations, minitrials, negotiated rulemakings, and other assisted resolution processes, as

[76] *See* SARAH COLE, CRAIG MCEWEN & NANCY ROGERS, MEDIATION: LAW, POLICY, PRACTICE APP. B (2d ed. 2001 and 2001 Supp.).

[77] Under that Act, agency decisions to use, or not use, an ADR proceeding are committed to agency discretion and not subject to judicial review. 5 U.S.C. § 581.

[78] The digest discusses concerns about arbitration later in this section and in the Contract Disputes section, above.

[79] In 1947, the *Attorney General's Manual* described informal procedures as "truly the lifeblood of the administrative process." U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 48.

[80] Professor Peter Shane has noted:

> A core lesson of modern administrative law is that our government of laws is profoundly a government of discretion. Many significant federal administrative decisions are not subject to any great procedural constraint as to their timing, origination, or format…[T]he forces that constrain discretion are often informal and largely beyond the capacity or desire of courts to review…One critical executive function where discretion infuses the execution of the laws is the conduct of government litigation. Not only government decisions to bring suit, but also the host of government decisions entailed in responding to a suit, typically are left to the near-plenary discretion of the Attorney General and subordinate lawyers.

Peter H. Shane, *Federal Policy Making By Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. CHI. LEGAL F. 241.

[81] Philip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 1 ADMIN. L.J. 315 (1989).

[82] The APA's legislative history makes clear that "even when formal hearing and decision procedures are available to parties, the agencies and parties are authorized to undertake the informal settlement of cases…before undertaking the more formal hearing procedure…." S. DOC. NO. 79-248, at 24 (1945). Schering Corp. v. Heckler, 250 U.S. App. D.C. 293, 779 F.2d 683 (D.C. Cir. 1985), supports the view that an agency's decision to settle an enforcement action is nonreviewable. Moreover, courts tend to leave up to the agency the "precise nature of [such] informal procedures" and how an agency chooses to structure its behavior when engaging in such procedures. Action on Safety and Health v. FTC, 162 U.S. App. D.C. 215, 498 F.2d 757, 762–63 (D.C. Cir. 1974), for example, held that an agency's power to prescribe consent negotiation procedures is committed to agency's discretion and not subject to judicial review. The same Circuit later was "convinced that the FCC's decision to conduct…settlement negotiations in private was fully consistent with the discretion it is granted under the APA." NYS Dep't of Law v. FCC, 299 U.S. App. D.C. 371, 984 F.2d 1209 (D.C. Cir. 1993).

[83] *See, e.g.,* Heckler v. Chaney, 470 U.S. 821, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985) (finding the FDA's decision not to undertake enforcement action against an alleged violation of the food and drug laws to be "committed to agency discretion" under § 701(a)(2) of the APA; and Chemical Waste Management, Inc., v. EPA, 873 F.2d 1477 (D.C. Cir. 1989) (deferring to agency's interpretation of hearing provision in environmental statute as permitting an informal adjudication procedure).

well as to negotiate administrative and court settlements without assistance.

2. Agency Binding Arbitration. One ADR process—binding arbitration—has evoked some controversy in the public sector. After Congress passed the U.S. Arbitration Act in 1925, binding arbitration in private sector disputes became a widely accepted alternative to litigation. Numerous Supreme Court decisions have encouraged resort to arbitration.[84] For nearly a century, however, the General Accounting Office (GAO) (now the Government Accountability Office) took the view that unless a federal agency had explicit statutory authorization, it was prohibited from using a private arbitrator to decide the validity of virtually any claim involving the government.[85] In addition, many state legislatures were reluctant to accord agencies broad authority to enter into binding arbitration.

Recent changes in federal statute, especially the Federal Administrative Dispute Resolution Act,[86] underscore a growing modern acceptance of arbitration. That statute affords all agencies broad authority to arbitrate, and reverses the longstanding GAO prohibition by authorizing parties in federal administrative proceedings, including agencies, to agree to binding arbitration.[87] This occurred in two steps. When initially enacted in 1990, the Federal Act provided that the arbitral award did not become final and binding on an agency party for 30 days; it allowed the agency head to vacate an arbitral award during that period. The 1996 reauthorization of the Act eliminated this one-sided agency opt-out provision. The 1996 change was effected in part due to a 1995 memorandum from the U.S. Department of Justice's Office of Legal Counsel that found, contrary to the views of earlier administrations, no constitutional objections to agency use of arbitration.[88]

The Federal Act now authorizes, for the first time, "true" binding arbitration—or something very similar to it—for federal agencies, though agency arbitration is still subject to a few minor constraints. While the 1996 amendments authorize an agency to arbitrate in its discretion, they establish certain requirements an agency must meet before arbitrating disputes. Before engaging in binding arbitration, an agency must:

- Issue guidance, after consultation with the Attorney General, on the appropriate use of binding arbitration (5 United States Code (U.S.C.) § 575(c));
- Require that all agreements to arbitrate disputes be in writing and specify the subject matter to be submitted to the arbitrator for decision (5 U.S.C. § 575(a)(2));
- Include in the arbitration agreement the maximum award amount that may be granted by the arbitrator (5 U.S.C. § 575(a)(2));
- Require any agency officer or employee offering to use arbitration in resolution of a dispute to have either the authority to enter into a settlement concerning the matter or the specific authority to consent to arbitrate on behalf of the agency (5 U.S.C. §§ 575(b)(1) and (2)); and
- Not require anyone to consent to binding arbitration as a condition to contracting with the agency (5 U.S.C. § 575(a)(3)).

Finally, the use of binding arbitration must be voluntary on the part of all parties (5 U.S.C. § 575(a)(1)).[89]

At present, only a small handful of federal agencies have issued the requisite arbitration guidance. Two USDOT entities—the FAA and Federal Motor Carrier Safety Administration (FMCSA)—are among those that have established arbitration processes under this new authority. FAA arbitration use has been mainly in contract claims, and FMCSA has been party to arbitration in approximately a dozen civil penalty proceedings in which a commercial carrier has acknowledged that a penalty is appropriate and the only issues to be resolved are the amount of the penalty owed and the length of time in which to pay it. The agency has been unwilling so far to allow a private arbitrator to decide whether or not a violation of law occurred or whether or not a penalty is appropriate.[90] FMCSA's arbitral process involves what is known colloquially as "night baseball" arbitration, in which each party puts its best offer in a sealed envelope and gives it to the arbitrator. After hearing the evidence and determining how the dispute should

[84] *E.g.,* Shearson/American Express, Inc. v. McMahon, 483 U.S. 1056, 108 S. Ct. 31, 97 L. Ed. 2d. 819 (1987).

[85] Harold H. Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, Report to the Administrative Conference of the United States, ACUS 533 (1987), *reprinted in* 67 TEX. L. REV. 441 (1989); *see also* Berg, *Legal and Structural Obstacles to the Use of ADR in Federal Programs*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, AGENCY ARBITRATION (1987).

[86] 5 U.S.C. §§ 571–584 (general provisions, confidentiality, administrative arbitration); 5 U.S.C. § 556(c) (ADMIN. L. J. authority); 9 U.S.C. § 10 (arbitration, judicial review); 41 U.S.C. §§ 604–607 (contract disputes); 29 U.S.C. § 173 (FMCS authority); 28 U.S.C. § 2672 (tort claims); and 31 U.S.C. § 3711(a)(2) (government claims); enacted Nov. 15, 1990, by Pub. L. No. 101-552, 104 Stat. 2736; significantly amended Aug. 6, 1992, by 102 Pub. L. No. 354, 106 Stat. 944, and Oct. 19, 1996, by 104 Pub. L. No. 320, 110 Stat. 3870.

[87] 5 U.S.C. §§ 575–581.

[88] Constitutional Limitations on Federal Government Participation in Binding Arbitration, see http://www.usdoj.gov/olc/arbitn.fin.htm; (Last visited Feb. 15, 2008), *see also* Submission of Aviation Insurance Program Claims to Binding Arbitration, 20 Op. O.L.C. 341 (1996).

[89] For advice to agencies on implementing these aspects of Act's arbitral procedures, *see* Phyllis Hanfling and Martha McClellan, *Developing Guidance for Binding Arbitration: A Handbook for Federal Agencies* (distributed by the U.S. Department of Justice and the Federal Alternative Dispute Resolution Council, 1999), *available online at* http://www.adr.gov/arbitra.htm.

[90] *See* FMCSA 2003-14794, *Guidance for the Use of Binding Arbitration Under the Administrative Dispute Resolution Act of 1996*, 69 Fed. Reg. 10,288 (March 4, 2004).

be decided, the arbitrator then unseals the parties' proposed settlement amounts. The final award is the proposed penalty that is closest to the arbitrator's determination. The goal of this type of arbitration is to encourage the parties to make reasonable proposals.

Predictably, arbitration laws and practices at the state agency level vary greatly. Many states' transportation and other executive agencies still lack broad (or indeed any) arbitration authority. In some states, this limitation stems from the doctrine of sovereign immunity, with courts or attorneys general finding that a contract clause requiring binding arbitration would be an impermissible waiver of sovereign immunity. Agencies in those states are prohibited (by statute, case law, or legal interpretation) from agreeing to engage in binding arbitration or any other mandatory dispute resolution other than as required by state courts in legal actions.

