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ALTERNATIVE DISPUTE RESOLUTION IN AGENCY ADMINISRATIVE PROGRAMS

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INTRODUCTION

The use of alternative dispute resolution (ADR) by the executive branch of the federal government to resolve disputes with or among private actors has deep historical roots.[1] ADR related to managerial agency matters such as employment or procurement is well-established across the government and performed under a uniform set of laws.[2] Much less is known, however, about the scope and reach of ADR in the execution of government programs entrusted to agencies by Congress, including regulatory enforcement, adjudication of claims, and

[1] Thomas Jefferson (as Secretary of State) and Theodore Roosevelt (as President) each mediated critical disputes such as the location of the nation's capital and the anthracite coal strike of 1902, respectively. *See* JEROME BARRETT & JOSEPH BARRETT, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, CULTURAL AND SOCIAL MOVEMENT (published in affiliation with the Association for Conflict Resolution, John Wiley & Sons 2004).
[2] Some of these laws are administered by the Equal Employment Opportunity Commission (EEOC). The Federal Service Labor Management Relationship Statute (FSLMRS) is administered by the Federal Labor Relations Authority (FLRA). As of 2000, the EEOC has required all agencies to have an ADR program available at both the pre-complaint and formal stages of the EEO process, see 29 C.F.R. § 1614.102(b)(2). Section 7121 of the FSLMRS requires all federal collective bargaining agreements to have grievance procedures, which are subject to arbitration. *See* U.S. FED. LAB. RELS. AUTH., GUIDE TO ARBITRATION UNDER THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE (2016), https://www.flra.gov/system/files/webfm/Authority/AR%20Forms,%20Guide,%20Other/Arbitration%20Guide%209.30.16.pdf. Guidance on Federal workplace ADR has been readily available through the Office of Personnel Management's Alternate Dispute Resolution Handbook, https://www.opm.gov/policy-data-oversight/employee-relations/employee-rights-appeals/alternative-dispute-resolution/handbook.pdf. Federal contracting is governed by the Federal Acquisition Regulation (FAR).

administering benefits or reimbursing services such as provider fees. This report uses the term "administrative program ADR" to refer to this category of ADR. The U.S. Code defines an "administrative program" in the context of ADR carried out by agencies as including "a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rulemaking, adjudication, licensing, or investigation."[3]

In 1987, the Administrative Conference of the United States (ACUS) developed a guide (the "Sourcebook") on federal agency ADR that reviewed some of this type of ADR work and provided guidance on its selection and use.[4] Since then, agency practices have changed, and new agencies developed innovative ADR programs not captured by any prior work. This study seeks to fill that gap.

Today, at least three dozen federal agencies publicly promote the use of ADR for their administrative programs. Agency ADR activities contribute in important ways to the work of the U.S. government. Although there is no government-wide data on the effectiveness of agency ADR, several agencies report that ADR has been a faster, cost-effective, and satisfactory form of dispute resolution for their programs.[5]

This report studies how federal agencies use and might better use different types of ADR —including mediation, conciliation, facilitation, factfinding, minitrials, arbitration, and the use of ombuds—in the programs Congress has entrusted them to administer. It also addresses the use of ADR to resolve disputes before the initiation of a formal agency adjudicative proceeding or litigation involving the agency's enforcement authority. The project considers topics such as the selection and implementation of the appropriate type of ADR and associated procedures; the qualifications, selection, and training of agency ADR personnel; ethics and confidentiality requirements for agency ADR personnel; ADR case management practices; and interagency mechanisms to facilitate ADR and support agency ADR personnel.

The report has three objectives. First, it provides background on the scope of administrative-program ADR in federal agencies, along with some historical comparisons. Second, it describes agency ADR practices. Third, it develops conclusions and recommendations surrounding the uses of ADR across the executive branch.

Part I provides some important background and history on the framework for administrative-program ADR, the terminology used in this report, and a synthesis of prior

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[3] 5 U.S.C. § 571.

[4] MARGUERITE S. MILLHAUSER & CHARLES POU, JR., SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION (1987) (prepared for Office of the Chairman Administrative Conference of the United States).

[5] *See, e.g.*, *Studies of the Mediation Program*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/studies-mediation-program (last visited Aug. 22, 2021); UDALL FOUND., ENVIRONMENTAL COLLABORATION AND CONFLICT RESOLUTION (ECCR) IN THE FEDERAL GOVERNMENT: SYNTHESIS OF FISCAL YEAR 2019 REPORTS 8 (2019), https://udall.gov/documents/ECRReports/2019/FY19%20ECCR%20Synthesis%20Report_Final.pdf; CONSENSUS BUILDING INSTITUTE, USING DISPUTE RESOLUTION TECHNIQUES TO ADDRESS ENVIRONMENTAL JUSTICE CONCERNS: CASE STUDIES (2003).

research completed on these issues. Part II describes our methodology. Part III draws on new information sources to develop an empirically grounded perspective of the recent and historical scope of ADR in agency work. Using a survey of agency officials, interviews with experts, and research on agency websites and other publicly available information, among other sources, it summarizes agency ADR practices and provides some examples of the ways agencies have successfully deployed ADR as well as trends that are notable across the branch. It also includes recommendations for each topic covered. Part IV turns to limitations of the study and areas for further research.

Four preliminary notes are in order. First, this report does not serve as a comprehensive catalogue of all government ADR programs. Second, while this report discusses forms of ADR generally, this project does not explore legal questions about ADR, the forms it should take in specific circumstances, or the limitations on its use. Third, this project is not intended to examine comprehensively the benefits and costs of using ADR in agency administrative programs. Fourth, because of the sensitivity of the agency equities involved, the report does not identify the agencies connected to survey respondents and interviewees apart from where the report refers to publicly available information or where agency staff consented to be named.

I. BACKGROUND ON ADR IN FEDERAL AGENCIES

This Part briefly describes the key statutory provisions and elements of the ADR systems across the federal government, as well as the history that led to the present landscape.

There are at least two distinct origins of the programs studied here: those that were an outgrowth of ordinary agency adjudication to address agency needs such as efficiency and burgeoning caseloads, and those that agencies created as stand-alone programs. Some agencies have administered ADR programs for several decades, especially where policymakers saw ADR as an opportunity to execute the agency's mission. Congress tasked many of those agencies with creating ADR initiatives as part of their core mandate.[6] Statutes dating back to the early part of the twentieth century empowered agencies to use ADR as a means of achieving their primary purposes. More recently, agencies adopted ADR as a means of alleviating backlog or eliminating the need for agency adjudication as interest in alternative processes grew both inside the federal government and outside of it.[7] We treat these differing underlying motivations for agency ADR the same in this study and in some instances their edges blend. That is, for some agencies, what may have been an alternative to ordinary adjudication became a broader tool once those agencies realized its potential.

As noted above, this report does not review ADR programs designed to address employee grievances, procurement, freedom of information act requests, or similar programs. Rather, this report focuses on ADR programs that manifest the administrative and enforcement authorities

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[6] *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. §§ 1001–02 (creating the Community Relations Service as part of the Department of Justice).

[7] *See, e.g.*, Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICKENSON L. REV. 331–32 (2001) (discussing the use of mediation by the EEOC to reduce docket backlogs).

granted by Congress. These are programs available to actors outside of the agency that serve the agency's programming mandates. We will abbreviate our references to federal program ADR with the understanding that the study is limited to this type of ADR.

A. Brief History of ADR Among Federal Agencies

This section provides a brief history of federal program ADR. To provide additional context, this section also provides information on major milestones in ADR generally, including both public and private ADR.

Congress first expressly authorized agency use of ADR to deal with labor unrest. In 1913, Congress empowered the Secretary of Labor to mediate and appoint commissioners of conciliation in labor disputes.[8] In its first year, the Department of Labor mediated 33 labor disputes.[9] The U.S. Conciliation Service within the Department carried out this function until 1947, when its functions were transferred to a new entity created by the 1947 Labor-Management Relations Act (the Taft-Hartley Act).

The Taft-Hartley Act created the Federal Mediation and Conciliation Service (FMCS), an independent agency charged with preventing or minimizing the impact of labor-management disputes on the free flow of commerce.[10] The FMCS seeks to preserve and promote labor-management peace and cooperation by serving communities, industries, and other agencies.[11] This move toward ADR in labor-management disputes complemented the use of ADR by private actors to resolve commercial disputes under the principles of the 1925 Federal Arbitration Act,[12] and the creation of the American Arbitration Association (AAA), which is today the largest non-profit global provider of ADR services, particularly arbitration services.[13]

Beginning in the 1970s, agencies used ADR experimentally to combat court backlogs and resolve environmental and natural resource disputes.[14] For example, Congress gave the Department of Health, Education, and Welfare the authority to act as the administrator of the Age Discrimination Act of 1975 to resolve claims of age discrimination in federal workplaces.[15] The Department obtained assistance from FMCS to mediate complaints under the new act to

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[8] Act of Mar. 4, 1913, ch. 141, § 8, 37 Stat. 736 (providing that "the Secretary of Labor shall have power to act as mediator and to appoint commissioners of conciliation in labor rower and authority disputes whenever in his judgment the interests of industrial peace may require it to be done").
[9] BARRETT & BARRETT, *supra* note 1, at 4.
[10] Labor Management Relations Act of 1947, 29 U.S.C. § 141 *et seq*.
[11] *About Us*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/aboutus/ (last visited June 10, 2021).
[12] 9 U.S.C. §§ 1–16; 9 U.S.C. §§ 201–08; 9 U.S.C. §§ 301–07.
[13] AM. ARB. ASS'N, *The American Arbitration Association: A Long History of Working with Government*, *available at* https://www.adr.org/sites/default/files/document_repository/AAA%20Government%20Services.pdf. The AAA maintains rosters of arbitrators and mediators and conducts case management for parties. In many ways, the AAA operates similar to a clerking function in court—maintaining dockets, appointing neutrals, and ensuring the timely resolution of the cases.
[14] U.S. OFF. OF PERS. MGMT., ALTERNATE DISPUTE RESOLUTION HANDBOOK 1, *available at* https://www.opm.gov/policy-data-oversight/employee-relations/employee-rights-appeals/alternative-dispute-resolution/handbook.pdf (last visited June 10, 2021).
[15] Michael McManus & Brianna Silverstein, *Brief History of Alternative Dispute Resolution in the United States*, CADMUS J., Oct. 2011, at 102.

facilitate speedy resolutions. By 1979, this process became routine for the Department and began to gain interest on a larger scale. At this same time in the private sphere, retired Judge Warren Knight of California started the Judicial Arbitration and Mediation Service (JAMS), which provides law firms, businesses, and individuals with access to judges open to serving in ADR capacities.[16] Today, AAA and JAMS are two of the country's largest private ADR provider organizations.

The 1980s brought a significant increase in interest from legal experts and academics in the use of ADR across several different fields.[17] Interest grew so quickly that universities and law schools nationwide began introducing courses and degrees in ADR topics. ACUS issued a series of recommendations related to agency use of ADR.[18] In 1985, the U.S. Attorney General issued an order recognizing the potential of ADR to reduce the time and expense of civil litigation.[19]

In 1986, ACUS issued a series of recommendations aimed at promoting the increased and thoughtful use of ADR methods by federal agencies.[20] They included a framework for determining when ADR is appropriate, and recommendations for congressional action to grant agencies authority to employ the full range of ADR techniques with the parties' agreement. The recommendations were intended as a first step to be supplemented by further empirical research, consultation with experts and interested parties, and more specific proposals. These recommendations came around the same time that the concept of "reg-neg" grew in popularity.[21] "Reg-neg" refers to the administrative practice of negotiated rulemaking. Across the administrative state, systems were changing to accommodate the growth of regulation and regulatory functions.

By that time, federal agencies were deciding far more cases annually than federal courts, and costs and delays had steadily increased.[22] Noting that traditional administrative proceedings had become "increasingly formal, costly, and lengthy," Congress passed the Administrative Dispute Resolution Act of 1990 (ADRA).[23] The ADRA authorized and encouraged federal agencies to use alternative means of dispute resolution to resolve controversies. According to the ADRA, "alternative means" included settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, either together or in combination.

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[16] *The JAMS Story*, JUD. ARB. & MEDIATION SERV., https://www.jamsadr.com/history (last visited Aug. 22, 2021).
[17] *Id.*
[18] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 1982-2, *Resolving Disputes Under Federal Grant Programs*, 47 Fed. Reg. 30704 (July 15, 1982); Admin. Conf. of the U.S., Recommendation 1982-4, *Procedures for Negotiating Proposed Regulations*, 47 Fed. Reg. 30708 (July 15, 1982).
[19] ALTERNATE DISPUTE RESOLUTION HANDBOOK, *supra* note 14, at 1.
[20] *See, e.g.*, Recommendation 82-2, *supra* note 18; Recommendation 82-4, *supra* note 18; Admin. Conf. of the U.S., Recommendation 1986-3, *Agencies' Use of Alternative Dispute Resolution*, 51 Fed. Reg. 25643 (July 16, 1986); David M. Pritzker, *The Administrative Conference and the Development of Federal ADR*, ADMIN. CONF. OF THE U.S.: ADMIN. FIX (Oct. 29, 2014, 8:05 AM), https://www.acus.gov/newsroom/administrative-fix-blog/administrative-conference-and-development-federal-adr.
[21] *See, e.g.*, Negotiated Rulemaking Act, Pub. L. No. 101-648, codified at 5 U.S.C. §§ 561–70.
[22] ALTERNATE DISPUTE RESOLUTION HANDBOOK, *supra* note 14, at 1.
[23] ADR Act, Pub. L. No. 101–552, 104 Stat. 2736. Congress also amended the Administrative Procedure Act, the statute that principally governs the administrative adjudication work of agencies, to promote the use of ADR in lieu of agency adjudication. *See* 5 U.S.C. § 571 et seq.

