

ACUS-DOJ Symposium on Federal Alternative Dispute Resolution
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Remarks of Miriam Nisbet, Director of the Office of Government Information Services (OGIS), National Archives and Records Administration

I am pleased to be part of the symposium, both as the current Chair of the Interagency ADR Working Group's Steering Committee and as the first director of a new program in the federal government. As Chairman Verkuil noted, the Office of Government Information Services, referred to in short as OGIS, was created under recent amendments to the Freedom of Information Act to bring Alternative Dispute Resolution (ADR) for the first time to the federal FOIA process. As the Attorney General reminded us last week – “Sunshine Week” – President Obama has called the Freedom of Information Act “a profound national commitment to ensuring an open government.”

First, I would like to tell you about my office only briefly, because I want to highlight five other departments and agencies – the International Trade Commission, TSA, Interior, FEMA and Defense -- which are extending ADR into new areas of practice and new modalities of dispute resolution such as collaborative governance, coaching, facilitation, ombuds and other consensual processes.

OGIS was placed within the National Archives to work across the Executive branch and with the public to:

- resolve disputes under the FOIA involving the federal departments and agencies as an alternative to litigation (just to give you context, the departments and agencies receive around 600,000 FOIA requests annually)
- review agency FOIA policy, procedures and compliance and recommend policy changes to Congress and the President to improve the administration of FOIA

We opened our doors in September 2009. By the end of our second year (the end of Fiscal Year 2011), OGIS cases involved 42 of the 99 Federal agencies, including all 15 cabinet-level departments.

In addition to handling actual disputes, much of our work falls under the designation that Congress gave us as the “FOIA ombudsman.” In that role, OGIS acts as a confidential and informal information resource, communications channel and complaint handler. We answer questions, provide information, listen to complaints and try to help in any way we can. For the more substantive disputes, we facilitate discussions between the parties, both over the phone and in person, and work to help them find mutually acceptable solutions.

We are trying to avoid disputes before they arise and to resolve them without a need for litigation, and also to work every day with members of the public and with Federal agencies to improve the administration of FOIA.

As you have heard, many departments and agencies now consider ADR and conflict management to be an integral part of normal business practices – but we still tend to think of ADR in a more traditional way and primarily for workplace, contracts, regulatory enforcement and claims disputes. Bringing ADR and its various methods such as ombuds into the federal FOIA landscape is just one illustration of how the use of ADR is evolving – by **moving into areas of the law not previously associated with its use.**

Another example is the International Trade Commission's Mediation Program, which is aimed at settling litigation over intellectual property matters involving imported goods. To do that, the program has taken ADR into a new area: allegations of unfair import practices (mostly patent and trademark infringement) under Section 337 of Tariff Act of 1930.

In late 2008 the ITC started a pilot mediation program for these types of cases and in 2010, turned it into a permanent program, requiring participation in mediation to replace required settlement conferences. Though it took a while to get buy-in from the Administrative Law Judges, the program is now well-established and poised to do even more as the case load of these kinds of cases has increased rapidly, for example due to domestic demands for protection of intellectual property rights.

How did the ITC make this innovation work?

First, the program was modeled on the highly successful mediation program for the Court of Appeals for the Federal Circuit. Key was building a roster of mediators with experienced retired jurists and practitioners – quality makes a difference – which meant that the parties experienced positive results early on.

Second, there is a strong motivation to streamline and conserve agency resources: International trade enforcement by its nature means complex, lengthy cases and there are billion-dollar industries at stake.

In other agencies, the focus is on **integrated conflict resolution systems** aimed at building agency-wide conflict management competence.

The Transportation Security Administration (TSA) is an agency with a difficult mission and a diverse workforce of 43,000 employees nationwide. The foundation of TSA's workplace ADR program is an Integrated Conflict Management System (ICMS).

TSA has taken dispute resolution to some innovative places:

Three examples are:

- (1) a peer conflict management coaching program;
- (2) ICMS coordinators trained to facilitate workforce engagement activities as well as early resolution of disputes at all hub airports; and
- (3) a peer review panel program providing Transportation Security Officers with an alternative to the grievance process.