While some states still view agency arbitration with disfavor, others (e.g., California, Mississippi, and several others) have embraced it for many government contract claims (especially in highway and other construction settings). These latter states' arbitration provisions are discussed in Section II.C, Contract Disputes, above.

B. Factors for Agencies Deciding Whether to Use ADR

The survey for this digest solicited agencies' guidance, policies, or informal advice as to how they have sought to structure their consideration of ADR options (e.g., policies that encourage or require consideration of ADR, criteria or presumptions for deciding whether to use ADR, or standards or processes for internal review of such decisions). It appears that these decisions have either received little attention or have been left to agency decision makers' discretion. In a few programs, like ROW mediation in Missouri, an agency has precommitted generally to engage in mediation if requested; some agencies are required by statute or policy either to accept ADR requests (e.g., Missouri DOT's tort arbitration) or at least offer reasons for declining (e.g., federal agency contract claims under the Federal Acquisition Streamlining Act). The other main exception involves court-annexed ADR in many states, in which judges may order parties, including agencies, into ADR processes.

Little systematic analysis or guidance for considering or assessing ADR options was located, apart from the statutes and executive orders mentioned above and in Section III.D (Implementing and Institutionalizing ADR in Transportation Agencies), above, and those discussed immediately below. The main exception located was the USDOT's ADR policy statement, which set forth a series of factors whose presence suggests ADR may be helpful in resolving a particular dispute:

- *Identifiable Parties.* There is an identifiable group of constituents with interests (the parties) so that all reasonably foreseeable interests can be represented.
- *Good Faith.* The parties are willing to participate in good faith.
- *Communication.* The parties are interested in seeking agreement, but poor communication or personality conflicts between the parties adversely affect negotiations.
- *Continuing Relationship.* A continuing relationship between the parties is important and desirable.
- *Issues.* There are issues that are agreed to be ripe for a negotiated solution**.**
- *Unrealistic View of the Issues.* The parties' demands or views of the issues are unrealistic. A discussion of the situation with a neutral may increase the parties' understanding and result in more realistic alternatives and options.
- *Sufficient Areas of Compromise.* There are sufficient areas of compromise to make ADR worthwhile.
- *Expectation of Agreement.* The parties expect to agree eventually, most likely before reaching the courtroom or engaging in other adversarial processes.
- *Timing.* There is sufficient time to negotiate, and ADR will not unreasonably delay the outcome of the matter in dispute. There is a likelihood that the parties will be able to reach agreement within a fixed time. There are no statutory or judicial deadlines that are adversely affected by the process. ADR may result in an earlier resolution of the dispute.
- *Resources.* The parties have adequate resources (budget and people) and are willing to commit them to the process.[91]

The sole statute found containing detailed guidance on using ADR for transportation agencies is the federal Administrative Dispute Resolution Act. Recognizing that ADR may be inappropriate in certain settings, that Act states that agencies should "consider not using" it under certain conditions:

- A definitive or authoritative resolution of the matter is required for precedential value and such a proceeding is not likely to be accepted generally as an authoritative precedent;
- The matter involves or may bear upon significant questions of government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;
- Maintaining established policies is of special importance, so that variations among individual decisions are not increased, and such a proceeding would not likely reach consistent results among individual decisions;
- The matter significantly affects persons or organizations who are not parties to the proceeding;
- A full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and

[91] 65 Fed. Reg. 69,121 (Nov. 15, 2000).

• The agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement (U.S.C. § 572(b)).

The ADR Act's admonition to "consider not using" ADR does not simply instruct an agency not to use ADR in a case involving one of these factors (e.g., affecting public policy), but involves a subtler balancing. While the Act sets forth some situations in which an agency might well decide not to employ ADR, in many of these cases mediation and similar methods may still prove very useful. The Act's approach was intended to afford agencies maximum discretion, reinforced by the Act's provision for general nonreviewability of almost all agency decisions on use of ADR. Voluntary use of ADR is never specifically forbidden, and the Act's structure indicates that ADR is generally presumed appropriate—the provision does not state that the agency "shall not consider," and the section employs the conjunctive "and." Thus, the Act's drafters appear to have intended that agencies, in exercising their very broad discretion, take into account all factors and qualifiers as to when, and what kind, of ADR methods to use. In no case does it (or almost any other statute governing an agency decision on employing ADR) require a formal finding or justification.[92]

C. Maintaining Confidentiality of Sensitive ADR Communications

1. Background. Confidentiality is a critically important feature of ADR processes, since many of the benefits of ADR processes can be realized only if these proceedings are protected from disclosure. However, this feature of ADR is complicated, especially given the divergent approaches that transportation entities (and indeed most agencies) have taken to addressing protection of sensitive communications. Interviews indicate that confidentiality is often misunderstood, and occasionally even controversial—especially in the context of governmental ADR.

These reasons have been advanced for strictly limiting disclosure of ADR communications:

• Confidentiality enhances participants' frank and open communications in, and effective use of, ADR processes. It assures parties that they may raise sensitive issues and discuss creative ideas and solutions that they would be unwilling to discuss publicly. A party may be willing to accept something less or different than he or she is advocating formally, but could fear that revealing that willingness in an assisted negotiation would be used to his or her harm in the event that negotiations do not succeed completely. Without assurance that confidences will not be disclosed, parties would be far less willing to discuss freely their interests and possible settlements.

• A neutral's disclosure of private recollections or documents could affect his or her perceived neutrality, be misconstrued as showing bias, and seriously disadvantage a participant. Some courts have found that public confidence in, and the voluntary use of, ADR can be expected to expand if people have confidence that the neutral will not take sides or disclose their statements, particularly in the context of other investigative or judicial processes. This public confidence rationale has been extended to permit the neutral to object to testifying, so that the neutral will not be viewed as biased in future mediation sessions that involve comparable parties.[93]

• In practice, even one or two cases where expectations of confidentiality are seriously undermined could precipitate a damaging loss of trust in ADR generally and inhibit future participation in ADR processes.

For these reasons, legislatures, courts, and most people knowledgeable about ADR processes[94] have established protections to assure ADR participants that what they say and do in an ADR process will not later be used to their detriment.[95] ADR neutrals are expected to avoid disclosure—either as an ethical duty, a legal

[92] The sole exception identified was the Federal Acquisition Streamlining Act, Pub. L. No. 103-355, Oct. 13, 1994, 41 U.S.C. § 405, which specifically allows small business contractors to request ADR from agencies and requires that, if a contracting officer rejects such a request, he or she must provide a written explanation that cites specific reasons why ADR is not appropriate for that dispute. Conversely, a contractor that rejects an agency offer to use ADR must inform the agency in writing of its specific reasons.

[93] *See*, *e.g.,* NLRB v. Macaluso, 618 F.2d 51 (9th Cir. 1980) (public interest in maintaining the perceived and actual impartiality of mediators outweighs the benefits derivable from a given mediator's testimony).

[94] *See, e.g.,* Administrative Conference Recommendation 88-11, 54 Fed. Reg. 5212 (Feb. 2, 1989), and 1 C.F.R § 305.88-11 (1992); Lawrence R. Freedman and Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection, Symposium: On Critical Issues in Mediation Legislation*, 2 OHIO ST. J. ON DISP. RES. 37, 43–44 (1986); Philip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality,* 41 ADMIN. L. J. 315, 323–24 (1989); Alan Kirtley, *The Mediation Privilege's Transformation from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1, 17.

[95] Rule 408 of the Federal Rules of Evidence has long recognized the need for confidentiality in the context of settlement negotiations, and precludes introduction of the parties' positions in settlement negotiations into evidence. Rule 408 recognizes the parties' need to speak candidly regarding settlement offers, without fear that those positions will later be used against them in the event the dispute is not settled. Similarly, Rule 26(b)(3) of the Federal Rules of Civil Procedure recognizes that parties to a dispute must have some confidentiality protection for their own thoughts and honest evaluations of their positions, and thus protects material prepared by the parties or their representatives in anticipation of litigation.

obligation, or both.[96] Parties and other participants' disclosure is also usually strictly limited by statute, rule, or contract.[97]

2. Confidentiality Generally. ADR statutes covering most state and federal transportation agencies' dispute resolution generally provide some combination of "process" confidentiality (i.e., protecting the confidentiality of the ADR process from disclosure to outsiders) and *ex parte* confidentiality (i.e., protecting confidential communications between a party and the neutral from disclosure to other parties or to outsiders). Protecting process confidentiality may include limiting who can attend ADR sessions; prohibiting recording of sessions; destroying notes at the conclusion of the process; prohibiting disclosure of communications to outsiders; and restricting use of communications by parties. Protecting ex parte confidentiality may include preventing disclosure of a party's sensitive caucus communications and party-supplied materials to other parties or to outsiders.