The ADRA required all federal agencies to appoint senior officials as dispute resolution specialists.[24] These specialists were tasked with training ADR personnel; assessing programs with ADR potential; educating relevant stakeholders about ADR and its benefits; and most crucially, adopting agency-specific policies addressing the use of ADR and case management. Congress sought to encourage agencies to use ADR to enhance executive branch operations and better serve the public.

The ADRA also reflected numerous ACUS recommendations and instructed agencies to consult with ACUS and the FMCS to develop their ADR policies.[25] All ADR processes required voluntary participation. Importantly, binding arbitration was authorized only with all parties' consent, although agencies had the ability to reject an arbitrator's award at will.[26] The statute was time-limited and terminated on October 1, 1995.[27]

Congress renewed the ADRA in 1996, removing its sunset provision and enhancing its confidentiality protections.[28] The 1996 ADRA, like its predecessor, reflected numerous ACUS recommendations. ACUS staff initially prepared the legislation.[29] The 1996 ADRA removed "settlement negotiation" from the definition of alternative means of dispute resolution due to its potential overbreadth.[30] It also added ombuds practice to the definition of alternative means of dispute resolution, which was gaining momentum within government and private organizations at the time.[31] The 1996 ADRA also removed agencies' ability to reject an arbitration decision.

President Clinton implemented ADRA by way of a Presidential Memorandum dated May 1, 1998, which created the Interagency ADR Working Group.[32] The Memorandum commissioned the Interagency ADR Working Group, convened by the Attorney General, to assist agencies in their ADR training and stakeholder education.[33]

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[24] *Id.*

[25] ADMIN. CONF. OF THE U.S., *Administrative Dispute Resolution Act*, *in* FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, https://sourcebook.acus.gov/wiki/Administrative_Dispute_Resolution_Act/view (last visited Mar. 4, 2021).

[26] *See* Margaret Ward, *Public Fuss in a Private Forum*, 2 HARV. NEGOT. L. REV. 217, 218–19 (1997).

[27] Interagency Alt. Disp. Resol. Working Grp., *Key ADR Statutes,* https://www.adr.gov/adrguide/04-statutes.html (last visited Aug. 22, 2021).

[28] Travis McDade, *Administrative Dispute Resolution Act (1990)*, ENCYCLOPEDIA.COM (last visited June 10, 2021).

[29] ADMIN. CONF. OF THE U.S., *supra* note 25.

[30] Ward, *supra* note 26, at 223 ("This change sends a clear message to administrative agencies that informal negotiations with private disputants, while a legitimate method of dispute resolution, do not fall within the mandate of ADRA, which speaks directly to Congress' desire to increase the availability of more formal alternative dispute resolution mechanisms.").

[31] 5 U.S.C. § 571(3). *See* Eric S. Adcock, *Federal Privilege in the Ombudsman's Office*, 8 CHARLESTON L. REV. 1, 10–15 (2013) (discussing the historical roots of the ombuds office as it moved from Scandinavia to the United States and grew in popularity).

[32] *See* Memorandum from President William J. Clinton on Designation of Interagency Committees to Facilitate and Encourage Agency Use of Alternate Means of Dispute Resolution and Negotiated Rulemaking to the Heads of Executive Departments and Agencies (May 1, 1998), https://www.justice.gov/sites/default/files/olp/docs/1998.05.01CLINTON.pdf (implementing ADRA and establishing an interagency committee to facilitate and encourage agency use of dispute resolution); *see also* 5 U.S.C. § 573(c).

[33] Memorandum from President William J. Clinton, *supra* note 32.

The Alternative Dispute Resolution Act of 1998 again expanded the use of ADR in the federal government, requiring federal trial courts to designate officers to implement, administer, oversee, and evaluate the courts' ADR programs.[34] The Environmental Policy and Conflict Resolution Act of 1998 (EPCRA) also created the National Center for Environmental Conflict Resolution (the "National Center") to facilitate the use of ADR across agencies with environmental law responsibilities.[35]

As the above history shows, since the late 1990s, ADR has become an accepted part of agency practice. Groups began to publish updated directories and resources regarding ADR practitioners, their firms, and areas of practice, opening greater access to ADR and facilitating their use by agencies.[36] These developments both contributed to and benefitted from increased interest in legal services more generally. The turn of the twenty-first century saw a majority of law schools providing ADR-related programs and courses, including clinical opportunities, as well as school organizations and extracurricular competitions.[37] Law firms regularly employ retired judges and certified attorneys with ADR experience and expertise to offer mediation, negotiation, and arbitration services.[38] Bar association ADR groups, like the American Bar Association (ABA) Dispute Resolution Section with nearly 11,000 members, have established a professional community of ADR practitioners across the public and private sectors.[39] The growth in federal agency ADR is part of this larger trend.

B. Modalities of ADR

Today, the term "ADR" encompasses many different processes. In the preparation of this report, it became clear that agencies are using many tools that could be considered ADR even if not so labeled. This section will introduce and define the different types of ADR under review as part of this study. Appendix D contains a chart detailing the essential functions of each of the modalities discussed in this section.

1. ADR Modalities in the 1990 ADRA

In 1986, ACUS defined seven modalities of ADR for federal agencies as part of a recommendation that agencies use ADR in their work.[40] This recommendation was a precursor to the ACUS Sourcebook the following year and to the ADRA that would follow four years later. That "lexicon," as it was called, included: arbitration, factfinding, minitrial, mediation, facilitation, convening, and negotiation.[41] Our study adopts a modernized vernacular and considers the following processes identified in the 1996 Act: conciliation, facilitation, factfinding, minitrials, arbitration, and mediation. This study also considers the use of ombuds,

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[34] ADRA of 1998, Pub. L. No. 105-315, 112 Stat. 2993; ADMIN. CONF. OF THE U.S., *supra* note 25.
[35] Pub. L. No. 105-156 (1998).
[36] *See, e.g.*, MEDIATE.COM, https://mediate.com/ (last visited Aug. 22, 2021) (leading website for promotion of mediator practice, as well as education for new and current mediators).
[37] McManus & Silverstein, *supra* note 15, at 102.
[38] *Id.*
[39] *Section of Dispute Resolution: Section Membership*, AM. BAR ASS'N: ABA GROUPS, https://www.americanbar.org/groups/dispute_resolution/membership/ (last visited Aug. 22, 2021).
[40] Recommendation 86-3, *supra* note 20.
[41] *Id.*

added to the ADRA in 1996.[42] Although not mentioned in the ADRA, we also define the terms "restorative justice" and "conflict coaching," used in some of the recommendations below.

Prior to turning to the various processes, a word on the term "neutral" may be helpful. The ADRA defines "neutral" as "an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy."[43] In the statutory section titled "Neutrals," ADRA notes that a neutral (no matter the type of ADR involved) may be a federal employee or any other person acceptable to the parties.[44] For neutrals serving as mediators, facilitators, or conciliators, the neutral serves at the "will of the parties."[45] In other words, neutrals serving an adjudicative role (i.e., arbitrator or fact-finder) serve on the case until the case's completion. Neutrals in consensual processes, such as mediation and facilitation, serve in the role *either* until the case's completion or until the parties revoke consent to the neutral.

The meaning of "conciliation" has changed over time. In past decades, the term was used to depict a reconciliation process led by a third party to the dispute.[46] Today, however, conciliation is often used to refer broadly to any process in which a confidential third-party resolves a dispute.[47] The lack of a shared understanding of conciliation is in part the result of the fact that it remains undefined in many areas of the law, such as in civil rights legislation and subsequent implementing regulations.[48] For one agency, conciliation involves an impartial board of inquiry that investigates relevant issues and makes recommendations for settling the dispute.[49] Some programs use the term "conciliation" interchangeably with "mediation," while other programs distinguish between the two. When a program involves both mediation and conciliation, the conciliator often takes a more hands-on and potentially evaluative role than a mediator.[50]

Facilitation "helps parties reach a decision or a satisfactory resolution of the matter to be addressed."[51] A facilitator usually conducts meetings but may not become deeply involved in the discussion or issue. Facilitation often refers to a process during which a group engages in

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[42] 5 U.S.C. § 571(3) (defining "alternative means of dispute resolution").
[43] *Id.* § 571(9).
[44] *Id.* § 573(a).
[45] *Id.* § 573(b).
[46] The term "conciliation" has some roots in religious as well as family, disputes, often with a focus on reconciliation. *See, e.g.*, Glenn G. Waddle & Judith Keegen, *Christian Conciliation: An Alternative to "Ordinary" ADR*, 29 CUMB. L. REV. 583, 585 (1999) (describing the use of conciliation in disputes seeking religious reconciliation). Many family courts have "conciliation" programs. *See* Cal. Fam. Code § 1820 (Joint family conciliation court services). These definitions of conciliation sometimes muddy the expectations of the parties.
[47] *See, e.g.*, Katherine Lynch, *Private Conciliation of Discrimination Disputes: Confidentiality, Informalism, and Power*, 22 WILLAMETTE J. INT'L DISP. RESOL. 49, 66 (2014) ("Conciliation can be broadly defined as a structured process involving a third party who is impartial as between the parties and who strives to remain as neutral as possible.").
[48] *See, e.g.*, Stephanie Greene & Christine Neylon O'Brien, *Judicial Review of the EEOC's Duty to Conciliate*, 119 PENN. ST. L. REV. 837, 845 (2015) ("The EEOC has not developed any regulations to define its duties to conciliate, except that it must 'notify the respondent in writing' when it determines that conciliation will not resolve the charge.").
[49] *See* 29 U.S.C. § 183 (authorizing Federal Mediation and Conciliation Service to take such steps to resolve labor disputes in the health care industry).
[50] Thomas J. Stipanowich & Veronique Fraser, *The International Task Force on Mixed Mode Dispute Resolution: Exploring the Interplay Between Mediation, Evaluation and Arbitration in Commercial Cases*, 40 FORDHAM INT'L L.J. 839, 848 (2017) (describing the role of the conciliator as more evaluative than a true mediator).
[51] Recommendation 86-3, *supra* note 20.

collaborative discussion with the help of a third party.[52] Like conciliation, some people and programs use the term interchangeably with "mediation," but facilitation usually refers to a process that is more party-driven and may involve dozens of stakeholders.[53] Facilitation need not involve a concrete dispute but may address problems with communications among individuals and groups. Facilitated processes may include both large group and small group meetings to accomplish the goals of the project. Facilitation might be best known for its use in public policy discussions, regardless of whether those discussions involve an element of decision-making. For example, a facilitator may work with a large group to draft a new policy, convening relevant stakeholders from within and outside the organization or agency.

A "factfinding proceeding" entails the "appointment of a person or group with the technical expertise in the subject matter to evaluate the matter presented and file a report establishing the facts."[54] Factfinding is a quasi-adjudicative process during which the parties, usually through their attorneys, present evidence and arguments to a neutral party, and the neutral makes a determination of likely outcomes at trial.[55] The evaluation can take many forms but one common form is findings of fact and conclusions of law. In this context, factfinding is the functional equivalent of early neutral evaluation (often abbreviated "ENE"). The evaluation is made for settlement purposes only; if the parties do not settle after the determination, the dispute resolution process continues as if the factfinding had not occurred.

A "minitrial" is "a structured settlement process in which each side presents a highly abbreviated summary of its case before senior officials."[56] The ACUS Sourcebook does not define the term "senior official," but this term appears to be shorthand for any person with authority to bind the agency for the specific case. The minitrial is structurally similar to the factfinding proceeding, involving the presentation of evidence and argument by lawyers for the parties. A third-party neutral's role is limited to guiding the presentations because the purpose of the minitrial is *not* to persuade the neutral third party but rather the principal decision-makers.[57] The principals may have the opportunity to ask questions to the lawyers presenting the cases during or after the process.[58] The purpose of the minitrial is to expose the strengths and weaknesses of each side's claims and provide information necessary to aid in settlement discussions. Once the presentations conclude, the senior officials have the opportunity to discuss settlement options with the parties behind closed doors and without any attorneys or third-party

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[52] SAM KANER, FACILITATOR'S GUIDE TO PARTICIPATORY DECISION-MAKING xx (2014) ("A facilitator is an individual who enables groups and organizations to work effectively; to collaborate and achieve synergy.").
[53] *See, e.g.*, Janice M. Fletcher, *One Size Does Not Fit All: Differentiating ADR Processes*, 49 S. TEX. L. REV. 1039, 1043–44 (2008) (noting that in the author's own practice as a facilitator does not fit neatly into any given label or box).
[54] Recommendation 86-3, *supra* note 20.
[55] The Maryland Courts have a particularly good definition of factfinding: "'Neutral fact-finding' means a process in which (1) the parties, their attorneys, or both appear before an impartial individual and present the evidence and arguments to support their respective positions as to disputed factual issues, and (2) the individual makes findings of fact as to those issues that are not binding unless the parties agree otherwise in writing." Md. Rules, R. 17-102(k) (2013).
[56] Recommendation 86-3, *supra* note 20.
[57] KRISTEN M. BLANKLEY & MAUREEN WESTON, UNDERSTANDING ALTERNATIVE DISPUTE RESOLUTION 241 (2017) (describing the minitrial process).
[58] *Id.*

assistance. As with factfinding, if the minitrial does not result in a settlement, the parties proceed as if the minitrial had not happened.