The integrated system takes a comprehensive and holistic approach to resolving specific issues at the lowest possible level and at the earliest possible time, which the agency finds improves the larger organizational culture and workplace environment. TSA also is better able to manage risk, and the open dialogue fosters innovation and problem-solving. That certainly impacts the bottom line in an indirect but significant way.

The Department of the Interior also has adopted an integrated conflict management system. Its Office of Collaborative Action and Dispute Resolution (CADR) addresses workplace, procurement, and program conflicts – and does so by using a wide array of conflict and dispute resolution processes.

In addition to workplace dispute resolution – estimated to have saved the department over \$5 million last year – Interior’s program helps the department’s bureaus to manage conflicts with outside stakeholders and with internal partners (such as bureau-to-bureau conflict). If you think of even two of Interior’s components – the Bureau of Indian Affairs and the National Park Service – you get a sense of how this program is critical to mission delivery.

A cornerstone of the program’s work is a train-the-trainer model to provide conflict management skills, communications, and generational mix training. The training not only supplements the department’s trained mediators -- over 1,100 employees throughout the country received training last year -- it helps to spread the word that these services and processes – including mediation, facilitation, and change management – are available across the Department.

Finally, ADR is evolving through **exploration of a range of services for conflict avoidance and conflict management**

The Federal Emergency Management Agency (FEMA) has an “embedded” ADR program, which means that it does not use outside contractors, nor does it ask employees to do ADR work as a collateral duty.

The agency has about 50 federal ADR professionals from around the nation who fly to disaster sites and assist FEMA employees as they work under very difficult conditions and in unusual places such as mobile home parks and cruise ships used as temporary housing for evacuees. These professionals function well beyond the traditional mediation model:

- help with project design, strategic planning, and public engagement
- use a process called a Resolution Oriented Conversation (“ROC”) to work with communities and state and local governments.
- do extensive conflict coaching, training, and meeting facilitations, and they train other employees in collaboration, team building, and facilitation skills.

In the past 10 years, the senior leadership of the Department of Defense and of the DoD Components (the Military Departments and the Defense Agencies) started focusing on making the use of ADR and conflict management an integral part of normal business practices.

While continuing the use of traditional ADR to resolve Equal Employment Opportunity (EEO), environmental, acquisition, and claims disputes, DoD began to engage in new practices and collaborations. The goal was to move beyond resolving disputes between specified parties to address the root causes that led to those disputes.

Examples of DoD's new practices and collaborations include:

- partnering with industry and the community in areas where environmental disputes could have serious impact on the mission of a Military Department
- creation of conflict resolution and ombuds offices which provide a range of services, including: workplace assessments and interventions; group facilitations; conflict coaching; leadership coaching; and mediation, conciliation and facilitation of disputes
- collaborative efforts to design and provide training – including to supervisors and managers -- in these skills

I would like to point out that DoD and Interior both were early partners with my office in developing training in dispute resolution skills for their FOIA professionals!

- ombuds-type services on behalf of the warfighter related to employment and healthcare
An exciting example is the Navy's Healthcare Resolution Program at the Walter Reed National Military Hospital Center (formerly the National Naval Medical Center). The Program addresses complex healthcare disputes arising from unanticipated adverse outcomes of medical care or quality of medical care, prior to claims being filed. Coaching, facilitating, informal fact-finding and conveying information between the involved parties (such as delivering bad news to a patient's family) are some of the ADR techniques the Program uses to assist the medical command, to ensure a fair resolution process for all parties and to build patient trust.

DoD is famous for its curricula on "lessons learned": one lesson is that early resolution of disputes and effective use of conflict -- as business practices -- permit everyone in the Department to focus on his or her tasks in support of the warfighter and national security, the mission of the Department.

I hope we've given you a sense of the evolving ADR processes and skills that are increasingly required to address complex issues and problems. Now I'll turn to Howard Gadlin, who speaks from long experience in being at the frontier of ADR.