3. Jurisdictions' Approaches to Protecting Confidentiality. In transportation agency and other settings, the rules governing confidentiality in the ADR process will almost always be shaped by specifically applicable legal standards—e.g., a state or federal statute, court or agency rule, or agreement among the participants. But ADR confidentiality statutes and rules take many different approaches,[98] and a general survey for this report indicates that parties' rights and obligations vary considerably:

- Even today, some jurisdictions have no law or rule governing ADR confidentiality for transportation and other state agencies' disputes, apart from whatever parties may contract for *inter se* at the outset of a proceeding.[99] In those states, like New York, no statute protects confidentiality in transportation or other governmental ADR unless it occurs in a court proceeding.
- Recent enactments in several states—most notably the Uniform Mediation Act (UMA)—have created a privilege protecting against use of mediation communications in a range of proceedings that take place after the mediation, including civil and criminal trials, administrative hearings, arbitrations, and legislative proceedings.[100] Under the UMA, now adopted in Illinois, Iowa, Nebraska, Ohio, New Jersey, Utah, Vermont, Washington, and the District of Columbia,[101] a participant in agency-level and most other transportation-related mediations (but no other ADR processes) would ordinarily be precluded from testifying in court; he or she might not be prohibited from disclosing mediation communications in other, less formal contexts.[102]
- Still other statutes—like the Administrative Dispute Resolution Act (establishing a statutory framework for administrative-level use of ADR by all federal agencies)—operate flatly to prohibit unauthorized disclosure by an ADR neutral or party in a court or any other setting, subject to some specific exceptions.
- Some statutes and agency or court rules have endorsed the notion that ADR processes should be "confidential" without defining that term or delimiting exceptions. For example, the Alternative Dispute Resolution Act of 1998 requires every U.S. District Court to implement an ADR program, but leaves the issue of ADR

[96] For instance, the Standards of Conduct for Mediators—probably the most widely recognized mediator ethics code—require that a mediator "maintain the reasonable expectations of parties with regard to confidentiality." While acknowledging that the parties' confidentiality expectations depend on the circumstances of the mediation and any agreements they may make, these Standards state that a mediator "shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy." These Standards, first adopted in 1994 by the American Arbitration Association (AAA), the Section of Dispute Resolution of the ABA, and the Society of Professionals in Dispute Resolution (now the Association for Conflict Resolution (ACR)), address the mediator's duties as regards issues like party self-determination, neutrality, bias, and confidentiality. Other ethical standards include the CPR-Georgetown Commission on Ethics and Standards in ADR's Model Rule for the Lawyer as Third-Party Neutral (Nov. 2002); JAMS Mediator Ethics Guidelines (2003), http://www.jamsadr.com/mediation/ethics.asp. (Last visited Feb. 14, 2008).

[97] For other perspectives that are somewhat more skeptical about the critical importance of confidentiality, *see generally* Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986); Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 MARQ. L. REV. 9 (2001).

[98] SARAH COLE, NANCY H. ROGERS & CRAIG MCEWEN, MEDIATION: LAW, POLICY, PRACTICE (2d ed. Supp. 2003) (apps. A and B, 2003); *see, e.g.*, ARIZ. REV. STAT. ANN. § 12-2238 (West 1993); ARIZ. REV. STAT. ANN. § 16-7-206 (1997); IOWA CODE § 679C.2 (1998); KAN. STAT. ANN. § 60-452 (1964); LA. REV. STAT. ANN. § 9:4112 (1997); ME. R. EVID. § 408 (1997); MASS. GEN. LAWS ch. 233, § 23C (1985); MONT. CODE ANN. § 26-1-813 (1999); NEV. REV. STAT. § 48.109(3) (1993); OHIO REV. CODE ANN. § 2317.023 (West 1996); OKLA. STAT. TIT. 12, § 1805 (1983); OR. REV. STAT. ANN. § 36.220 (1997); 42 PA. CONS. STAT. ANN. § 5949 (1996) (general); R.I. GEN. LAWS § 9-19-44 (1992); S.D. CODIFIED LAWS § 19-13-32 (1998); TEX. CIV. PRAC. & REM. CODE § 154.053(c) (1999); UTAH CODE ANN. § 30-3-38(4) (2000); VA. CODE ANN. § 8.01-576.10 (1994); WASH. REV. CODE § 5.60.070 (1993); WIS. STAT. § 904.085(4)(a) (1997); WYO. STAT. § 1-43-103 (1991).

[99] The UMA's drafters found that only 25 states had enacted confidentiality statutes of general application.

[100] Section 2(7).

[101] Legislation to implement the UMA has recently been introduced in Connecticut, Indiana, Massachusetts, and Minnesota.

[102] Experts and practitioners in states with strong mediation statutes (e.g., California, Texas, Florida) have expressed concern that adoption of the UMA's "weaker" model might have the effect of eroding "strong" ADR statutes in their, or other, states. However, in the considerable number of states with little or no ADR authority on the books, the UMA is likely to afford agencies and other parties significant new protection for communications made in ADR.

confidentiality to local rule, yielding a proliferation of confidentiality rules.[103]

Given the disparate approaches taken, broad generalizations about definitions and protections for communications in ADR are difficult—particularly in governmental contexts, where statutes (or agency rules) are especially complex and have taken diverse approaches to striking a balance between open government, oversight, and confidentiality. The Reporter's Notes to the Uniform Mediation Act[104] offers a good overview, pointing out that while many states have adopted some form of privilege reflecting a strong public policy favoring ADR confidentiality, in most states this policy has been effected through statutes or other authorities with large gaps in their coverage. Existing statutory provisions frequently vary in key respects, not only from state-to-state but within a state, and the scope and even existence of any protection often varies depending on whether the mediation takes place in a court, an agency, a community program, a private setting, or elsewhere. Common variables include definitions of ADR or mediation, scope of the ADR processes and activities covered, nature and scope of the protection afforded, whether and how confidentiality may be waived, exceptions created,[105] impact on open records and other laws, procedures for handling access requests, and subject matter of the disputes covered.

4. ADR Confidentiality and Open Records Laws. Besides these issues, a recurring concern in government is what impact ADR confidentiality laws have on other statutes, especially open records or freedom of information statutes. Results vary among jurisdictions. Section 574(j) of the Federal Administrative Dispute Resolution Act of 1996 provides generally that the Act is a statute specifically exempting disclosure under the Freedom of Information Act.[106] Similarly, Texas and several other states have adopted statutes explicitly making ADR confidentiality provisions available to governmental disputants and establishing an exception to public information acts for records relating to an ADR proceeding.[107]

While the UMA's drafters avoided taking a position as to that Act's impact on state open meetings and open records acts,[108] some implementing states have sensibly concluded that allowing such disclosure via open records requests could seriously harm agencies' ADR use. Thus, Washington has provided that all work product or case files of dispute resolution centers are confidential and privileged, notwithstanding state open records laws. Ohio has taken a different approach to obtain a similar result, providing that records privileged under the UMA are not considered public records and thus not subject to disclosure under the open records act.[109]

A related issue that a few agencies have had to face[110] involves conflicts with other laws and policies that afford access to government information. While ADR statutes' policies against disclosing dispute resolution communications tend to be clear, occasionally situations have arisen when a party, an investigator, or other entity has sought to compel a neutral to divulge ADR communications under claims that its request supersedes any restrictions on disclosure. For example, a number of entities are authorized to obtain certain documents from agency employees. At the federal level, statutes according such access include the Inspector General Act of 1978 and the Whistleblower Protection Act.[111]

5. Guidance on Agency ADR Confidentiality. While governmental confidentiality disputes have not been frequent, they have given rise to enough uncertainty and concern to lead some authorities to offer advice to minimize future clashes. Most notably, in 2000 the Federal ADR Council—a group created by Executive Order whose members are drawn from federal agencies active in ADR—issued (in conjunction with the DOJ) a guidance document entitled, *Confidentiality in Federal Alternative Dispute Resolution Programs.*[112] It noted that confidentiality is "a critical component of a successful ADR process," and suggested several practical steps to minimize the likelihood of disclosure disputes. An American Bar Association Federal ADR Confidentiality Committee completed a collaborative effort in 2005, publishing a *Guide to Confidentiality under the Administrative Dispute Resolution Act*.[113] This volume offered

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[103] Gregory A. Litt, *No Confidence: The Problem of Confidentiality by Local Rule in the ADR Act of 1998,* 78 TEX. L. REV. 1015 (2000).

[104] http://www.pon.harvard.edu/guests/uma/ (Last visited Feb. 14, 2008).

[105] Typical exceptions to confidentiality permit disclosures of threats of bodily harm or reports of child abuse and neglect.

[106] This statute reverses the approach taken initially by the 1990 version of that Act; *see generally* Mark H. Grunewald, *The Freedom of Information Act and Confidentiality Under the Administrative Dispute Resolution Act*, Report to the Administrative Conference of the U.S., 1994–95 ACUS 557, *reprinted in* 9 ADMIN. L. J. AM. U. 985 (1996).

[107] The Texas statute excepts records of communications made between the impartial third party and a disputant and between the disputants that are relevant to the dispute and made during the dispute resolution procedure. The statute also exempts the notes of the impartial third party from discovery and disclosure pursuant to the Public Information Act. These exceptions are outlined in § 2009.054(b)(1) and (2).

[108] Section 8 (Confidentiality).