In "arbitration," a third-party neutral decides the submitted issue after reviewing the evidence and hearing argument from the parties. Arbitration involves the presentation of evidence and witnesses to a neutral third party. Compared to litigation, arbitration is typically a private process occurring outside of public view.[59] Decisions by arbitrators are considered binding because federal law only provides for the most limited review of arbitrator awards.[60] Although the idea of arbitration has held much promise to advocates for its time- and cost-efficiency, modern arbitration practice tends to look similar to litigation, but private and with a decision-maker of the parties' choosing.[61]

By contrast, "mediation" involves a neutral third party to assist the parties in negotiating an agreement. The mediator has no independent authority and does not render a decision; the parties themselves must reach a decision.[62] Like facilitators, mediators guide a discussion between the parties, but mediation is usually limited to solving discrete problems,[63] while facilitators may work with parties to simply increase communication or run a meeting. Mediators use a wide variety of strategies to solve problems, such as listening actively, managing impasse and heightened emotion, and working with parties to create and evaluate settlement proposals, among others. While some mediators focus on enabling conversation among the parties, other mediators may direct the process, provide advice, and give informal recommendations to resolve the dispute.[64] When a mediation is successful, the parties formalize their agreements into a contract. If unsuccessful, the parties proceed in litigation, adjudication, or another process.

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[59] *See* Kristen M. Blankley, *The Ethics and Practice of Drafting Pre-Dispute Resolution Clauses*, 49 CREIGHTON L. REV. 743, 770 (2016) ("Arbitration is a private method of dispute resolution, where the parties can choose their decision-maker, and the arbitrator makes a binding decision on the merits of the dispute.").

[60] 9 U.S.C. § 10(a) (providing review of an arbitrator's award for ethical misconduct, arbitrator bias, serious flaws in the process, and arbitrators exceeding the powers given to them by contract). A less common practice of "non-binding arbitration" resembles binding arbitration but may permit one or more parties for further review following the issuance of an arbitral decision. *See* Ward, *supra* note 26, at 218–20 (providing context for the change from the agency "escape clause" to a binding form of arbitration for all parties).

[61] *See* Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 ILL. L. REV. 1, 8–9 (2010) (noting that by the turn of the millennium, arbitration process largely mirrored litigation processes, including the delays and expenses associated with prolonged discovery).

[62] BLANKLEY & WESTON, *supra* note 57, at 51 (describing decision-making autonomy in mediation).

[63] The Uniform Mediation Act defines mediation as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute." Uniform Mediation Act § 2(1) (2003) (definition of mediation).

[64] Mediation literature and training since the 1990s focused on a divide between "facilitative" and "evaluative" mediators. Although those labels are less and less applicable as mediators utilize the best techniques to fit the given situation, this dichotomy still has value. For more information about these styles, see Leonard Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003); Leonard Riskin, *Mediator Orientations, Strategies, and Techniques*, 12 ALTS. TO THE HIGH COST OF LITIG. 111 (1994). For a discussion of the third type of mediation—transformative mediation—see ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT (Joseph Bass, rev'd ed. 2005).

2. ADR Modalities in the 1996 ADRA

The 1996 revisions to ADRA removed negotiation from the list but added "ombudsman" programs. Ombuds offices may vary in the services provided, making this modality difficult to define with any precision. As a general matter, an ombuds is usually an employee of an organization with multiple powers of investigation and dispute resolution.[65] Despite being organizational employees, ombuds have great independence, resulting in flexibility to resolve issues from stakeholders. Ombuds usually follow standards of practice focusing around four principles: (1) independence, (2) neutrality, (3) confidentiality, and (4) informality.[66] Ombuds provide many services, including, depending on the situation, listening to problems, providing information, investigating complaints, resolving conflicts, advocating for changes within the organization, and writing reports, among other functions.[67] Ombuds most often work one-on-one with a stakeholder who reports a problem or frustration, but some ombuds provide mediation services to multiple parties to a dispute.

3. Additional ADR Modalities to Consider Not Currently in the ADRA

Although not currently addressed in the ADRA, we define two additional types of ADR: "conflict coaching" and "restorative justice." Some neutrals working on federal ADR may already be using the coaching model, particularly facilitators and ombuds. Second, we mention restorative justice as a model of ADR that agencies may consider using in the future. Neither of these processes is defined by the ADRA, so we provide definitions from the literature.

Conflict coaching is an activity that grew out of executive coaching. It involves one-on-one discussions with a person in conflict for the purpose of developing an understanding of the conflict and skills for the client to work through the conflict. From the coach's perspective, this approach does not require the participation of all parties in the conflict but rather only those who wish for additional insight and strategy. Mediators, facilitators, and ombuds may also use the skills of coaching in their work, particularly when working with one party.[68]

Restorative justice is an umbrella term that describes a philosophy for resolving problems that involve harm by one side against another side. It is not a particular process. In the criminal law context, the U.S. Code defines "restorative justice" as a "program that emphasizes the moral accountability of an offender toward the victim and the affected community."[69] Restorative practices seek to hold accountable an individual who caused harm, focus on the needs of the

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[65] *See* Harold J. Krent, *Federal Agency Ombuds: The Costs, Benefits, and Countenance of Confidentiality*, 52 ADMIN. L. REV. 17, 20–21 (2000) (discussing history and structure of ombuds offices).

[66] International Ombudsman Association, *IOA Standards of Practice* (2005); *see also* ACUS, *A Reappraisal—The Nature and Value of Ombudsmen in the Federal Agencies*, Part 1, 13–15 (2016) (discussing standards of practice among federal agency ombuds) [hereinafter ACUS Ombuds Report].

[67] *See* ACUS Ombuds Report, *supra* note 66, at 286 (discussing actions taken by programmatic ombuds programs).

[68] *See* Cindy Fazzi, *Book Review: Introducing the One-on-One Dispute Resolution Process Conflict Coaching: Conflict Management Strategies and Skills for the Individual*, 64 DISP. RESOL. J. 90, (Oct. 2009) (defining conflict coaching). Conflict coaching is often used as a tool to address communications problems among parties. *See* International Ombudsman Association, *Ombuds Frequently Asked Questions*, https://www.ombudsassociation.org/ombuds-faq (last visited Dec. 6, 2021).

[69] 34 U.S.C. § 10401. Note that this statute involves juvenile justice, currently one of the areas in which restorative justice is most widely available.

harmed party, and work to reintegrate all parties back into the community.[70] Restorative justice uses many modalities, ranging from the conciliatory processes of mediation and facilitation to the adjudicative processes of specialized courts and commissions (such as the Truth and Reconciliation Commission in South Africa).[71] Although most restorative practices today in the United States largely focus on youth, some are also used in communities and workplaces.[72] Restorative practice in the federal government currently appears to be limited to the Department of Justice Community Relations Service, which works with community groups to resolve community conflicts and prevent and respond to hate crimes.[73] In 2019, the Department of Justice established the National Center on Restorative Justice to study mechanisms to advance restorative justice principles and practice in criminal justice (both youth and adult offenders) and other conflicts. This body partners with law schools to assess education, training, and research resources in the field.[74] Restorative justice also holds promise in other areas of the law, such as in areas involving civil rights or environmental issues, to repair harms.

II. METHODOLOGY

To prepare this report, we gathered information about agency practices from government and non-government sources. First, we asked agency officials to respond to a survey we prepared covering the areas of inquiry noted in the Introduction to this report, and which are discussed in detail at Section III below. We began by approaching ACUS Government Members to help identify appropriate individuals within each agency. Ultimately, representatives from ten agencies completed the survey, and another two agencies provided partial responses. A copy of the survey is appended to this Report after the appendices. We also conducted interviews with agency employees involved in ADR. We conducted telephone or video conference interviews with representatives from sixteen different agencies. There are nine agencies for which we both received a completed survey and interviewed personnel.

To ensure agency participation wherever possible, we worked with ACUS and our own professional contacts to make connections with the appropriate ADR personnel. We met with the Interagency ADR Working Group and the Coalition of Federal Ombudsman (COFO). Many agencies requested that we not disclose their information. To the extent that the same information is publicly available, we cite to those sources rather than the interviewees. Some agencies gave us permission to cite their surveys or their interviews, and we refer to those sources as appropriate. Appendix D identifies sources except for individuals where confidentiality was requested.

In addition to working with agency personnel, we researched publicly available information for all seventeen cabinet agencies and an additional seventeen independent agencies.

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[70] *See* Kristen M. Blankley & Alisha Caldwell Jimenez, *Restorative Justice and Youth Offenders in Nebraska*, 98 NEB. L. REV. 1, 6–11 (2019).
[71] *Id.* at 12–15.
[72] *See* TED WACHTEL, TERRY O'CONNELL & BEN WACHTEL, RESTORATIVE JUSTICE CONFERENCING (Piper's Press 2010).
[73] *Community Relations Service*, U.S. DEP'T OF JUST., https://www.justice.gov/crs (last visited Aug. 22, 2021).
[74] *National Center on Restorative Justice*, U.S. DEP'T OF JUST., https://bja.ojp.gov/program/national-center-restorative-justice/overview (last visited Aug. 22, 2021).

We attempted to identify all programs on agency websites that use ADR to resolve conflicts related to the determination of rights, privileges, or obligations of private persons. We also reviewed pertinent reports, studies, and articles about federal agency use of ADR.

III. AGENCY ADR PROGRAMS AND EXPERIENCES

This Part addresses agency practices involving administrative program ADR. It covers the following research areas: (A) selection and implementation of ADR; (B) qualifications and selection of ADR personnel; (C) training procedures for ADR personnel; (D) ethics and confidentiality of ADR personnel; (E) case management procedures; and, (F) interagency mechanisms to facilitate ADR.

A. Selection and Implementation of ADR

Agencies typically select and make one ADR modality, such as mediation or arbitration, available to participants. Few agencies offer participants a menu of options.[75] The following table shows the number of agency programs reported by modality.

Table of ADR Modalities*					
Mediation	**Arbitration**	**Facilitation**	**Conciliation**	**Fact-finding**	**Ombuds**
25	**4**	**11**	**4**	**1**	**13**

*Based on review of 36 agencies, including as separate agencies those that are within a cabinet department and have their own programs. Numbers do not total to 36 as some agencies have multiple modalities.

Although participation in ADR is mandatory in some programs, primarily in the area of labor relations,[76] it is voluntary at most agencies. That is, agencies that provide ADR as an alternative to traditional adjudication generally give parties the choice of using ADR rather than mandating it. Likewise, where ADR is offered as a program apart from traditional agency adjudication, private parties are not required to participate.

This section outlines the ADR modalities agencies are using and how they have operationalized those choices (i.e., whether the modality is mandated by statute or whether agencies have discretion to select among the ADR modalities). It also explores agency evaluation of their programs and whether those evaluations have precipitated changes to their programs when permitted under law.

[75] An example of an agency that does provide a menu of modalities is the Federal Maritime Commission, which offers both adjudicative and non-adjudicative forms of ADR at the parties' election. *See Alternative Dispute Resolution Services*, FED. MAR. COMM'N, https://www.fmc.gov/databases-services/alternative-dispute-resolution-services/ (last visited Aug. 22, 2021).

[76] *See, e.g.*, Railway Labor Act, 41 U.S.C. § 151 *et seq.* (mandatory arbitration) and National Labor Relations Act, 29 U.S.C. § 183 (mandatory conciliation).

1. Background

Prior to discussing the types of ADR agencies currently use, this section gives background, including historical context, regarding how organizations, including governmental organizations, determine which ADR modalities to implement. This section then briefly discusses legal authority for implementing dispute resolution programs.

Theories of Process Design

In 1976, Harvard Law Professor Frank Sander delivered the keynote address at the historic ADR Pound Conference, imagining a "multi-door courthouse" in which litigants could be triaged into the most appropriate process for their dispute, such as mediation, arbitration, or litigation, by a court clerk or other program manager.[77] This conference served as a catalyst for the increased use of ADR within the courts, including federal courts.[78] Former Attorney General Griffin Bell and the Department of Justice began creating ways to implement the ideas of the Pound Conference into the federal government.[79] In addition, "multi-door courthouses" popped up across the country, offering a menu of processes to resolve disputes.[80]

Congress passed the 1990 version of the ADRA at this time, appearing to draw on the concept of the multi-door courthouse. Similar to the trend of ADR programs at the time, the ADRA included a menu of dispute resolution options, including conciliation, facilitation, mediation, factfinding, minitrials, and arbitration.[81] As noted above, the use of ombuds services was added in 1996.[82] Congress gave agencies broad authority to use dispute resolution proceedings when parties voluntarily agree to participate.[83] The reason for a broad selection of options was to preserve the ability to "fit the forum to the fuss,"[84] and be able to match a dispute with the most appropriate process, taking into account party needs and interests. Key interests that may determine the appropriate process choice include accessibility (including lack of formality), time and cost efficiencies, and preservation of relationships, among other factors.[85] The 1990s were a high point for the sheer number of types of ADR processes, both consensual and adjudicative, and even some hybrid processes. This time period also ushered in a host of

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[77] Frank Sander, *Varieties of Dispute Processing, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (Apr. 7-9, 1976), in 70 F.R.D. 79, 111 (1976); *see also* Lara Traum & Brian Farkas, *The History and Legacy of the Pound Conferences*, 18 CARDOZO J. CONFLICT RESOL. 677, 685–86 (2017) (discussing Professor Sander's keynote address); Lisa Blomgren Amsler, *Dispute System Design and the Global Pound Conference*, 18 CARDOZO J. CONFLICT RESOL. 621, 621 (2017) ("Frank Sander's speech at the 1976 Pound Conference marked a turning point in the field's growth and development within the United States").
[78] Louise Phipps Sendt & Cynthia A. Savage, *ADR in the Courts: Progress, Problems, and Possibilities*, 108 PENN. ST. L. REV. 327, 327–28 (2003) (discussing the history of the Pound Conference).
[79] *A Dialog Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse*, 5 U. ST. THOMAS L. REV. 665, 671 (2008) (discussing the interest of the attorney general).
[80] *See id.* (describing multi-door courthouse programs arising in the 1990s).
[81] 5 U.S.C. § 571 (1990).
[82] *Id.* § 571 (1996).
[83] *Id.* § 572.
[84] Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).
[85] *See* Hon. Gladys Kessler & Linda J. Finkelstein, *The Evolution of a Multi-Door Courthouse*, 37 CATH. U.L. REV. 577, 580–85 (discussing case needs and how the programs move cases into dispute resolution processes in the D.C. courts).