[109] OHIO REV. CODE, § 149.43 (A)(1)(i).

[110] In re Grand Jury Proceeding, 148 F.3d 487 (5th Cir. 1998; see Charles Pou, *Gandhi Meets Eliot Ness: 5th Circuit Ruling Raises Concerns about Confidentiality in Federal Agency ADR*, DISP. RESOL. 9 (1998); *reprinted in* ADMIN. L. & REG. NEWS 5 (1999).

[111] 5 U.S.C. app. 3, § 6(a)(2) and 5 U.S.C. § 1212(b)(2); *see also* USA PATRIOT Act, 107 Pub. L. No. 56, 115 Stat. 272 (2001) (esp. 18 U.S.C. 2701–2709) (ch. 121).

[112] 65 Fed. Reg. 83,085 (Dec. 29, 2000).

[113] http://meetings.abanet.org/webupload/commupload/DR030450/relatedresources/CopyofGuideFinalJul05.pdf.

analysis and tips to assist program administrators, neutrals, and others on dealing with day-to-day issues like intake, preliminary conflict assessments, confidentiality agreement drafting, document handling, access requests, evaluation, and training. The next section of this digest contains advice on confidentiality, drawn from these documents and interviews conducted in connection with the digest survey.

D. Implementing and Institutionalizing ADR in Transportation Agencies

1. General. Among the transportation agencies that have made major use of ADR processes, a few have adopted policies or systems. Indeed, some agencies that have found the most substantial benefit in these methods have suggested that ADR use

> needs to grow into a system of pro-active conflict management as opposed to a one-shot reaction to a presenting dispute. The key to reducing conflict is early intervention and anticipatory dispute resolution which prevent an escalation of a mere disagreement into a public dispute, draining agency resources and impeding agency work.[114]

A few agencies have sought to follow this "conflict management" path by making commitments to agree to ADR in one or more areas: that is, to "say yes" when another party requests that they engage in mediation or another ADR process. The thinking behind taking this approach is that it signals an openness to expeditious case handling and reduces the likelihood that offering or agreeing to ADR will be perceived by other parties as an "appearance of weakness" or will signal a lack of confidence in the merits of a case.

Several transportation agencies have established a dispute resolution program (or at least some capacity) serving to promote the use of ADR or assist transportation agency personnel with its use. In some states, this has been done through executive order or legislation or simply high-level interest and support within particular agencies. Governors in Alabama, Florida, Massachusetts, New Mexico, Oregon, Pennsylvania, and Utah have issued executive orders requiring state agencies to appoint dispute resolution coordinators, assess their use of ADR, and develop plans to increase ADR use.[115] In several states, legislation encouraging or mandating similar steps has been approved. Florida and Washington have incorporated ADR provisions as amendments to their state administrative procedures acts. The states of New Mexico, Oregon, Texas, and Virginia have enacted freestanding government ADR statutes and rules to authorize agencies to use ADR or require appointment of ADR coordinators.

At the federal level, the 1990 Administrative Dispute Resolution Act, and its 1996 successor, mandated an internal review process for agencies to consider whether, and under what circumstances, ADR techniques may help it to fulfill statutory duties more effectively. It required each agency head to designate a senior official to be the agency dispute resolution specialist (DRS). This DRS oversees the implementation of ADR activities and development of an agency policy on ADR, seeks to help counsel and program officers make effective use of available ADR options, and makes training available to its specialist and other employees involved in implementing the Act.

2. Transportation Agency Implementation. Several jurisdictions have undertaken substantial efforts to institutionalize their use of ADR; with very few exceptions, these conflict resolution steps in most transportation agencies have not matched activity to institutionalize a related function—public involvement. While all DOTs appear to (1) support staff positions (individuals, small teams, or entire divisions) charged with "stewarding" public involvement implementation, coordination, and capacity building and (2) use some external assistance in the form of private consultants at some point in their public involvement planning or project development process, ADR implementation has tended to be patchy.

USDOT. Pursuant to the Administrative Dispute Resolution Act's mandate and a subsequent policy

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[114] Federal Interagency Alternative Dispute Resolution Working Group, et al., *Report for the President on the Use and Results of Alternative Dispute Resolution in the Executive Branch of the Federal Government* (2007) (available at http://www.adr.gov/pdf/iadrsc_press_report_final.pdf).

[115] To date, the following states have Executive Orders (EO) aimed at the implementation of dispute resolution processes:

- Alabama (1998 and 2003)—Two EOs promoted the use of ADR by state agencies and established a state agency Task Force to facilitate ADR implementation through education, training, and coordination of activities among agencies.
- Florida (2002)—Required 15 executive state agencies to assess their current use of dispute resolution, appoint a DR coordinator, and develop plans to increase agency use of ADR.
- Massachusetts (1999)—Identified the benefits of using ADR in state government, and required state agencies to "work diligently to fully utilize, wherever appropriate, alternative dispute resolution to resolve disputes."
- New Mexico—Designated the Risk Management Division as the lead agency for implementing a Governmental Dispute Resolution Act, also passed in 2000, and required the head of each executive agency to designate ADR coordinators to encourage and facilitate the use of ADR in their agencies.
- Oregon (2000)—Called for each state agency to review its processes for managing conflicts and controversies, and to take steps to ensure their ADR processes are efficient and effective. Required heads of all agencies with more than 50 employees to appoint a DR coordinator.
- Pennsylvania (2002)—Directed state agencies, departments, boards, etc., to become familiar with mediation, and regularly explore, encourage, and facilitate its use. Also directed these entities to designate a Mediation Coordinator who encourages and facilitates the use of mediation.
- Utah (2003)—Directed larger state agencies to designate a DR Coordinator, and smaller agencies to arrange for a representative to participate in an ADR Council, established under this EO, of executive branch agency representatives and other participating agencies.

statement by Secretary Norman Mineta,[116] USDOT established a Dispute Resolution Council to further the use of ADR across the Department. Headed by the Department's Dispute Resolution Specialist, it is comprised of representatives appointed by heads of each modal administration, Secretarial officers, and the Inspector General; members serve as Deputy Dispute Resolution Specialists to promote and coordinate the use of ADR. Among other things, USDOT's Dispute Resolution Council examines how the Department is currently using ADR in headquarters and regions and makes recommendations for improvements; explores the use of ADR techniques in connection with specific areas; and assists in coordinating the development of ADR programs and finding mediators or other ADR neutrals.[117] The Department's Dispute Resolution Specialist's office (the Center for ADR) works with organizations and individuals to increase USDOT's knowledge, quality, and use of ADR; offers informational and skills-based training on preventing and mitigating conflict; provides conflict assessment services; designs dispute resolution systems; and develops and promotes ADR policies within USDOT.

Florida. In 1998, the Florida legislature created the State Agency Administrative Dispute Resolution Project to assess the value of ADR approaches through agency pilot cases and to suggest ways to address legal, organizational, budgetary, educational, and leadership barriers to greater ADR use. The April 2000 project advisory group's final report offered recommendations to the Governor and noted that the Florida DOT's counsel and program managers used ADR successfully to reach settlements in 26 cases involving nonconforming signs and vegetation management matters adjacent to highways. It noted as well:

- FDOT mediated a settlement with neighborhoods affected by proposed interchange improvements to the Interstate 95 Palm Beach Airport interchange.
- The agency's district office participated in a project mediation involving transportation impacts from a proposed large-scale development in Osceola County.

As a result of the pilot, Florida DOT established a dispute resolution coordinator position in its Office of General Counsel and increased its use of ADR in planning and ROW acquisition settings.

Oregon. Oregon is practically unique among states in having established a sophisticated, ongoing program to promote ADR and collaborative decision making by state agencies. The Oregon DOJ, assisted by other state entities, has taken a lead role in developing a coordinated approach to ensure that ADR is available to all agencies and is used appropriately. DOJ has developed model rules for ADR use, established a state roster of mediators, sponsored a steering committee that has worked to increase ADR use, and designated clusters of agencies (e.g., natural resources, transportation, and community development agencies) to work together implementing consensus processes. Each cluster has hired a full-time "cluster coordinator" to help its agencies assess ADR potential in particular cases, acquire neutrals' services, assess ADR initiatives, and train and educate government personnel. In addition, each large agency, including ODOT, has appointed a dispute resolution coordinator to work within the agency to encourage and enable ADR use.[118]

The Oregon DOT's September 2001 report[119] stated that it "has an overwhelming number of ADR activities" and recommended a series of steps to enhance, coordinate, assess, and integrate ADR further into the agency's decision-making frameworks.

Ohio. The Ohio DOT's Claims Administrator, who oversees the agency's dispute resolution processes (an administrative claims system and a DRB process), has developed training courses on dispute resolution and offered them to contractors and in-house contract administrators. It also maintains a list of available neutrals, and posts it on a Web site as a starting point for neutral selection.

E. Finding and Acquiring the Services of ADR Neutrals

Background. Interviews for this digest, and numerous studies, make clear that neutrals (mediators, arbitrators, facilitators, evaluators) are regarded by many agency and private ADR participants as key to the effectiveness of any ADR process. Of those people interviewed, a high percentage of those with negative or lukewarm views on ADR cited problems with neutrals' services as a major factor.

The neutral typically presides over and manages the process by which the parties seek to resolve their differences; in arbitration, the neutral actually renders a decision that is binding on the parties. While nearly everyone interviewed agreed that a neutral's skills and other attributes can be crucial to a quality ADR outcome, they differed on what were the critical roles that neutrals played. In part, this was because roles vary depending on the setting and issues in controversy—e.g., helping experienced parties settle a contract claim

[116] 65 Fed. Reg. 69,121 (Nov. 15, 2000).

[117] While not a transportation agency, EPA has frequently been involved as a party to environmental conflicts stemming from state and federal highway planning and similar conflicts. EPA's Conflict Prevention and Resolution Center (CPRC) provides ADR services to that agency. CPRC develops and implements agency ADR policy, administers agency-wide ADR programs, coordinates case management and evaluation, and provides support to program- and case-specific ADR activities. CPRC also assists other agency offices in developing effective ways to anticipate, prevent, and resolve disputes, and makes neutral third parties more readily available. *See* http://www.epa.gov/adr/index.html.

[118] These and other activities are described in detail in *The Department of Justice Dispute Resolution Pilot Project* (Jan. 30, 2001), http://www.doj.state.or.us/adr/pdf/gen74031.pdf.

[119] Oregon Dep't of Transp., *2001 Alternative Dispute Resolution Report and Assessment* (Sept. 2001).

or working with a diverse set of stakeholders in a multiparty environmental dispute. Also, expectations for neutrals appeared to vary depending on the program, the parties, the specific issue in controversy, and the sophistication of users.

This diversity of roles that mediators and other ADR neutrals play—to "transform" relationships, to "facilitate" effective negotiations, to "evaluate" parties' options, to "decide" specific controversies, or to perform a combination of these activities—has presented complications in parties' thinking about the acquisition of neutrals' services, as well as in the establishment of standards and procurement procedures for transportation cases. Standards and procedures reflect existing differences among academics, mediators, and administrators within the ADR field as to what constitutes quality practice by neutrals and the best ways to assure that practitioners have the required skills.[120]

Transportation Agencies' Approaches to Finding and Using Neutrals. Data collected for this report show that agencies rely on a variety of sources for neutrals: preexisting external rosters, internal rosters specifically established for agency disputes, neutrals employed at other agencies, people listed on expedited contracting mechanisms or retained via expert consultant contracts, or individual practitioners in whom they have confidence. While in a few programs, sources or standards are mandated by statute—which can give rise to availability or acquisition issues that limit usage (e.g., Rhode Island's arbitration program for claims under $100,000[121])—most agencies have handled these issues administratively.

As a result, qualifications, sources, selection, and acquisition of the services of neutrals are issues over which substantial differences have emerged, both among transportation agencies and within the ADR field generally. Some transportation agencies have tended to rely on minimal training and experience requirements (e.g., 20 hours of training and 5 cases), while others simply deal with qualifications issues by relying on ex-judges and experienced lawyers to serve as neutrals. Still others piggyback on the standards used by local court programs, which vary considerably but often require bar membership.

Another important variable on which survey respondents differed is the relative importance that agencies and other prospective parties attach to neutrals' subject matter and legal expertise, as opposed to their experience and education in process skills. Clearly, for arbitrators, subject knowledge is crucial, along with the ability to run a hearing and oversee evidence exchange and similar matters. Evaluators in ENE and minitrials also need considerable substantive expertise. However, mediators, lawyers, and scholars have differed considerably in considering mediators' skill sets. Several litigating lawyers who acquired mediators' services downplayed process skills in favor of substance, either because they "don't want to waste time educating someone" or because they believe that evaluation will be the key component of the mediator's work; as a result, they looked primarily at legal or technical expertise to make selections of mediators. Others, though, suggested that this focus on efficiency minimizes complex quality issues and ignores other important, interdependent goals that good mediators often seek to accomplish to reach sustainable, equitable outcomes.[122]

Two rosters warrant specific mention: Oregon's state ADR provider roster and a transportation roster established by the IECR. Many neutrals listed on these rosters have experience in transportation cases and familiarity with ADR generally. Finalized in 2001 by FHWA and IECR, the transportation roster of qualified neutral facilitators and mediators was an optional tool for transportation project sponsors.

IV. CONSIDERATIONS FOR TRANSPORTATION AGENCIES USING ADR

A. General

One commentator on ADR use and lawyers' duties to their clients has pointed out that standards of professionalism are changing, and has noted:

> Custom and practice are fast establishing a justifiable expectation among clients that their attorneys, whether transactional lawyers or trial lawyers, will be sufficiently knowledgeable in dispute resolution techniques to be open for effective knowledgeable consultation to educate

[120] *See* Charles Pou, *Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality*, J. DISP. RESOL. 303 (2004); Sarah R. Cole, Nancy H. Rogers, Craig A. McEwen, *Regulating for Quality, Fairness, Effectiveness, and Access: Mediator Qualifications, Certification, Liability and Immunity, Procedural Requirements and Other Measures*, *in* MEDIATION: LAW, POLICY, PRACTICE §§ 11:2-11:5 2d ed. (Supp. 2003); Margaret Shaw, *Selection, Training, and Qualification of Neutrals*, *in* National SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH 155, 157 (Susan Keilitz ed., State Justice Institute, 1994); Ellen A. Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F.L. Rev. 723 (1996); Glenn Sigurdson, *Quality of Practice and Oversight*, ACR Environment/Public Policy Section (Sept. 2002).

[121] RIDOT is limited in its use of ADR because of the statutory constraints under the Public Works Arbitration Act. There is not an established pool of arbitrators as would be available under a system like the AAA. Consequently litigation is viewed as a more acceptable option in claims of significant amounts.

[122] As Chris Moore of CDR Associates in Boulder, Colorado, described them:

- *Procedurally*, participants need to believe that a process is fair—that it affords them a chance to "have their say" in a fair process that was not biased or prejudiced.
- *Emotionally*, participants need to feel satisfied about their participation in the process—that they personally (and not necessarily *just* their lawyers) have been listened to, acknowledged, respected, and validated.
- Participants must be satisfied concerning the *substantive* outcomes regarding the issues that are the subject of the dispute.

clients to make informed judgments on the choices of dispute resolution methods against the contingency of future disputes.[123]

Several states have even amended their ethics standards in recent years to require that attorneys understand ADR processes and explain these options to clients.[124]

It is clear, then, that ADR methods are becoming a part of the mainstream for all lawyers and their clients. Even so—and notwithstanding impressive results and testimonials in some settings—it would be naive to suggest that ADR and other collaborative processes are panaceas or that they will work (or be needed) in all cases. Using them can present significant issues. We can benefit from examining agencies' experiences, exploring some of the practical and legal questions raised, and considering ways to make life easier and more productive for those who do choose to engage in ADR. To that end, this digest may aid transportation entities, stakeholders, and practitioners to see how agencies across the nation have employed these processes, understand their conflict resolution options better, weigh them analytically, and make thoughtful process choices that serve their interests.

Drawing upon survey responses, interviews, and expert sources, the following sections offer advice to aid transportation lawyers and decision-makers on some key issues to consider in using ADR methods effectively.

B. Selecting an ADR Process

The survey for this report identified little that agencies had developed or utilized that is geared specifically to analyzing their cases for susceptibility to various ADR methods. However, ADR experts and entities that assist companies and others in employing ADR have begun to develop instruments for helping to "fit the forum to the fuss" by determining whether a particular dispute is suitable for resolution through a specific ADR process. The International Institute for Conflict Prevention and Resolution, for instance, has prepared an *ADR Suitability Guide* that some agencies may find worthwhile. The Guide addresses critical questions about how best to resolve particular disputes, such as these:[125]

- Is mediation appropriate for our dispute?
- What other ADR process choices might be suitable?
- If nothing else works, should we arbitrate or go to court?
- What other resources might be helpful?

Instruments like the CPR Institute for Dispute Resolution's Mediation Analysis Screen, which comprises a part of this *Suitability Guide*, let parties assess the impact of a variety of relevant factors, including their overarching, legal, and pragmatic goals for managing the dispute; the suitability of the dispute for problem solving; and the potential benefits of employing ADR for the particular case.[126]

C. Preparing for and Participating Effectively in an ADR Process

Preparation. Transportation agency lawyers, representatives, and others participating in an ADR process should consider the following suggestions:

- Advance preparation regarding:
  - The participants' interests and needs and potential solutions to meet those interests and needs.
  - What should be discussed with the neutral or other parties before the first session.
  - What an agreement to employ ADR needs to cover.
  - Representation issues—identifying internal or other constituents, preparing to negotiate in real time, and establishing a process to support the lead negotiator.
  - ADR advocacy—a less formal setting (especially in private caucus)—assembling and offering persuasive information, articulating views on key issues, and suggesting solutions.
  - What a client's role should be and how a client is prepared for participation.
- The benefits of employing the expertise of the mediator or other neutral's expertise in advance of ADR negotiation sessions. It can be helpful for the lawyers and parties to talk with a neutral in advance, individually or by conference call, to further preparations in several ways:
  - Orchestrating the preparation process and narrowing issues.
  - Covering confidentiality and other threshold procedural matters.
  - Making sure all the needed players will be available for negotiations.
  - Assembling and transmitting documents or position papers in advance.
  - Providing for sufficient, but not excessive, information exchange—enough to develop decision-quality information adequate to allow the parties to settle the issues in controversy.