ADR-related laws and, a few years later,[86] the promulgation of process-specific standards of ethics and practice.

Over time, the truest vision of the multi-door courthouse with a plethora of processes did not materialize. Rather, three processes emerged dominant, depending on the situation: arbitration, mediation (and, to a lesser extent, facilitation), and ombuds practice. Systems historically using arbitration (i.e., prior to the reforms of the 1960s through 1990s) continue to use arbitration to this day. In particular, private cases involving labor relations are often resolved by arbitration due to language in specific collective bargaining agreements.[87] Within the courts, mediation rose to prominence as the preferred method of dispute resolutions by court systems, attorneys, and parties.[88] Finally, both private and public organizations have increasingly used ombuds services.[89] The use of trained third-party facilitators is a smaller, but growing practice to structure discussions regarding public policy—including conversations about environmental concerns or policing, as two examples. Other types of processes, such as minitrials, factfinding, and conciliation, have diminished in frequency or been used on a limited case-by-case or program-by-program basis.[90]

Although the multi-door courthouse ideal that existed at the time of the passage of ADRA did not materialize as originally thought, now the growing field of "dispute system design" (DSD) is used to plan for and implement new ADR processes.[91] DSD is the "applied art and science of designing the means to prevent, manage, learn from, and resolve streams of conflict."[92] Central principles of DSD include thoughtful consideration of process values and of process flexibility, seeking and incorporating valuable feedback from stakeholders, and engaging in periodic evaluation of the process to determine successes and shortcomings.[93] DSD principles are now widely considered best practices for many types of institutions.[94]

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[86] *See* Jacqueline Nolan-Haley, *International Dispute Resolution and Access to Justice: Comparative Law Perspectives*, 2020 J. DISP. RESOL. 391, 399 (2020) (discussing federal efforts in the 1990s regarding ADR).

[87] *See* Epic Systems v. Lewis, 138 S. Ct. 1612 (2018) (consolidating two cases before the NLRB and one case from the realm of employment regarding arbitration issues).

[88] *See, e.g.*, Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. DISP. RESOL. 298–99 (2011) (noting the preference for mediation); Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL'Y & L. 211, 211 (2004) (discussing an empirical preference for mediation, particularly facilitative mediation).

[89] *See* Timothy Hedeen, *Ombuds as Nomads? The Intersection of Dispute System Design and Identity*, 13 U. ST. THOMAS L.J. 233, 235–37 (2017) (discussing history of ombuds practice).

[90] *See* Nancy A. Welsh, *I Could Have Been a Contender: Summary Jury Trial as a Means to Overcome Iqbal's Negative Effect Upon Pre-Litigation Communication, Negotiation, and Early, Consensual Dispute Resolution*, 114 PENN. ST. L. REV. 1149, 1185–88 (2010) (urging more use of summary jury trials).

[91] *See* Andrea Kupfer Schneider, *How Does DSD Help Us Teach About Community Conflict (And How Can Community Conflict Help Illustrate DSD)?*, 13 U. ST. THOMAS L.J. 370, 371 (2017) (describing DSD as a sub-field drawing on conflict theory, organizational behavior, and alternative dispute resolution).

[92] Victor D. Quintanilla, *Human-Centered Civil Justice Design*, 121 PENN. ST. L. REV. 745, 758 (2017).

[93] *Id.* at 758–59 (summarizing key elements of dispute system design); *see also* Kupfer Schneider, *supra* note 91, at 372 ("DSD theorists outline the qualities that usually distinguish effective systems: stakeholders have participated in designing them, the systems are fluid and flexible, and the system is transparent and accountable.").

[94] Thomas B. Metzloff, *Control Over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221, 222 (2004) (discussing some of the origins of dispute resolution design); Lisa Blomgren Amsler, *The Dispute Resolver's Role Within a Dispute System Design: Justice, Accountability, and Impact*, 13 U. ST. THOMAS L.J. 168, 175 (2017).

This summary of considerations for implementing ADR programs highlights a few widely accepted views in the academic literature: first, that the design of any ADR program should be intentional; the choice of modality for a program should be based on the interests of the participants and the goals of the program. Second, when programs are designed, stakeholders should be consulted to give input. The relevant stakeholder groups should include not only the participants from within the agency but also those from outside the agency who might later be a party to the process.[95] Third, all programs should be reviewed periodically for success, and should be flexible to adjust over time.

Agency Authority to Institute ADR Programs

Agencies have broad authority to choose ADR processes for their programs. Under the ADRA: "An agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding."[96] Although the ADRA lists certain ADR modalities, the law does not limit agencies to the modalities within the list nor does it dictate which process any one agency should adopt.[97] Further, the ADRA supplements any other agency authority to implement ADR programs under other law.[98]

The ADRA, however, directs agencies to consider not using ADR in six instances, all of which implicate public policy issues such as the need for precedent, the need for a record, the absence of needed third parties, and the need for continuing jurisdiction on the part of the agency.[99] To date, no court has reached the question of whether an agency acted outside of its authority in creating a dispute resolution program. Only a handful of cases involve federal agency ADR at all. In one case, a court found no error in an environmental dispute resolution process,[100] and in another, the court found that an agency had the authority to agree to binding arbitration with a stakeholder, as opposed to non-binding arbitration under the ADRA.[101]

As a matter of policy, agencies may decide not to employ ADR programs even where there is a perceived need in certain circumstances. For example, ADR may not be appropriate where an agency seeks to establish authoritative precedent, particularly in new or emerging areas of law. Similarly, ADR may not be the right choice for an agency where a full, public record would be important to the agency or the public. ADR processes involving confidentiality would not meet that need; confidentiality is discussed in greater detail below. As a matter of law, agencies are guided to consider not using ADR where these and other considerations come into

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[95] *See* Recommendation 86-3, *supra* note 20.
[96] 5 U.S.C. § 572(a); *see also* Michael Asimow, *Best Practices for Administrative Hearings Outside the Administrative Procedures Act*, 26 GEO. MASON L. REV. 923, 954 (2019) (discussing the use of ADR as an agency best practice).
[97] 5 U.S.C. § 571(3) (defining ADR as "any procedure that is used to resolve issues in controversy, including, but not limited to . . .").
[98] *Id.* § 572(c) ("Alternative means of dispute resolution authorized under this subchapter are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques.").
[99] *Id.* § 572(b) (listing six exceptions to the general rule regarding ADR authority).
[100] *See* Miccosukee Tribe of Indians of Fla. v. United States, 420 F. Supp. 2d 1324, 1339 (S.D. Fla. 2006) (finding no error in use of Institute of Environmental Conflict Resolution program).
[101] College Blvd. Nat. Bank v. Credit Systems, Inc., 1994 WL 242670, *2 (D. Kan. 1994) (finding that the ADRA is not the only authority that the FDIC may have to enter into a dispute resolution contract).

play.[102] Likewise, some academics have recognized these interests and others such as balances in power or the potential role of the courts.[103] The relative dearth of judicial decisions and scholarly discussion on the authority of agencies to implement ADR programs suggests that their legal foundations are widely considered to be sound.

2. Agency Practices

To investigate agency motivations and decisions regarding their choices of ADR programs, we first asked each of the targeted agencies what modalities of ADR they are using and provided a closed set of options: conciliation, facilitation, factfinding, minitrials, arbitration, mediation, and ombuds practice. We also reviewed publicly available information on agency websites to gain a fuller picture to supplement agency responses to our inquiries. This section provides information not only on the types of ADR performed by agencies but also feedback and measures of success. Appendix A provides links to the websites of agencies using the modalities of ADR reviewed by this study.

ADR Programs Offered by Agencies

Mediation is the most commonly used modality of ADR. At least 25 agencies indicated using some form of mediation in their ADR programs. The following agencies report using mediation on their websites: the Environmental Protection Agency,[104] the Nuclear Regulatory Commission,[105] the International Trade Commission,[106] the Department of Education,[107] three agencies of the Department of Agriculture,[108] the Department of the Interior (DOI),[109] the

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[102] 5 U.S.C. § 572(b). The six instances are: (1) when binding precedent is needed; (2) the area involves a significant question of unresolved government policy; (3) the government has a need to maintain consistency across cases; (4) when the outcome of the situation would involve third parties; (5) when a full public record is necessary; and (6) when dispute resolution would interfere with an agency's continuing monitoring of a situation.

[103] *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). *See also* Jack B. Weinstein, *Comments on Owen M. Fiss,* Against Settlement, 78 FORDHAM L. REV. 1265, 1267 (2009).

[104] *Conflict Prevention and Resolution Center (CPRC)*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/adr (last visited Aug. 22, 2021).

[105] *Alternative Dispute Resolution in the NRC's Enforcement Program*, U.S. NUCLEAR REGUL. COMM'N, https://www.nrc.gov/about-nrc/regulatory/enforcement/adr.html (last visited Oct. 18, 2021).

[106] *Mediation Program*, U.S. INT'L TRADE COMM'N, https://www.usitc.gov/intellectual_property/mediation.htm (last visited Aug. 22, 2021).

[107] *Alternative Dispute Resolution (ADR)*, U.S. DEP'T OF EDUC.: OFF. OF THE GEN. COUNS., https://www2.ed.gov/about/offices/list/ogc/adr-page.html (last visited Oct. 18, 2021).

[108] U.S. DEP'T OF AGRIC., FARM SERVICE ADMINISTRATION AGRICULTURAL MEDIATION PROGRAM: FACT SHEET (2021), *available at* https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/agricultural-mediation-program-factssheet.pdf; U.S. DEP'T OF AGRIC., *Risk Management Agency Mediation Program*, https://www.rma.usda.gov/en/About-RMA/Laws-and-Regulations/Mediation; U.S. DEP'T OF AGRIC., *Natural Resources Conservation Service Mediation Program*, https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/alphabetical/?cid=nrcs143_008444; *Rural Development Agency Mediation*, *available at* https://www.rd.usda.gov/files/RD-SFH-MediationNotes.pdf (last visited Oct. 24, 2021).

[109] *Office of Collaborative Action and Dispute Resolution*, U.S. DEP'T OF THE INTERIOR, https://www.doi.gov/pmb/cadr (last visited Aug. 22, 2021).

Internal Revenue Service (IRS),[110] Health and Human Services,[111] the Federal Energy Regulatory Commission (FERC),[112] the Department of Justice Community Relations Service,[113] the Department of Transportation,[114] the Department of Commerce,[115] the Pension Benefit Guaranty Corporation,[116] the National Mediation Board (NMB),[117] FMCS,[118] the Federal Maritime Commission,[119] the Office of Special Counsel (OSC),[120] the National Labor Relations Board,[121] the National Archives and Records Administration,[122] the National Center,[123] the Federal Labor Relations Authority,[124] the Federal Communications Commission,[125] the Federal Election Commission,[126] and the Equal Employment Opportunity Commission (EEOC).[127]

Most of the agencies surveyed use facilitative mediation in which a professional mediator attempts to facilitate negotiation between the parties in conflict without providing a substantive assessment of the merits of the case. The mediator encourages the parties to reach a voluntary

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[110] *IRS Appeals Mediation Program*, https://www.irs.gov/appeals/appeals-mediation-programs (last visited Oct. 17, 2021).

[111] *Mediation*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/about/agencies/dab/adr-services/mediation/index.html (last visited Oct. 17, 2021).

[112] *Alternative Dispute Resolution*, FED. ENERGY REGUL. COMM'N, https://www.ferc.gov/enforcement-legal/legal/alternative-dispute-resolution (last visited Oct. 17, 2021).

[113] *Community Relations Service*, U.S. DEP'T OF JUST., https://www.justice.gov/crs/our-focus (last visited Oct. 24, 2021).

[114] *Mediation, Facilitation and Consulting Services*, U.S. DEP'T OF TRANSP., https://www.transportation.gov/CADR/mediation-facilitation-and-consulting (last visited Oct. 17, 2021).

[115] *Coastal Zone Management Act Mediation*, U.S. DEP'T OF COMMERCE, *available at* https://coast.noaa.gov/data/czm/consistency/media/CZMA-mediations.pdf (last visited Aug. 22, 2021).

[116] *PBGC Mediation Program*, PENSION BENEFIT GUAR. CORP., https://www.pbgc.gov/prac/other-guidance/pbgc-mediation-program (last visited Oct. 17, 2021)).

[117] *Mission & Organization*, NAT'L MEDIATION BD., https://nmb.gov/NMB_Application/index.php/mission-organization/ (last visited Aug. 22, 2021).

[118] *Alternative Bargaining Processes*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/services/resolving-labor-management-disputes/alternative-bargaining-processes/ (last visited Aug. 22, 2021).

[119] *Alternative Dispute Resolution Services*, FED. MAR. COMM'N, https://www.fmc.gov/databases-services/alternative-dispute-resolution-services/ (last visited Aug. 22, 2021).