[123] Robert Greenbaum, *Dispute Resolution and Counsel: Changing Perceptions, Changing Responsibilities*, 55 DISP. RESOL. J. 40 (2000), available at http://findarticles.com/p/articles/mi_qa3923/is_200005/ai_n8894542. (Last visited Feb. 15, 2008).

[124] *See, e.g.,* Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?,* 13 GEO. J. LEGAL ETHICS 427 (2000). The Missouri Supreme Court's Rule 17.02(b), for instance, provides that "counsel shall advise their clients of the availability of alternative dispute resolution programs."

[125] www.cpradr.org (Last visited Feb. 14, 2008).

[126] *See also* Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10(1) NEGOTIATION J. 49 (1994); Wayne Brazil, *Early Neutral Evaluation or Mediation? When Might ENE Deliver More Value?,* 14 DISP. RESOL. 10 (2007).

• Helping the neutral gain familiarity with the substantive issues, identify questions to ask, and perhaps do some advance research to assure that ADR sessions are efficient.

• The benefit of attending an ADR session prepared to understand, explain, and address relevant information and issues:

• Laws and other authorities affecting effective agency ADR use (e.g., authority, confidentiality, open records).

• The agency's or client's "bottom line" calculus, and insofar as possible that of the other side(s).

• Ratification and internal review processes.

• Other parties' diverse experience, resources, and styles.

• Any potential media or legislative interest or significant political concerns.

Participation. Negotiating successfully in ADR may involve paying attention to several different dimensions, each presenting challenges that stem from conflicting goals, interests, and perceptions within organizations and negotiating teams. Participants in ADR should bear in mind these dimensions and their effect on ADR processes:

• "Across the table" matters:

• Establishing a relationship with counterparts across the table is vital.

• Identifying counterparts' objectives and respecting their issues and concerns are important goals.

• Building trust with other parties and using it to create doubt in their minds as to the viability of their positions are critical components of good negotiation.

• Seeking a process where participants debate the issues, not the positions, and in which brainstorming can thrive and information can flow freely to allow creative solutions to evolve.

• Understanding and addressing issues arising within negotiating teams:

• Within each party's team, there often will be more than one person at the negotiating table, including a lead negotiator and team members who take on other roles.

• No team is monolithic, and each team will likely contain some who want to reach an agreement ("stabilizers") and others who remain skeptical about agreement ("de-stabilizers").

• A lead negotiator or team leader will need to manage the relationship between his or her team's members and their counterparts across the table.

• A lead negotiator will likely need to play a mediative role within his or her team and, as such, employ many of the same process management and persuasion tools with team members that a mediator uses (although the negotiator will not be in a "neutral" role).

• Awareness of organizational ratification processes and strategic opportunities and challenges they present:

• Understanding and respecting all parties' final ratification processes and related decision-making roles.

• Being accessible to all members of your agency's negotiating team, and if possible, keeping your organization's "deciders," organizational stakeholders, and supervisors who are not directly participating in the negotiation fully informed, because eventually they will need to understand and approve any decision.

• Being especially attentive to keeping skeptics and de-stabilizers in your organization informed of developments in negotiation.

• Discussing within your organizational hierarchy, and carefully managing throughout the process, your "decider's" participation in the negotiations.

• Using the need to check with a supervisor to your advantage.

• Knowing who your negotiation counterpart's supervisor or ratifier is, and seeking to understand his/her ratification structure.

• During and after ADR sessions:

• Listening carefully to other participants' views, being flexible, and not rejecting proposals out-of-hand.

• Keeping promises.

• Trying to work out as many details of a written settlement agreement as possible while negotiators are together during an ADR session, to minimize or eliminate any time lag between settlement and execution of a written agreement.

• If an agreement in principle is reached that will need more detailed drafting later, avoiding the urge to tinker with the language or raise new issues that may be viewed by other parties as renegotiating settled issues or seeking a "second bite."

D. Encouraging and Enabling Effective Use of ADR

While some state transportation agencies' caseloads may not warrant major ADR use, several states' experiences suggest that there are entities that could benefit from enhanced, systematic consideration and use of ADR methods in one or more areas of their decision making and dispute handling. Agencies interested in more effective use of ADR might consider these strategies:

• Adopting policies, or at least signaling explicit executive support, to encourage voluntary ADR use;

• Identifying personnel responsible for providing advice on ADR use and acting as points of contact for those interested in exploring ADR use in specific settings;

• Assuring that agency attorneys and those involved in deciding litigation strategy understand the range of potential ADR options and the benefits and drawbacks of each;

• Providing for systematic review of conflicts for appropriateness and viability or opportunity for ADR; and

• Offering to key personnel training in interest-based negotiation and effective participation in ADR processes.

Agencies that establish ADR programs may find the following useful:

• To plan and implement ADR activities in ways that seek early, meaningful input of representatives of all appropriate stakeholders in order to have a greater probability of acceptance and long term satisfaction;
• To obtain resources adequate to sustain an ADR program;
• To employ ADR training and outreach to assure broader understanding and acceptance among potential users;
• To use ADR agreements and standard practices that provide maximum confidentiality protection of neutrals' and parties' communications made during ADR processes, consistent with applicable statutes and rules (see details in Section IV.F); and
• To provide means by which all appropriate decision makers are involved in, or regularly apprised of, the course of major negotiations (subject to any confidentiality limitations) to ensure that the concerns of interested segments are reflected as early as possible and reduce the likelihood that tentative agreements will be upset.

E. Finding and Selecting ADR Neutrals

Successful ADR processes afford all parties a measure of control over the process. Consistent with party control, *all ADR neutrals* should be acceptable and accountable to all parties and should have latitude to act on behalf of all parties independently of the sponsoring entity or agency parties. However, there are instances, such as multiparty environmental cases, where the agency will choose the neutral (either in-house or outside) to help set up and then run the process ahead of identification of the stakeholders. It is suggested that transportation agencies, including those that have qualified in-house third parties, follow these practices:

• Not require the use of in-house neutrals, but always also offer parties the options of unassisted negotiation or of using an outside neutral (whose cost parties may have to share).
• Provide that a neutral who serves as a mediator or evaluative neutral (but not an arbitrator) serves at the will of the parties.
• If contracting with private neutrals, examine standard contracts that other agencies have developed, such as the Oregon DOJ's Personal Services Contract for Mediator/Facilitator Services.[127]

It is suggested that the qualifications for *mediators* in transportation settings include the following:

• Mediation process skills, including gathering background information, communicating information to others, analyzing information, assisting with exploration of options and agreement, managing cases, and helping to document any agreement by the parties;
• Ability to act in an impartial manner, with no substantive stake in the outcome;
• Compliance with applicable ethical standards;[128] and
• Adequate substantive knowledge in the issues and type of dispute to help manage communication, help parties to develop options, and alert parties to relevant information.

Mediators ideally should possess a combination of process expertise and experience and substantive knowledge. While the amount of substantive knowledge that a mediator will need will depend on the nature of the dispute, some parties err in overemphasizing mediators' substantive knowledge. In many cases, a mediator who understands interest-based negotiation can perform excellent service without being a substantive expert, especially if he is able to confer with parties before the initial session to gain familiarity with the specific substantive issues and perhaps do some advance research to assure that ADR sessions are efficient.

Arbitrators should possess the ability to conduct timely hearings and write clear decisions; have significant substantive knowledge (although it is possible for the arbitrator to be provided access to a neutral expert); and comply with applicable standards of ethics and impartiality.[129]

Transportation agencies considering use of ADR in an environmental, policy-making, or other large-scale setting that involves complex, contentious issues, might consider sponsoring a preliminary conflict assessment by a third party who confers in confidence with all iden-

[127] http://www.doj.state.or.us/adr/psk.shtml (Last visited Feb. 14, 2008).

[128] *E.g.,* the Model Standards of Conduct for Mediators, recently revised by the ACR, ABA, and AAA. Some of these ethical codes apply explicitly to those wearing more than one "hat" in an ADR proceeding (e.g., mediator, attorney, judge, engineer); for example, CPR-Georgetown Commission on Ethics and Standards in ADR's Model Rule for the Lawyer as Third-Party Neutral (Nov. 2002); JAMS Mediator Ethics Guidelines, http://www.jamsadr.com/mediation/ethics.asp (Last visited Feb. 15, 2008). Others relate to separate professions, whose codes must be meshed with an individual's practice as an ADR neutral. *E.g.,* American Society of Civil Engineers, Fundamental Principles and Canons (1975). *See generally* the Web site for the Center for the Study of Ethics in Professions, http://64.233.169.104/search?q=cache:UpqIfl1PvucJ:ethics.iit.edu/codes/+online+ethics+code&hl=en&ct=clnk&cd=1&gl=us&client=firefox-a (Last visited Feb. 15, 2008), which contains an extensive collection of over 800 codes of professional, corporate, government, and academic institutions.

[129] *See, e.g.,* AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, 33 BUS. L. 309 (1977).

tifiable interests. Using interview results and other data, this "convenor," or assessor, could identify goals and issues; find affected interests whose stake is initially difficult to identify; recommend if ADR is appropriate (and if so, the type and timing); and advise on such matters as representation, the "shape of the table," and process design. The assessor may also be considered for the neutral's role in any ensuing ADR process. Agencies that do so weigh explicitly the relative benefits of employing an in-house third party against using an outside professional to serve as convenor or to lead any subsequent ADR process. Factors to consider include whether parties are likely to find an insider acceptable and to offer candid views to an insider.

F. Protecting Confidentiality in ADR

Agencies that have implemented ADR with success have usually sought systematically to set participants' confidentiality expectations early on so as to permit them to address sensitive subjects that they might be unwilling to discuss otherwise, explore their interests and alternatives candidly, and develop creative solutions. To this end, it is suggested that transportation agency lawyers, representatives, and others participating in ADR processes with them develop and use agreements to mediate (or to engage in other forms of ADR) that provide maximum protection of dispute resolution communications consistent with applicable statutes. Several factors should be considered:

- Being aware that there may be serious consequences if sensitive information gets into the wrong hands and attempting to prevent disclosures by participants, especially unanticipated disclosures that substantially disadvantage any party.
- Employing agreements to engage in ADR that are clear, understandable, and consistent with applicable statutes or policies. Agreements should explicitly identify governing laws or authorities and seek to assure protection of trade secrets, proprietary information, or other sensitive information.
- Agreeing not to discuss communications related to an ADR process with anyone who was not present and not to share such information voluntarily with nonparticipants, except in situations where the party is represented by an official who does not have final decision-making authority. In those cases, it would be beneficial to discuss at the outset the possible need to consult with advisors during the mediation or before signing any agreement and the need to disclose details of a proposed settlement to superiors or other reviewers in order to obtain approval.
- Understanding that an agreement enhancing protection of ADR communications beyond what is provided by statute or rule is generally permissible and valuable, but that such an agreement may not be enforceable against third parties to the same extent that it binds signatories.
- Assuring that the parties, their employees, attorneys, and representatives will not call upon or subpoena the neutral in any legal, arbitral, or administrative proceeding of any kind to testify, or to produce any notes, files, or documents in any way created in connection with the ADR process.
- Assuring that neutrals understand applicable confidentiality standards, follow a presumptive no-disclosure policy, and handle requests for potentially confidential information consistently.
- Assuring that contracts or other agreements acquiring the services of a private-sector neutral provide that the neutral's documents (including work product, notes, files, and other materials gathered in connection with the proceeding) are not available to, and do not become the property of, the agency or any of its personnel.

V. CONCLUSION

A key lesson from the survey and related data gathering is that there is no "one size fits all" formula for employing or institutionalizing ADR processes. This is especially so given that two of ADR's most highly touted benefits are flexibility and adaptability to parties' needs in particular situations.

The ADR processes and neutrals that are most useful in a large-scale environmental conflict or in dispute avoidance will often differ from what may be needed to resolve a contract claim or tort lawsuit. Rather than assuming that "the best" ADR practices can be identified and applied across the board, agency lawyers and programs tailor individual processes to fit the case at hand and select neutrals and prepare accordingly.

APPENDIX A: ALTERNATIVE DISPUTE RESOLUTION GLOSSARY

Alternative means of dispute resolution (or ADR). Any procedure involving a neutral that is used as an alternative to a hearing, trial, or other more formal procedure to resolve an issue in controversy, including, but not limited to, facilitation, mediation, fact finding, minitrials, ombuds, arbitration, or any combination. ADR processes emphasize creativity and cooperation in place of adjudicative means of problem solving.

Arbitration. An ADR process in which the disputing parties present their case to one or more neutrals (arbitrators), who hear evidence and argument and render a decision or award on the merits (binding or nonbinding). Arbitration differs from mediation and other ADR processes in which the neutral helps the disputing parties to develop a solution on their own.

Caucus. A private meeting or series of separate meetings in an ADR process that take place between the neutral and one or more, but not all, participants. Many mediators and other ADR neutrals sometimes work in private caucuses with parties to give them a chance to explore acceptable resolution options, develop or clarify proposals and interests, or move closer to resolution. A "joint session," by contrast, includes all parties and the ADR neutral.

Dispute resolution communication. Any oral, written, or electronic communication prepared for the purposes of a dispute resolution proceeding, including memoranda, notes, or work product of the neutral, parties, or nonparty participants. The term "dispute resolution communication" includes documents, statements (whether oral or in a record), pictures, other tangible items, and conduct meant to inform that relates to an ADR process. Given the critical importance of candor during initial conversations to insure a thoughtful agreement to employ ADR, most statutes define dispute resolution communication to include communications made for purposes of retaining a session neutral or considering, initiating, conducting, participating in, or continuing a dispute resolution proceeding. A written agreement to enter into a dispute resolution proceeding or final written agreement or arbitral award reached as a result of a dispute resolution proceeding is not a dispute resolution communication.

Dispute resolution proceeding. Any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is employed and specified parties participate. These may be administrative, arbitral, or other formal or informal agency adjudicative processes.

Facilitation. A collaborative process involving the use of techniques to improve the flow of information in a meeting. In it, a neutral facilitator seeks to assist a group to discuss issues constructively and provides procedural direction to help the group move through a problem-solving process to arrive at a jointly agreed-on goal. While facilitation bears many similarities to mediation, and while facilitation techniques may be applied to decision-making meetings where a specific outcome is desired (e.g., resolution of a conflict or dispute), the neutral in a facilitation process (the "facilitator") often plays a less active role than a mediator. The term "facilitator" is often used interchangeably with the term "mediator," but a facilitator typically does not become as involved in the substantive issues.

Fact finding. An ADR process in which a neutral fact finder receives information and arguments from the parties about the issues and facts in a controversy (and may conduct additional research to investigate the issues in dispute) and then submits a report with findings of fact and perhaps recommendations based on those findings.

Issue in controversy. An issue that is material to a decision and about which there is disagreement between an agency and persons who would be substantially affected by the decision or between persons who would be substantially affected by the decision.

Joint session. A meeting in an ADR process that (unlike a caucus) includes all parties and the ADR neutral.

Med-Arb. A hybrid process where mediation is followed by arbitration, if necessary.

Mediation. An ADR process in which a neutral third party (a "mediator") with no decision-making authority seeks to assist the parties in voluntarily reaching an acceptable resolution of issues in controversy. While mediators differ in their methods of assisting disputing parties, the mediator typically enables the parties to initiate progress toward their own resolution. A mediator enhances negotiations by improving communication between parties, identifying interests, and exploring possibilities for a mutually agreeable resolution.

Minitrial. A structured ADR process in which the parties seek to reframe issues in controversy from the context of litigation to the context of a business problem. Typically, attorneys for each party make summary presentations to a panel consisting of a neutral minitrial advisor and nonlawyer party representatives who possess settlement authority. The panel then attempts to negotiate a resolution of the issues in controversy.

Negotiated rulemaking. A multiparty consensus process used as an alternative to the traditional notice-and-comment approach to issuing regulations, in which agency officials and affected private representatives meet under the guidance of a neutral (much like a mediator) to engage in negotiation and draft a proposed agency rule, policy, or standard. The public is then asked to comment on the resulting proposed rule. By encouraging participation by interested stakeholders, the process makes use of private parties' perspectives and expertise and can help avoid subsequent litigation over the resulting rule.

Negotiation. A process of discussion and give-and-take in which disputants communicate their differences to one another through conference, discussion, and compromise to resolve them.

Neutral (or ADR neutral). An individual who functions specifically to aid the parties in an ADR process to resolve an issue in controversy. Depending on his or her function at a given time, an ADR neutral may be called a mediator, facilitator, arbitrator, or evaluator and may play differing roles:

- An administrative (or program) neutral typically conducts the day-to-day administration of an ADR program, including intake, assistance in identifying and obtaining session neutrals, record-keeping, establishment of evaluation mechanisms, and offering parties aid and advice.
- A session neutral assists the parties during and between negotiation sessions in exploring options, identifying common interests, and resolving their dispute.
- A convening neutral (or convenor) typically confers with potentially interested persons regarding a situation involving conflict to identify the issues in controversy and all affected interests, determine whether direct negotiations would be suitable, educate parties about the dispute resolution process, design the structure of a dispute resolution process to address the conflict, and possibly bring the parties together to negotiate.

Neutral evaluation (or early neutral evaluation). An ADR process in which the parties and their counsel present the factual and legal bases of their case to a neutral evaluator—often someone with specifically relevant legal, substantive, or technical expertise or experience—who then offers a nonbinding oral or written evaluation of the strengths and weaknesses of the parties' cases. This evaluation can form the basis for settlement discussions facilitated by the neutral evaluator if the parties so choose.

Nonparty participant. Experts, friends, support persons (including lawyers), potential parties, and others who participate in the mediation or other dispute resolution proceeding but are not parties.