[120] *Alternative Dispute Resolution Overview*, U.S. OFF. OF SPECIAL COUNS., https://osc.gov/Services/Pages/ADR.aspx (last visited Aug. 22, 2021).

[121] *NLRB Contracts with FMCS to Provide Mediators in Board Alternative Dispute Resolution Program*, NAT'L LAB. RELS. BD.: OFF. OF PUB. AFFS. (Oct. 23, 2012), https://www.nlrb.gov/news-outreach/news-story/nlrb-contracts-with-fmcs-to-provide-mediators-in-board-alternative-dispute.

[122] *Mediation Program*, U.S. NAT'L ARCHIVES & RECS. ADMIN.: OFF. OF GOV'T INFO. SERVS., https://www.archives.gov/ogis/mediation-program (last visited Aug. 2, 2021).

[123] *John S. McCain III National Center for Environmental Conflict Resolution*, UDALL FOUND., https://www.udall.gov/ourprograms/institute/institute.aspx (last visited Aug. 22, 2021).

[124] *Negotiation Impasse*, U.S. FED. LAB. RELS. AUTH., https://www.flra.gov/cases/negotiation-impasse (last visited Aug. 22, 2021).

[125] *EB—Market Disputes Resolution Division*, FED. COMMC'NS COMM'N, https://www.fcc.gov/general/eb-market-disputes-resolution-division (last visited Aug. 22, 2021).

[126] *Alternative Dispute Resolution*, FED. ELECTION COMM'N, https://www.fec.gov/legal-resources/enforcement/alternative-dispute-resolution (last visited Oct. 1, 2021).

[127] *Questions And Answers About Mediation*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/questions-and-answers-about-mediation (last visited Aug. 22, 2021).

solution by probing their interests.[128] Four agencies use evaluative mediation, which is a process modeled on settlement conferences held by judges. An evaluative mediator assists the parties in reaching resolution by pointing out the strengths and weaknesses of their cases and predicting what a judge or jury would be likely to do.[129] Two agencies use transformative mediation, which, in contrast with the other forms of mediation that focus on problem-solving, is focused on fostering the parties' "empowerment" to participate and "recognition" of the other party.[130] The theoretical underpinnings of transformative mediation assume that people in conflict are more self-absorbed and unable to see the conflict partner clearly. This model attempts to shift the mindsets of the participants by first building up the participants ("empowerment") to give them the ability to understand the conflict from the other perspective and repair the relationship ("recognition"). The goal of transformative mediation is first to move the relationship forward and less to resolve the underlying dispute.[131] Six agencies leave the choice of style to the mediator.

FMCS, the NMB, and the Federal Maritime Commission use arbitration in addition to mediation.[132] The Federal Labor Relations Authority is notable in that it also uses "med-arb" in which if any issues are unresolved after mediation, the mediator serves as arbitrator.[133]

A dozen agencies we considered have ombuds services. Some of these and other agencies, such as the Federal Deposit Insurance Corporation, use ombuds services for both program ADR and internal ADR.

Finally, seven agencies deploy facilitation: the DOI, the Department of Education, and the Department of Transportation, as well as the Environmental Protection Agency (EPA), FMCS, the National Center, FERC and the U.S. Army Corps of Engineers.[134] The Office of Inspector General at the Department of Defense offers mediation and facilitation in a program

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[128] Katie Shonk, *Types of Mediation: Choose the Type Best Suited to Your Conflict*, Harvard L. Sch.: Program on Negot. (Aug. 9, 2021), https://www.pon.harvard.edu/daily/mediation/types-mediation-choose-type-best-suited-conflict/.

[129] Diane Cohen, *Evaluative Mediation*, MEDIATE.COM (Mar. 2011), https://www.mediate.com/articles/CohenDbl20110321.cfm.

[130] Brad Spangler, *Transformative Mediation*, BEYOND INTRACTABILITY, https://www.beyondintractability.org/essay/transformative_mediation (2003).

[131] *Id.*

[132] *Arbitration and the Arbitrator Roster*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/services/arbitration/ (last visited Aug. 23, 2021); *Arbitration Overview*, NAT'L MEDIATION BD., https://nmb.gov/NMB_Application/index.php/arbitration-overview/ (last visited Aug. 23, 2021); *Alternative Dispute Resolution Services*, *supra* note 75.

[133] *Mediation-Arbitration ("Med-Arb")*, U.S. FED. LAB. RELS. AUTH., https://www.flra.gov/fsip_drpg_4c (last visited Aug. 23, 2021).

[134] *CPRC Services*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/adr/cprc-services (last visited Aug. 23, 2021); *Facilitation*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/services/alternative-dispute-resolution-for-government/facilitation/ (last visited Aug. 23, 2021); *Office of Collaborative Action and Dispute Resolution*, *supra* note 112; *Alternative Dispute Resolution*, *supra* note 115; *Mediation, Facilitation and Consulting Services*, *supra* note 109; *John S. McCain III National Center for Environmental Conflict Resolution*, *supra* note 123; *Collaboration and Public Participation Center of Excellence*, U.S. ARMY CORPS OF ENGINEERS, https://www.iwr.usace.army.mil/About/Technical-Centers/CPCX-Collaboration-Public-Participation/ (last visited Oct. 27, 2021).

that is unique in the Federal Government: helping to resolve whistleblower reprisal cases against DOD components.[135]

At least a handful of agencies including the DOI, Department of Education, Department of Justice, as well as the Nuclear Regulatory Commission (NRC), the EPA, and the National Labor Relations Board (NLRB) offer still other forms of ADR.[136] Some use multiple modalities in combination, and a few offer a menu of modalities from which either participants or agency staff then select. For instance, the Federal Communications Commission (FCC) offers mediation at three different stages of its adjudicative process: in addition to offering mediation for the resolution of complaints, it has an informal pre-complaint mediation process offered to parties who initially contact the FCC about potentially filing a complaint and an informal complaint mediation process for those in the process of filing a complaint, which tolls the limitations period for six months.[137] The EPA Environmental Appeals Board (EAB) employs a process in which all parties to a case first receive a confidential evaluation by an off-panel EAB Judge of the strengths and weaknesses of their respective positions through a process best described as ENE; once the parties have the benefit of those evaluations, then the process shifts to mediation or facilitation in an effort to resolve the issues identified by the parties.[138] FERC also offers ENE.[139] FMCS uses several modalities and also offers to tailor an ADR process to the parties' needs.

As noted above, DSD is an important emerging part of the field of dispute resolution. FMCS has expertise to provide design services to other agencies. According to the FMCS website, "FMCS can assist your organization to design and develop a new alternative dispute resolution system or to refresh your current system so that it can manage both internal and external conflict sources."[140] In addition to assisting with the design of a program, FMCS can also consult with federal agencies to design a process for a specific case.

Several agencies provide ADR-specific annual reports and make them available to the public,[141] but most do not. Some agencies noted that their organic statutes or the supplemental statutes on which they rely for authority to conduct ADR do not define the scope of their chosen modality, such as "mediation," and the phrase "ADR" does not appear in the statutory language. In fact, when some agencies began this work, those terms were not in common usage. Agencies

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[135] *ADR Program for Whistleblower Reprisal Complaints*, https://www.dodig.mil/Components/Administrative-Investigations/Alternative-Dispute-Resolution-ADR-Program-for-Whistleblower-Reprisal-Complaints/. The ADR program has resolved nearly 200 cases since it began in 2017. Survey response from DOD OIG Whistleblower Reprisal Investigations Directorate, Oct. 2021.

[136] *See, e.g.*, *Alternative Dispute Resolution (ADR)*, *supra* note 110; *Office of Collaborative Action and Dispute Resolution*, *supra* note 112; *CPRC Services*, *supra* note 137.

[137] Interview with Rosemary McEnery, ADR Division Chief, Enforcement Bureau, FCC (Feb. 21, 2021).

[138] Interview with David Hecker, Staff Attorney, EPA Environmental Appeals Board (June 8, 2021).

[139] *Dispute Resolution Service*, FED. ENERGY REGUL. COMM'N, https://www.ferc.gov/enforcement-legal/legal/alternative-dispute-resolution/dispute-resolution-service (last visited Oct. 28, 2021).

[140] *Dispute Resolution Systems Design*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/services/alternative-dispute-resolution-for-government/dispute-resolution-systems-design/ (last visited Aug. 23, 2021).

[141] *See, e.g.*, U.S. ENV'T PROT. AGENCY, ENVIRONMENTAL COLLABORATION AND CONFLICT RESOLUTION FY 2019 ANNUAL REPORT (2019), https://www.epa.gov/sites/default/files/2020-08/documents/fy_2019_epa_eccr_annual_report_final.pdf.

have developed complex ADR programs and used loose fitting statutory language as the hook for their doing so.[142]

Feedback and Measures of Success

Most agencies surveyed had a means for receiving feedback to measure the success of their ADR programs. Some agencies have contracts with private parties that collect feedback about their ADR program. Other agencies gather their own feedback.[143] For example, the ombuds at the Office of Federal Contract Compliance Programs of the Department of Labor, provides a feedback form on its website and at the end of the fiscal year sends it to all parties that brought a matter to the ombuds office.[144] Of particular note is the National Center, which uses various feedback forms for its facilitation participants. It will either deploy a short survey (nine questions, each on a sliding scale)[145] or a longer questionnaire with answers on sliding scales and free-response questions.[146] After the National Center conducts a mediation, it deploys its Mediator Participant Evaluation, asking questions about the process and the neutral.[147] Additionally, the Internal Revenue Manual includes a requirement that following appellate mediation, the mediator provides the customer with a voluntary satisfaction survey with a request to complete the survey within 30 days. The IRS additionally provides a self-addressed stamped envelope for the customer's convenience.[148]

One agency observed that after the 1996 ADRA specifically noted evaluation of ADR programs, it began evaluating its program and sought independent academic and other researchers to help assess the ADR program and make changes.[149] Another agency commented that it meets regularly with practitioners that appear before it and that they provide informal feedback. In general, according to the agency, most practitioners have been very satisfied with the program. Several agencies commented that they interpret that their programs or individual cases are "successful" if they do not hear back from participants after the conclusion of the mediation or other engagement. Agency comments confirmed that where an agency does not provide an easy, readily available format to parties for giving feedback at the close of the process, those parties are unlikely to give such feedback voluntarily.[150]

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[142] Congress can require an agency to adopt a particular variant of ADR. For example, the Affordable Care Act mandated that HHS create a binding ADR program for claims between health care providers and manufacturers that participate in what is known as the "340B program" which establishes price ceilings for certain covered outpatient drugs. HHS issued the final rule establishing the binding ADR program, which resembles arbitration by a panel of HHS officials, in December 2020. *See* 85 Fed. Reg. 80632 (Dec. 14, 2020).

[143] Surveys deployed by or on behalf of agencies aimed at more than nine members of the public must, of course, comply with the Paperwork Reduction Act, 44 U.S.C. § 3501 et seq.

[144] Interview with Marcus Stergio, Ombuds, Office of Federal Contract Compliance Programs (June 23, 2021).

[145] National Center, Meeting Facilitation Form, OMB Number: 2010-0042, 2434.54.

[146] National Center, Long Term Group Facilitation Participant Questionnaire, OMB Number: 2010-0042, 2434.54.

[147] National Center, Mediation Participant Evaluation, OMB Number: 3320-0004.

[148] Internal Revenue Manual 8.23.3.10 (2017), https://www.irs.gov/irm/part8/irm_08-026-003 (last visited, Oct. 1, 2021).

[149] Interview with Stephen Ichniowski, National ADR Coordinator, EEOC (Apr. 21, 2021).

[150] Defaults (doing nothing) are sticky and people tend to stick with that, absent some kind of a nudge. *See generally* RICHARD THALER AND CASS SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS (Penguin updated ed. 2021).

3. Recommendations

In this section, we provide three recommendations regarding the general practice of selection and implementation of agency ADR.

Application of DSD principles. Agencies should apply DSD principles to be thoughtful about their ADR modalities in light of the goals and objectives of the program. As noted above, the different modalities are based on differing goals and philosophies. Program administrators and designers should think carefully about whether the modality is intended to reach consensual outcomes (such as mediation, in which the parties hold the power to accept or reject settlement offers) or provide information and guidance to the participants (such as in factfinding, ENE, minitrials, or even ombuds practice), to name just two. ADR programs with a goal of reducing delay might find arbitration particularly attractive since arbitration promotes finality in ways not provided by other processes. Elaborating on these considerations is beyond the scope of this data-gathering study but the academic and practice literatures provide such guidance.

Fitting "the forum to the fuss" requires understanding the problem to be addressed, designing an ADR process that addresses it, and then reviewing the results from the perspective of stakeholders and the agency. For example, after years of a burgeoning caseload leading to a significant backlog, in 1991, the EEOC launched a pilot mediation program in four of its regional offices. The program was designed to capture one category of case that EEOC saw as being both best suited for ADR and also yielding the most benefits: cases in which the charges had possible merit but final findings were conditioned on the results of an investigation.[151] At the end of the first year, the EEOC hired a consultant to conduct a survey of participant satisfaction, which was found to be high. Resolution rates and processing time also significantly improved. The agency then expanded the program to all of its regions. In the ensuing years, the EEOC conducted three studies of the expanded program: one of participant satisfaction, one of mediator feedback, and a third survey of employers who did not use the mediation program to determine the reason and what actions might be available to induce them to try it.[152] Some of the factors present in this example—namely a large caseload of potentially meritorious cases—likely exist within other agencies, so this model could be piloted at other agencies and also evaluated for success.