Ombuds. Person who receives complaints and questions from individuals concerning others within an organization. They rely on a number of ADR processes to resolve disputes, including mediation, conciliation, and fact finding. When an ombuds receives a complaint, he or she may conduct interviews, review files, and make recommendations to the disputants. Ombuds do not impose solutions.

Settlement judge. An ADR process in which a judge—different from the presiding judge in the case—meets with the parties jointly and separately, acting as a mediator or neutral evaluator in a case pending before a tribunal.

APPENDIX B: TRANSPORTATION RESEARCH BOARD SURVEY: CURRENT PRACTICES IN THE USE OF ALTERNATIVE DISPUTE RESOLUTION

Explanation of Survey. The results of this survey will be incorporated into a report on the current use of ADR by transportation agencies. The report will be published by the Transportation Research Board and made available to transportation industry lawyers and other interested persons. It will, we hope, provide:

- Enhanced awareness of state and federal transportation organizations' use to date of ADR processes in environmental conflicts, contract disputes, tort claims, and right-of-way acquisition, and
- An understanding of legal, policy, and practice issues for effective use of ADR methods.

Processes Covered by Survey. The term "**alternative dispute resolution**," as used here, means a process that involves a mediator, arbitrator, facilitator, or other neutral third party and that is used as an alternative to a hearing, trial, or other more formal procedure to resolve an issue in controversy relating to an agency decision. "ADR" processes often emphasize creativity and cooperation in resolving conflicts in place of adjudication or other judicial methods. ADR includes, but is not limited to, mediation, facilitation, fact-finding, minitrials, early neutral evaluation, arbitration, or any combination. (For purposes of the survey, unassisted negotiation between disputants, without a neutral third party, is NOT ADR.) The attached glossary describes common ADR processes in greater detail.

Your Name _____

Title _____

Name of Employing Agency _____

Telephone Number _____

E-mail Address _____

1. Does your agency engage in activities relating to, or giving rise to litigation or other conflicts in, the following areas:

[ ] Environment [ ] Contracting

[ ] Tort claims [ ] Right-of-way acquisition

2. Has your agency employed any ADR process (as defined above) to avoid or resolve litigation or other conflicts arising from any of these activities? [ ] Yes [ ] No

3. If yes, please indicate which of the following areas of activity in which ADR has been used, and, for each area of activity, please indicate what ADR processes have been used and provide the name, telephone number, and email address for the individual or individuals in your agency (if any) with additional data about specific agency uses of ADR:

[ ] Environment
Name/ Contact Information _____
_____
[ ] Arbitration
[ ] Early neutral evaluation
[ ] Facilitation
[ ] Fact-finding
[ ] Mediation
[ ] Med-Arb
[ ] Minitrial
[ ] Settlement Judge
[ ] Other ADR process (Please specify) _____

[ ] Contracting
Name/ Contact Information _____
_____

[ ] Arbitration
[ ] Early neutral evaluation
[ ] Facilitation
[ ] Fact-finding
[ ] Mediation
[ ] Med-Arb
[ ] Minitrial
[ ] Settlement Judge
[ ] Other ADR process (Please specify) _____

[ ] Tort claims
Name/ Contact Information _____
_____
[ ] Arbitration
[ ] Early neutral evaluation
[ ] Facilitation
[ ] Fact-finding
[ ] Mediation
[ ] Med-Arb
[ ] Minitrial
[ ] Settlement Judge
[ ] Other ADR process (Please specify) _____

[ ] Right-of-way acquisition
Name/ Contact Information _____
_____
[ ] Arbitration
[ ] Early neutral evaluation
[ ] Facilitation
[ ] Fact-finding
[ ] Mediation
[ ] Med-Arb
[ ] Minitrial
[ ] Settlement Judge
[ ] Other ADR process (Please specify) _____

4. Does your agency have an ADR policy? If so, please briefly describe the policy or policies, including the area(s) to which it applies (e.g., civil enforcement, regulatory, claims against the government, contracting). If the ADR policy is available on the Internet, please give the web address. If not, please attach a copy.

_____
_____
_____

5. Please briefly describe any established ADR program(s) at your agency, including (if possible) the substantive area(s) to which it applies; in-house education and external outreach activities it has undertaken; assignment of agency staff for ADR-related duties; ways in which resource needs have been met; and approaches to finding and selecting appropriate neutrals.

_____
_____
_____

6. If you are aware of any state or federal statute, agency regulation, policy or model agreement affecting your agency's use of ADR (including documents relating to authority to use ADR; various agency conflicts' appropriateness for ADR; ADR confidentiality; selection or use of mediators, arbitrators, or other neutrals; or internal responsibility or procedures for implementation or use of ADR), please attach a copy or provide a citation or web address.

_____
_____
_____

7. If you are aware of any article, judicial decision(s) (reported or unreported), evaluations, case studies, or other

documents relating to use of ADR by your agency (or by another agency that could provide data relevant to this survey), please attach a copy or provide a name of case, docket number and date, web address, or other citation.

_____
_____
_____

8. If you are aware of other agencies within your jurisdiction that engage in transportation-related activities and that have made extensive use of ADR in environmental conflicts, contract disputes, tort claims, or right-of-way acquisition, please provide that entity's name and (if possible) the name, telephone number, and e-mail address for an individual with more specific data.

Name/ Contact Information _____
_____
_____
_____

9. If you are aware of useful statement(s) of good conflict management practice (or "best ADR practices" or "lessons learned") for state or federal transportation agencies or governmental entities generally, please attach a copy or provide a citation or web address for each.

_____
_____
_____

10. Please provide any other information, comments, or advice that you believe could make the forthcoming survey of transportation agency use of ADR especially relevant or useful to its readers.

_____
_____
_____

Please direct questions about this survey to:

Charles Pou, Jr.
2227 20th Street, NW, Suite 501
Washington, DC 20009
Telephone: 202-887-1037
Fax: 202-887-5374
E-mail: chipbloc@aol.com

Please return your survey response by <u>April 30, 2007</u>, via e-mail or surface mail, to:

James B. McDaniel, Esq.
Counsel for Legal Research Projects
Transportation Research Board
500 Fifth Street NW 4th Floor
Washington, DC 20001
E-mail: JMcdaniel@nas.edu

APPENDIX C: SUMMARY OF RESPONSES TO SURVEY

RESPONDING STATES	ALTERNATIVE DISPUTES MECHANISM											
	ENVIRONMENTAL CONFLICTS			CONTRACT DISPUTES			TORT CLAIMS			RIGHT-OF-WAY ACQUISITION		
	A*	M**	O***	A*	M**	O***	A*	M**	O***	A*	M**	O***
ARKANSAS (NO ADR)												
CALIFORNIA (ADR)		√	√	√	√		√	√		√	√	
CONNECTICUT (ADR)				√	√							
DISTRICT OF COLUMBIA (NO ADR)												
FLORIDA (ADR)		√		√	√			√			√	
HAWAII (ADR)				√								
IDAHO (ADR)	√	√	√	√	√	√	√	√	√	√	√	
ILLINOIS (NO ADR)												
IOWA (ADR)			√					√	√			√
KANSAS (ADR)		√			√			√			√	
LOUISIANA (ADR)		√			√						√	
MICHIGAN (ADR)						√						
MINNESOTA (ADR)			√	√	√	√		√				
MISSISSIPPI (ADR)				√								
MISSOURI (ADR)		√			√		√	√			√	
MONTANA (ADR)			√		√						√	
NEBRASKA (ADR)			√									
NEW HAMPSHIRE (ADR)		√			√			√			√	
NEW YORK (ADR)						√						
NORTH DAKOTA (ADR)				√	√	√		√			√	
OHIO (ADR)				√	√	√						
OREGON (ADR)				√	√	√			√		√	
PENNSYLVANIA (ADR)		√		√	√	√			√		√	√
RHODE ISLAND (ADR)				√	√					√	√	
SOUTH CAROLINA (ADR)			√	√	√	√		√				√
SOUTH DAKOTA (ADR)					√	√		√	√			
TENNESSEE (ADR)								√			√	

RESPONDING STATES	ALTERNATIVE DISPUTES MECHANISM											
	ENVIRONMENTAL CONFLICTS			CONTRACT DISPUTES			TORT CLAIMS			RIGHT-OF-WAY ACQUISITION		
	A*	M**	O***	A*	M**	O***	A*	M**	O***	A*	M**	O***
TEXAS (ADR)			√			√						
UTAH (ADR)		√	√		√	√		√	√		√	
VERMONT (ADR)		√			√			√			√	
WISCONSIN (ADR)				√	√	√						
WYOMING (ADR)					√							√

* Arbitration

** Mediation

*** Other (This category includes early neutral evaluation, facilitation, fact finding, med-arb, minitrial, settlement judge, or another ADR process specifically designated by the responding state.)

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These digests are issued in order to increase awareness of research results emanating from projects in the Cooperative Research Programs (CRP). Persons wanting to pursue the project subject matter in greater depth should contact the CRP Staff, Transportation Research Board of the National Academies, 500 Fifth Street, NW, Washington, DC 20001.

Transportation Research Board
500 Fifth Street, NW
Washington, DC 20001