More recently, after a U.S. Government Accountability Office report specifically noted the need to increase transparency and enhance communications with outside stakeholders at the Office of Federal Contractor Compliance Programs,[153] that agency began holding a series of annual town halls during which agency stakeholders reiterated the needs for increased transparency and enhanced communication.[154] The agency response to the GAO report and the town hall feedback was the hiring of an ombuds who could help the agency accomplish these

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[151] EEOC excluded from the program its two other categories of cases: those that clearly have merit at the outset, and those that clearly do not. *Studies of the Mediation Program*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/studies-mediation-program (last visited Aug. 22, 2021).
[152] *See Studies of the Mediation Program*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/studies-mediation-program (last visited Aug. 23, 2021).
[153] *Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance*, GAO 16-750 (Sept. 22, 2016), https://www.gao.gov/products/gao-16-750.
[154] Interview with Marcus Stergio, Ombuds, Office of Federal Contract Compliance Programs (June 23, 2021).

two goals while facilitating the resolution of individual disputes between the agency and stakeholders in the short term and improving agency-stakeholder relations in the long term. There had been such a program which had been popular at the time but was discontinued with a change of presidential administrations. The ombuds program was created by a directive from the agency head in 2018, and an experienced ADR professional was hired.[155] The ombuds assiduously seeks feedback from stakeholders which, so far, has been high.[156]

Program visibility. The visibility and ease of access to information about agency ADR programs vary widely. Some agencies prominently display ADR program information on their websites, have codified their ADR programs in either regulations or guidance, and have issued press releases about their programs or otherwise publicized them.[157] Other ADR programs can be found only by targeted internet search. Some agencies have incorporated ADR into their adjudication and/or enforcement procedures; for example, offering ADR as an option within a notice that a complaint has been filed with the agency.[158] Other agencies that offer ADR deploy an ad hoc approach. In some instances, not only do members of the public not know about the ADR options available to them, but some officials at some agencies did not know about available ADR programs in other agency components.

Although some agencies remarked on how it is difficult to let participants know about their ADR programs, others expressed concern that if interest in their ADR programs greatly increased, they would not have enough staff to accommodate so many new cases.[159] Several agencies discussed the limitations of their programs either due to legal or personnel constraints. Those constraints could be addressed through more reliable funding and codification of their programs, or, if resources are limited, through interagency agreements discussed in later sections of this report.

Accordingly, we recommend that agencies make their ADR programs readily accessible on their websites and push information to their constituents to publicize the programs (e.g., press releases, speeches, brochures). Even where resources are limited, these are low-cost means by which to enhance the ADR experience. In addition, information about the option to use ADR should be incorporated into the relevant agency processes, whether by regulation, guidance or other vehicle that ensures that parties have consistent access to ADR.

Program evaluation and feedback. Another area for improvement is that of feedback and evaluation. Not all agencies actively measure feedback from participants in their ADR programs.

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[155] *Id.*

[156] U.S DEP'T OF LAB.: OFF. OF FED. CONT. COMPLIANCE PROGRAMS, 2020 ANNUAL REPORT OFCCP OMBUDS SERVICE (2020), https://www.dol.gov/sites/dolgov/files/OFCCP/OMBUDS/ofccp-ombuds-2020-ar-508.pdf.

[157] *E.g.*, *Office of Collaborative Action and Dispute Resolution*, *supra* note 2; *CFPB Ombudsman*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/cfpb-ombudsman/ (last visited Aug. 23, 2021); FCC ADR regulations at 47 C.F.R. 1.737; ITC Section 337 Mediation Program, Publication Number 4387 (Nov. 2018); Press Release, Pension Benefit Guar. Corp., PBGC to Launch Pilot Mediation Project to Resolve Certain Termination Liability Collection and Early Warning Program Cases (Oct. 16, 2017), https://www.pbgc.gov/news/press/releases/pr17-07.

[158] *See, e.g.*, 47 C.F.R. § 1.737 (FCC).

[159] This particular concern is not new. Ward noted funding problems and staffing issues in her 1997 article on the 1996 enactment of ADRA. *See* Ward, *supra* note 26, at 224 (discussing funding and staffing issues).

Detailed surveys following the conclusion of ADR services would help provide additional information to an agency as to how it could improve accessibility and outcomes. Feedback from participants has the potential to alert agencies to both the good and the bad of a program. Feedback is also useful for neutrals. We recommend that agencies create participant feedback mechanisms, deploy them consistently (in compliance with the Paperwork Reduction Act), and review the feedback periodically to improve the practice of the neutrals and the program. Agencies should also monitor whether their feedback mechanisms are actually collecting the information sought and modify the feedback system, if necessary.

B. Qualifications and Selection of Personnel to Conduct and Manage ADR

None of the general umbrella statutes governing agency ADR programs elucidates requirements with respect to personnel. This omission provides agencies with considerable discretion as evidenced in the variety of tactics these agencies have adopted. Prior to discussing the qualifications and selection of personnel agencies currently use, we provide some background on possible approaches in use today.

1. Background

This section reviews various models for selecting personnel engaged in ADR services in communities, in state courts, and the private sector, to inform the choices available for federal agencies.

Highly distinct models for staffing ADR services have evolved over the past few decades. One example is that of community mediation centers, which began in the 1960s as an outgrowth of the civil rights movement to provide neighborhoods with localized and affordable conflict resolution services. These community mediation centers use trained community volunteers as providers of mediation services; the practice of mediation is open to all persons.[160] Professional and educational credentials are not generally required, and the centers provide continuous training and mentoring by more experienced mediators.[161]

Many states and the District of Columbia offer ADR programs through their court systems, and all federal courts have ADR programs.[162] The methods for delivery of ADR services to the courts span a wide continuum. On one end of this continuum lie courts that establish ADR programs within the court structure and have court staff provide ADR services. In the middle of the spectrum are courts that develop and maintain a roster of neutrals from which

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[160] *See 9 Hallmarks of Community Mediation Centers*, NAT'L ASS'N FOR CMTY. MEDIATION, https://www.nafcm.org/page/9Hallmarks (last visited Aug. 23, 2021).

[161] *See* Timothy Heeden, *The Evolution and Evaluation of Community Mediation: Limited Research Suggests Unlimited Progress*, 22 CONFLICT RESOL. Q. 101, 117–18 (2004). The ABA Section of Dispute Resolution outlines additional resources for ADR programs through the lens of access to justice in a white paper. ABA SECTION OF DISP. RESOL., ACCESS TO JUSTICE THROUGH ALTERNATIVE DISPUTE RESOLUTION WHITE PAPER, https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/access-to-justice-project-white-paper.pdf.

[162] The Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651, requires each federal district court to offer ADR to litigants by local rule. For a summary of each district's ADR local rule, see https://www.justice.gov/archives/olp/file/827536/download.

neutrals are appointed by the court. Finally, on the opposite end of the spectrum are programs that are outside the court system. For these types of programs, the court contracts with an outside entity to administer the ADR program and provide services on the court's behalf.[163] As an examination of this rich subject area is beyond the scope of this report, we briefly review two well-regarded programs from different points on the continuum.

Connecticut's highly successful Foreclosure Mediation Program is one example of an ADR program staffed by full-time government employees. The program was founded in 2008 in the wake of a tsunami of foreclosures from the recession. The state legislature provided dedicated funding for the program, which enabled the hiring of an experienced housing mediator to run it and mediator staff who are all lawyers in each judicial district in the state. The program provides extensive training on both mediation and relevant aspects of federal and state housing law.[164]

The District of Columbia's Multi-Door Dispute Resolution Division, by contrast, is staffed by volunteers. The Multi-Door program has two avenues for recruiting neutrals. New mediators must apply and be selected for one of the programs (family, child protection, small claims, landlord/tenant, or civil), complete a specialized training class and then complete a mentorship. There are no professional qualifications except for civil, tax, and probate, which require bar membership. After 40 hours of training, new mediators then must mediate three to six cases, depending on the program, without a stipend.[165] After that, the new mediators undergo a one-year probationary period during which they can receive a stipend. The other avenue for recruitment, open enrollment, is an application process for people who have previously completed a basic training of at least 40 hours and have significant experience mediating cases relevant to the court.[166]

In the private sphere, parties hire neutrals either by using a provider organization, such as AAA or JAMS, or by appointing the neutral on an "ad hoc" (or one-time) basis. Membership on AAA rosters requires significant experience,[167] and parties pick neutrals who work as independent contractors.[168] JAMS also uses a panel system—the use of a standing roster of qualified individuals—to appoint arbitrators and mediators for service in individual cases.[169]

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[163] *How Do Courts Use ADR?*, RESOL. SYS. INST., https://www.aboutrsi.org/resource-center/how-do-courts-use-adr (last visited Aug. 23, 2021).

[164] Interview with Hon. Douglas C. Mintz (ret.), Judge, Connecticut Superior Court (June 18, 2021).

[165] Stipends may be per case or per hour depending on the program and range from $50 to $200 per case, and from $25.00 to $40.00 per hour, with set rates for certain types of proceedings.

[166] SUPER. CT. OF THE D.C.: MULTI-DOOR DISP. RESOL. DIV., 2019 PROGRAM SUMMARY 6 (2019), https://www.dccourts.gov/sites/default/files/MultiDoor-PDFs/MultiDoor-2019-Program-Summary.pdf.

[167] American Arbitration Association, *AAA Panel of Mediators Qualification Criteria*, https://adr.org/sites/default/files/document_repository/AAA%20National%20Roster%20of%20Mediators%20Qualification%20Criteria.pdf ("A minimum of 10 years of senior-level experience in business, industry or a profession") (last visited Aug. 23, 2021).

[168] *See Arbitrator Selection*, AM. ARB. ASS'N, https://www.adr.org/ArbitratorSelection (last visited Aug. 23, 2021); *Mediation*, AM. ARB. ASS'N, at https://www.adr.org/Mediation (last visited Aug. 23, 2021).

[169] JAMS Comprehensive Arbitration Rules and Processes, Rule 15, at https://www.jamsadr.com/rules-comprehensive-arbitration/#Rule-15.

Ombuds offices generally fall within one of three categories, and the type of ombuds office determines the staffing. The "classic" ombuds offices are those that respond to citizen complaints and consist of governmental employees, and these offices are most commonly found within state governments.[170] Many classic ombuds offices take issues, complaints, or concerns across government agencies.[171] Classic ombuds offices may take complaints on a wide variety of topics, such as prison conditions, denials of statutory benefits, or claims of delays in responding to individuals. An "advocacy" ombuds office is often a governmental agency usually tasked with receiving complaints from and helping consumers within an industry, such as health care.[172] For example, a long-term care ombuds takes complaints on behalf of residents and attempts to resolve them. Finally, "organizational" ombuds are usually employees of the organization tasked to handle conflict management issues relevant to the organization.[173] Organizational ombuds offices may resolve issues internal to the organization, such as personnel matters, or external to the organization, such as customer complaints. All of the ombuds offices discussed in this report fall into the category of organizational ombuds, and this report only covers the programs that are external facing.

2. Agency Practices

This section describes how ADR programs have organized their staff, particularly their neutrals, and what they require of them.

Qualifications of Neutrals and ADR Staff

Although there are no specific federal requirements for qualifications of ADR staff, the Interagency ADR Working Group has developed guidance on Criteria for Mediator and Quality Control.[174] While the information collected (in 2002) is somewhat dated, the considerations for hiring neutrals remain useful today. For example, the guidance reviews levels of credentialing, such as a tiered approach with basic and advanced levels of knowledge, skills and abilities. It describes training requirements focused on classroom preparation and assessment, education requirements at college level or above, and experience measured in a minimum number of cases and/or number of hours in mediation. Other categories include monitoring or supervision prior to credentialing and using a mock mediation as part of a skills assessment for candidates. Although agencies differ in which of these requirements make sense for their programs given their size, funding level, and technical knowledge requirements, the elements described in the guidance are useful considerations in creating a staffing plan.

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[170] *See, e.g.*, *Public Counsel (Ombudsman's Office)*, NEB. OFF. OF PUB. COUNS., https://nebraskalegislature.gov/divisions/ombud.php (last visited Aug. 23, 2021) (outlining duties of the Ombudsman's Office).

[171] *Id.*

[172] *See, e.g.*, *Office of the State Long-Term Care Ombudsman*, IOWA DEP'T OF AGING, https://iowaaging.gov/state-long-term-care-ombudsman (last visited Aug. 23, 2021) (describing services provided to Iowans who have complaints or concerns about long-term care services provided in the state).

[173] *See, e.g.*, *University Ombuds Office*, OR. STATE UNIV., https://ombuds.oregonstate.edu/ (last visited Aug. 23, 2021) (describing services provided to the campus community).

[174] Interagency Alt. Disp. Resol. Working Grp., *Criteria for Mediator Credentials and Quality Control*, https://www.adr.gov/criteria-mediator-credentials.html (last visited Aug. 23, 2021). The guidance was prepared using the ABA Section of Dispute Resolution Task Force on Credentialing "Report on Mediator Credentialing and Quality Assurance" (2002), which looked at a group of five federal and seven state/local mediation programs.

Otherwise, agencies generally have been left to their own devices to develop position descriptions for neutrals. We identified only a sampling of those descriptions from which it is difficult to generalize. For example, we found three neutral position descriptions in the Office of Personnel Management library based on a mediator position in labor relations specifically limited to use by the FMCS and the NMB.[175] The minimum qualifications for the position include full-time experience utilizing the concepts and theories of collective bargaining alternative dispute resolution, negotiation and/or conflict resolution, while serving in the role of lead or second chair spokesperson, benefits expert, mediator, consultant or trainer. The three positions reflect different levels of experience qualify for progressively higher pay levels. More recently, the EEOC posted a position for an "ADR Mediator," at the GS-12 level. The posting does not require any specific type of educational background but does require at least one year of experience in employment-related ADR.[176]

The COFO's Unified Model for Developing an Ombudsman Program provides an example of an ombuds staff position description, from the Department of Education's Federal Student Aid Office of the Ombudsman.[177] The requirements focus on knowledge such as in the application of qualitative and quantitative methods for assessment of program effectiveness, and skills such as ability to negotiate effectively with management to accept and implement recommendations, and ability to maintain confidentiality and neutrality.[178] A recent posting for an associate ombuds at the Department of Energy was advertised at the GS-15 level, requiring at least one year of ADR experience. The posting did not include any specific educational requirements.[179]

Thus, agencies largely have tailored their standards for the qualifications of neutrals to their particular needs.

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[175] U.S. OFF. OF PERS. MGMT., POSITION CLASSIFICATION STANDARD FOR MEDIATION SERIES, GS-0241 2-3, https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/standards/0200/gs0241.pdf (last visited Nov. 3, 2021).

[176] *ADR Mediator*, USAJOBS, https://www.usajobs.gov/GetJob/ViewDetails/607025300 (last visited Aug. 23, 2021).

[177] The Coalition of Federal Ombudsman (COFO) is the principal interagency forum that provides collaboration, advice and guidance on professional ombuds standards, skills development, program development, and effectiveness. *See Charter*, COAL. OF FED. OMBUDSMAN, https://federalombuds.ed.gov/s/charter (Sept. 30, 2013). The Unified Model is an extensive guidebook developed by COFO in 2006 to assist agencies in creating and developing ombuds office. It is available at https://fsaocts.my.salesforce.com/sfc/p/#t0000000Gyiq/a/t0000000Y8Go/n_VK.eEGPgM4n26w.H7mi4ue8j496DEPLGV9TOg0vS0.

[178] Section 141 of the 1998 Amendments to the Higher Education Act of 1965 created a new organization to manage the delivery of federal student financial assistance, which included within it a Student Loan ombudsman appointed by the Chief Operating Officer in consultation with the Secretary of Education. The role of the ombuds is to attempt to resolve complaints from borrowers including with the Department of Education and with institutions of higher education, lenders, guaranty agencies, loan servicers and other participants. The office is staffed solely by federal employees. Employees participate in training on conflict resolution, managing challenging customers interactions, student loan eligibility and participation requirements.

[179] *Associate Ombudsman*, USAJOBS, https://www.usajobs.gov/GetJob/ViewDetails/606860000 (last visited Aug. 23, 2021).

Employment Status and Contractual Systems for ADR Staff

We discovered four different approaches for staffing and managing the ADR function at federal agencies, as well as several combinations of them. They include: using the agency's own federal employees, contracting with another federal agency to use its employees, contracting with the private sector, and maintaining a roster of pre-qualified neutrals from which the parties can make their own selection. Some agencies use combinations of the approaches; we found a few agencies using all of them.

(a) Agencies Using Full Time Federal Employees

Many agencies employ full time federal employees as neutrals. In some agencies, the neutrals are all attorneys. They are experts in the agency's laws and regulations and have mediation experience and training or obtain experience while employed as agency counsel. For example, by regulation, the FCC provides for mediation for the pre-complaint, informal complaint, and formal complaint stages of common carrier and pole attachment disputes under the Communications Act of 1934.[180] The mediation function is located in the FCC Market Disputes Resolution Division of the Enforcement Bureau, which is also ultimately responsible for adjudication of such complaints. The ten mediators are all experienced lawyers who also handle FCC adjudications.[181] All have been trained in conflict resolution. Similarly, the NLRB's Office of the Executive Secretary has five attorney-mediators who handle mediation for cases that are pending on appeal to the Board.[182]

In a few agencies, administrative law judges sometimes serve as neutrals. The NLRB's Office of Administrative Law Judges has a program in which an administrative law judge (ALJ) not assigned to the case serves as "settlement judge." ALJs serve as settlement judges depending on their availability. The EPA Environmental Appeals Board similarly assigns a non-presiding Appeals Board Member as a "settlement judge" and pairs that neutral with a staff attorney who acts as a second neutral for the case.

In several agencies, neutrals come from many different fields. They are required to have a certain level of ADR experience and knowledge of the agency's governing law and practice. The EPA's Conflict Prevention and Resolution Center is located in the agency's Office of General Counsel but works with environmental collaboration and conflict resolution specialists located in all ten EPA regions to help deliver services in support of regional programs. While many of these specialists are attorneys, some come from other EPA areas of expertise including public involvement, environmental justice, and enforcement.[183] The EEOC requires particular professional credentials but has tailored the mediator position description to include requirements relevant to EEOC practice, i.e., five years of EEO- and EEOC-related experience and two years of EEOC-specific experience.[184]

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[180] 57 C.F.R. § 1.737.
[181] Interview with Rosemary McEnery, ADR Branch Chief, Enforcement Bureau, FCC (Feb. 21, 2021).
[182] Survey response from NLRB, Dec. 2020.
[183] See *Conflict Prevention and Resolution Center*, *supra* note 104.
[184] Interview with Stephen Ichniowski, National ADR Coordinator, EEOC (Apr. 23, 2021).

Agencies in this group tend to seek a combination of ADR experience, training, and education when hiring neutrals. This flexibility enables agencies to hire neutrals at different levels, which enhances succession planning, as does the existence of basic neutral training, which is discussed in the next section of this report. One interesting example of a flexible approach is the Office of Collaborative Action and Dispute Resolution at the DOI, which houses both environmental and workplace neutrals and enables them to cross-train with one another.[185] Another is the OSC, which permits its attorneys in other units to be trained in mediation and serve as collateral duty mediators when needed.[186]

Minimum competency levels may be achieved through careful crafting of neutral qualifications. FMCS, for instance, has rigorous requirements to be on its arbitration roster, including the submission of five letters of reference and five recently drafted arbitration awards.[187] To become an FMCS "shared neutral," the prospective mediator must provide documentation of mediation training, two letters of recommendation, and complete an application form describing the mediator's training and experience.[188] Other agencies reported backgrounds in conflict resolution or other training to be a neutral. The ACUS Ombuds Report recommended that the federal ombuds be purposeful in crafting job descriptions and qualifications in part, to ensure the quality of the program.[189]

As might be expected, agencies with a primary mission relating to ADR have the most developed ADR personnel practices since neutrals make up much of their labor force. There are three federal agencies with primary missions relating to ADR: the NMB, FMCS, and the National Center.

NMB's mission is to support labor peace in the airline and railway industries by providing representation, mediation, and arbitration services for labor/management disputes. NMB has separate offices for mediation and arbitration. Its mediation office is staffed by federal employees. It recently expanded its mission to include the provision of other ADR training and education to its constituents. NMB includes information about its mediators on its website.[190] All are experienced labor relations professionals from the airline or railway industries; of the ten neutrals, only two are lawyers. NMB does not employ its own arbitrators but contracts for them, discussed in more detail below.

FMCS has organized its delivery of ADR services in four offices. The Office of Arbitration and Shared Neutrals oversees its arbitration program, which is not staffed by federal employees but by a roster of outside professionals, discussed in more detail below. Mediation is the agency's core program. FMCS's approximately 150 mediators work within the three offices

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[185] *See Office of Collaborative Action and Dispute Resolution*, *supra* note 109.
[186] Survey response from OSC, Dec. 2020.
[187] *Information on Joining the Arbitration Roster*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/services/arbitration/information-joining-arbitrator-roster/ (last visited Aug. 23, 2021).
[188] *Mediator Profile/Application*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/wp-content/uploads/2018/11/SN-Mediator-Profile.pdf (last visited Aug. 23, 2021).
[189] ACUS Ombuds Report, *supra* note 66, Part 4, at 12 (while not recommending a single job qualification, the Report noted the importance of things such as job descriptions and qualifications).
[190] *The Mediators*, NAT'L MEDIATION BD., https://nmb.gov/NMB_Application/index.php/the-mediators/ (last visited Aug. 23, 2021).

of the Division of Agency Initiatives: the Office of Conflict Resolution, the Center for Conflict Resolution Education, and the Office of Strategy Development.[191] All mediators have extensive experience in both dispute resolution and, usually, labor relations. Once hired, they participate in a five-week training program on FMCS services followed by extensive monitoring on the job.

The National Center serves as an ADR resource for Environmental Collaboration and Conflict Resolution (ECCR) cases. Its eleven employees conduct mediations, facilitations, and training. They are experienced neutrals, who are hired based on a combination of experience and education in conflict resolution and environmental issues. Biographies of all the staff are on the agency website.[192] To leverage its resources, the National Center recently issued a call for proposals for a training contract. The National Center also maintains a roster for self-referrals, discussed below.

(b) Interagency Agreements

Some agencies enter into agreements with other agencies to provide neutrals and/or ADR training either through a standing program or through orders for a service on a case-by-case basis. In general, the interagency agreement function is overseen at the requesting agency by a program manager who acts as the gatekeeper to the ADR process and contacts the supplying agency when a neutral is needed. Due to federal budgeting and contracting requirements, interagency agreements usually are renewed each year and the annual renewal process includes a review of performance. Quality control is maintained through various feedback mechanisms such as debriefing of participating staff and surveys to outside participants.

Interagency agreements to obtain the services of external neutrals have been used to avoid conflicts of interest (or appearances of conflict) when an agency has an interest in a dispute or is a party to a dispute. For example, in environmental disputes, agencies can have a conflict or appearance of a conflict if they are potentially financially responsible for damage resulting from their activities or can have claims that compete with those of private entities that require them to step out of the ADR process. There also can be interagency cross-jurisdictional issues, that is, where more than one agency has jurisdiction to decide an issue arising in a matter, such as permitting. Also in such cases, there may be a need for specific expertise that another agency has.[193]

Another reason agencies obtain the services of external neutrals through interagency agreements is to assure neutrality. Outside parties in conflict with an agency may feel that the agency's personnel cannot be genuinely neutral. Outside parties also may be concerned about agency contractors whose continued relationship with the agency depends on a good evaluation of their performance.

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[191] *See Division of Agency Initiatives*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/aboutus/agency-departments/division-of-agency-initiatives/ (last visited Aug. 23, 2021).
[192] *See About Us: Meet Our Staff*, UDALL FOUND., https://www.udall.gov/AboutUs/MeetOurStaff.aspx (last visited Aug. 23, 2021).
[193] Interview with Stephanie Kavanaugh, Deputy Director, National Center (Dec. 21, 2020).

Small agencies and those with a relatively small demand for ADR have reported that interagency agreements to obtain the services of external neutrals or training have been useful because they are less expensive and easier to administer than private sector contracts and create few, if any, conflict issues. Moreover, the receiving agency can often arrange for training for program staff from trainers that understand how federal agencies function. For example, one agency with a relatively new administrative enforcement ADR program contracted with FMCS to provide it with mediators and to train program staff who would be participating in the mediations on the agency's behalf.[194] Interagency agreements also sometimes supplement in-house mediators when caseloads fluctuate. FMCS mediators supplement ADR personnel from the Department of Education's Office of Hearings and Appeals, for example.[195] FMCS mediators also supplement ADR staff that mediate federal sector employee discrimination complaints within its Office of Hearings and Appeals, when needed.[196]

In some instances, agencies have preferred not to use interagency agreements where, for example, neutrals need subject-matter expertise, including the expertise to know that a particular case is not suitable for ADR. Other agencies have preferred to develop in-house ADR expertise.

(c) Private Contractors

We found two general types of contracts used by agencies to obtain private neutrals. The first is what is basically an on-call service contract under which services can be ordered during the contract period. The second type of contract is a standalone and separate contract with an individual neutral or neutrals.

An Indefinite Delivery Indefinite Quantity contract (IDIQ) is the vehicle used for on-call services. Awards are usually for a specified number of base years with renewal options (generally limited to five years in total). The government places task orders against a basic contract for individual requirements. Exact dollar amounts for minimums must be named when the contract is awarded. An IDIQ can be awarded to multiple vendors.[197]

IDIQs are efficient vehicles for larger programs. The EEOC ADR program is quite large; according to EEOC's 2020 Annual Report, 9,036 mediations were conducted during fiscal year 2020.[198] EEOC also uses an IDIQ contract methodology for placement on its contractor roster and the field offices have authority to decide who qualifies and how many people to keep on the roster. There is a maximum of 31 mediations any one contact mediator can be assigned and an annual cap on compensation.[199] DOI and EPA both use IDIQ contracts to supplement their federal staff neutrals. The contracts are overseen by full time contracting officer representatives and thus subject to the record-keeping, reporting, and evaluative requirements of federal acquisition regulations.[200]

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[194] Interview with Kartar Khalsa, Deputy General Counsel, PBGC (Apr. 12, 2021).
[195] *See* Survey response from Department of Education, Dec. 2021.
[196] Interview with Stephen Ichniowski, National ADR Coordinator, EEOC (Apr. 21, 2021).
[197] *See* Federal Acquisition Regulation, 48 C.F.R. § 16.505.
[198] *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, FISCAL YEAR 2020 AGENCY FINANCIAL REPORT (2020), https://www.eeoc.gov/fiscal-year-2020-agency-financial-report-us-equal-employment-opportunity-commission.
[199] Interview with Stephen Ichniowski, National ADR Coordinator, EEOC (Apr. 21, 2021).
[200] *See* Federal Acquisition Regulation, *supra* note 197.

When the agency has a role in selecting the neutral for a particular case, it may choose to contract directly with individuals. This is the approach taken by the NMB for arbitrators in railroad labor disputes involving what are termed "minor grievances" where arbitration is compulsory and the NMB is required to fund arbitrator services. The NMB maintains a prequalified roster of arbitrators. To qualify for the roster, an arbitrator must have issued at least five awards in labor-management disputes; have ten years of substantive experience in labor-management disputes in the airline or railway industry; and ten years of experience in relevant matters arising in dispute resolution in these industries. The arbitrator must also be a member in good standing of the American Academy of Arbitrators. The NMB reviews the status of arbitrators on the roster annually. When parties to a covered dispute request an arbitrator, the NMB furnishes a panel from which to choose, and ultimately issues a certificate of appointment and a compensation letter to the selected arbitrator, explaining their status as an independent contractor, and setting the rate of compensation and expenses.[201] Biographies of all roster members are on the NMB website.[202]

For these agencies, contracting with ADR professionals has been an effective way to obtain the services of skilled and experienced neutrals on as-needed basis. They have been shown to be useful because they can be scaled up and down in response to demand and the budgetary environment. One difficulty with contracts, however, that agencies have noted is the need to competently oversee the contracts and maintain sufficient knowledgeable personnel to make decisions about suitability of cases for ADR. Management of the contractual system, a role that typically remains with agency staff, has required leadership and expertise.

(d) Rosters

Some agencies have leveraged their resources to expand access to ADR by creating rosters of neutrals. These are listings of pre-qualified individuals from outside the agency that parties can choose to serve in their case. They may be independent contractors with the agency, or contract directly with the parties.

Agencies have used rosters in highly creative ways. For example, some agencies have used rosters to extend their reach, employing individuals outside the agency to help address burgeoning caseloads. FMCS maintains a roster of about 1,000 arbitrators for labor-management disputes. Admission to the roster requires an application that demonstrates experience, competence, and acceptability in decision-making roles in labor relations disputes or extensive and recent experience in relevant collective bargaining positions. Roster candidates also must demonstrate capability for conducting an orderly hearing and preparing clear and concise awards within reasonable time limits. Applications are reviewed by the agency's Arbitrator Review Board, which makes recommendations to the agency director.[203]

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[201] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-B-305484, NATIONAL MEDIATION BOARD—COMPENSATING NEUTRAL ARBITRATORS APPOINTED TO GRIEVANCE ADJUSTMENT BOARDS UNDER THE RAILWAY LABOR ACT, (2006).
[202] *See Arbitrator Resumes*, NAT'L MEDIATION BD., https://nmb.gov/NMB_Application/index.php/arbitrator-resumes/ (last visited Aug. 23, 2021).
[203] *See Information on Joining the Arbitrator Roster*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/services/arbitration/information-joining-arbitrator-roster/ (last visited Aug. 23, 2021).

FMCS oversees the roster to ensure compliance with FMCS policies and its Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.[204] Upon request, the agency provides panels of arbitrators experienced in labor relations the parties can select, and can accommodate requirements such as expertise, fees, and geographic location.[205] FMCS typically receives more than 10,000 requests for arbitrator panels each year from parties to labor-management disputes.

The International Trade Commission (ITC) has a unique roster of mediators for unfair import investigations under section 337 of the 1930 Tariff Act. These cases usually involve patent or registered trademark infringement and can be highly technical. The ITC maintains a roster of pre-screened mediators who have agreed to provide a single pro bono session for these investigations. According to the ITC, many of these mediators have served in a similar capacity for the U.S. Court of Appeals for the Federal Circuit, as well as other federal and state court mediator panels. Applicants must demonstrate both intellectual property and mediation expertise. To guard against conflicts, to join the roster a mediator must not be in active practice as counsel or amicus in any matter before the ITC.[206] The Secretary of the ITC helps the parties in mediation selection. Parties may select a mediator from the roster and before approving a mediator, the Secretary inquires into conflicts of interest. Confidentiality is strictly enforced through a standing protective order issued by the ITC, as well as nondisclosure agreements for mediators, parties, and counsel. The mediation is expected to take one day, at no expense to the parties. If the parties require additional days, they negotiate compensation with the mediator.

The EEOC also has a small number of cases (5 percent of its caseload) mediated by pro bono mediators.[207] It recruits volunteers from mediators who want to keep their skills current, and therefore the program has a waiting list.[208]

The National Center maintains an online searchable database of over 300 environmental conflict resolution professionals. Applicants must have 200 hours of experience as a neutral in a collaborative or conflict resolution process in environmental, natural resource, and/or public lands issue. There are also requirements for case experience, training, substantive background, and education.[209]

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[204] *See Arbitration Policies and Procedures*, https://www.fmcs.gov/services/arbitration/arbitration-policies-and-procedures/ (last visited Oct. 23, 2021).

[205] *See id*. Fees are set by the arbitrators and paid by the parties to the arbitrators; FMCS charges $35 to service on-line panel requests; $70 for manual processing.

[206] *See* U.S. INT'L TRADE COMM'N, SECTION 337 MEDIATION PROGRAM: TENTH UPDATE 10 (2019), https://www.usitc.gov/publications/337/pub4990.pdf.

[207] In total, about 90 percent of EEOC mediations are done by staff, 5 percent by contractors and 5 percent by pro bono volunteers. Interview with Stephen Ichniowski, National ADR Coordinator, EEOC (Apr. 21, 2021).

[208] *Id.* Some attorneys mediate pro bono to meet ethical expectations to the profession *See* Model Rule of Professional Conduct R. 6.1 (recommending each lawyer provide 50 hours of pro bono service each year).

[209] *See National Roster of ECR Professionals – Apply for Roster Membership*, UDALL FOUND., https://udall.gov/OurPrograms/Institute/BecomeRosterMember.aspx (last visited Aug. 23, 2021). The National Center has reported that roster searches have not met its goal for the past several years, and it is looking into ways to improve it, including plans to migrate administrative management to a third party. (2020 PAR at 21).

The NMB is also frequently asked to furnish panels of arbitrators from its roster from which the parties select a neutral for airline industry boards of adjustment.[210] These boards are local bodies that adjudicate "minor grievances" involving contract interpretation disputes between labor and management in the airline industry. These arbitrators are paid by the parties.

3. Recommendations

This section makes four recommendations on the topic of ADR participant qualifications for agencies considering or developing ADR programs.

Executive leadership structure. An agency's ADR programs should be placed within the agency's reporting structure under committed leadership. Without support from agency leadership, some programs have struggled to retain staff, maintain morale, and otherwise improve their practices. Generally, agencies have structured their ADR administrative programs in different ways that appear to work well for them. But to ensure that a program is visible both to agency officials to promote and use, as well as to agency constituents, a program should be placed in a reporting line to committed leadership. Having senior leadership accountable for the program through performance measures and strategic planning goals ensures that it gets the oversight it needs to be successful. Such leadership is also necessary to ensure the program has a place at the table in agency budget decisions. For example, FERC moved its program to the general counsel's office in 2019 to enhance its visibility and accessibility.[211] Given the fundamental duty of independence central to ombuds practice, those programs may be well suited to run outside of traditional reporting lines.[212]

Collection/sharing of position descriptions across agencies. Agencies would benefit from being able to share best practices in the creation of position descriptions for their neutrals. Having a central repository, such as the Interagency ADR Working Group, where the examples of the various position descriptions could be housed, would likely be useful. This would give agencies additional tools to tailor their recruiting efforts to the appropriate audience and ensure that they are asking for the right types of talents and expertise. Such a library should include different levels from junior to senior neutrals, to enhance employee retention and promote succession planning.

Enhanced use of interagency agreements. Agencies that are considering "dipping their toes" into administrative program ADR but are concerned about resources (either staffing or contractor dollars) might consider using interagency agreements to test the concept with their constituents. As noted above, interagency agreements are sometimes useful such as where subject-matter expertise is not a pre-requisite for neutrals. Whether and how much to use

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[210] *See Arbitrator Resumes*, *supra* note 202.

[211] *See* News Release, Fed. Energy Regul. Comm'n, FERC's Dispute Resolution Service Gets New Home (June 18, 2019), https://www.ferc.gov/news-events/news/fercs-dispute-resolution-service-gets-new-home (last visited Oct. 23, 2021).

[212] For example, the CFPB ombuds office maintains independence and autonomy separate from the remainder of the agency. The CFPB Ombuds Charter specifies: "The Ombudsman's Office is a separate office, outside of the CFPB business lines, that will report directly to the CFPB Deputy Director with access to the Director." *Ombudsman Charter*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/cfpb-ombudsman/ombudsman-charter/ (last visited Aug. 23, 2021). The Office of Contractor Compliance Programs ombuds reports to the agency director.

interagency agreements really depends on the types of cases an ADR program would handle, budget and staff at the agency, and the demand for ADR. Interagency agreements may be a good way for an agency to begin to use ADR within its programs. Pilot programs could be staffed through interagency agreements, but those programs could be expanded with agency staff if the size and complexity of the program warrants. Interagency agreements sometimes also function well as a supplement to in-house staff.

Creation of rosters. Agencies that do not have rosters might evaluate whether their programs could benefit from adding a roster of neutrals or replacing their current system with a roster system in light of some of the unique benefits associated with them as discussed above. Rosters also may be useful to supplement established ADR programs staffed by agency employees. Rosters can involve pro bono obligations in appropriate circumstances.[213] Sometimes rosters function purely as a referral mechanism for ADR conducted outside the agency's aegis. In other instances, rosters are contractors. The variety of approaches that has worked for agencies shows that a roster can be a flexible tool for dealing with the ADR caseload and, by seeding more ADR professionals into administrative program disputes, can help normalize ADR as the resort of first instance. The same caveats with respect to interagency agreements and contracting (e.g., maintaining in-house ADR expertise), though, remain applicable for agencies considering rosters.

C. Training Procedures for ADR Personnel

Training procedures, like other components of ADR programs across the executive branch, vary considerably. Some agencies provide no training and instead rely on the expertise of the individuals that serve as ADR neutrals. Other agencies require extensive training. We asked each agency to tell us about the training it has in place, how often that training is conducted and for whom, what types of topics are covered and by whom, and how such trainings are evaluated. We also reviewed the publicly available reports filed by the environmental agencies[214] reporting on multiple metrics of their ADR program, including training.

1. Background

The academic and policy literature varies as to the nature and extent of training for ADR professionals that it recommends. In the 1990s, some advocates sought to require licensure, minimum qualifications, and specific educational standards,[215] yet with the exception of basic training in ADR processes and on-the-ground experience for neutrals that handle state court

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[213] In general, unless it has express statutory authorization, an agency may accept voluntary services only pursuant to an advance written agreement stating the services are offered without expectation of payment and expressly waiving any future pay claims against the federal government. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-B-324214, DEPARTMENT OF TREASURY – VOLUNTARY SERVICES (2014).

[214] Environmental agencies are uniquely situated due to the public reporting requirement that we describe below. ECCR casework has been most concentrated at four of the reporting agencies: EPA, DOI, FERC, and the US Army Corps of Engineers, as well as at the National Center.

[215] *See, e.g.*, Bobby Marzine Harges, *Mediator Qualifications: The Trend Toward Professionalization*, 1997 B.Y.U LAW REV. 687, 714 (1997) (recommending continuing the conversation towards minimum qualifications for mediators); Theodore A. Levine & Peter R. Cella, *Arbitrator Training and Selection*, 63 FORDHAM L. REV. 1679, 1681 (1995) (discussing current trends in arbitration training).

cases, that push appears to have slowed. This change in direction occurred largely to ensure flexibility for specific programs (particularly pro bono programs, such as small claims programs) and diversity among conflict resolvers across not only racial and socioeconomic backgrounds, but also among professional backgrounds (legal, social science, mental health, human resources, etc.).[216] To further complicate the question, little research exists on the effectiveness of training, and the research that does exist does not lead to clear answers.[217]

Despite the lack of clear consensus,[218] some trends have evolved over the last 30 to 50 years regarding training for ADR professionals. These standards draw upon requirements from court programs, state statutes, and professional organizations.[219] The remainder of this section considers those private and public sector trends in the areas of arbitration, mediation, and ombuds practice.

Arbitration

Historically, arbitration relied more on arbitrator qualifications in areas such as experience as a trial judge or magistrate to ensure quality as an arbitrator.[220] This trend has largely continued to this day, with arbitration programs focusing more on qualifications than training, except the Financial Industry Regulatory Authority (FINRA) arbitration roster handling securities disputes.[221]

FINRA has the least stringent arbitrator requirements, which is intentional to maintain a public roster of arbitrators with no professional connections to the securities industry.[222] FINRA suggests that applicants have "five years of paid business and/or professional experience—inside

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[216] Stephanie A. Henning, *A Framework for Developing Mediator Certification Programs*, 4 HARV. NEGOT. L. REV. 189, 199-200 (1999) (discussing the role of diversity as it relates to minimum standards and qualifications for mediators).

[217] *See* Art Hinshaw & Roselle Wissler, *How Do We Know that Mediation Training Works?*, 12 No. 1 DISP. RESOL. MAG. 21, 21-22 (ABA Publishing 2005) (discussing the scant available information on effectiveness of training for mediators).

[218] In the mid-2000s, the Association for Conflict Resolution ("ACR") attempted to set forth a uniform standard of mediator qualifications and competencies. After an unsuccessful attempt, the ACR shifted its focus and instead published standards on how to certify mediation programs. ASS'N FOR CONFLICT RESOL., MODEL STANDARDS FOR MEDIATOR CERTIFICATION PROGRAMS (2011), https://cdn.ymaws.com/acrnet.org/resource/resmgr/docs/ModelStandardsCertification.pdf.

[219] The nonprofit Mediator Certification Consortium of California launched a voluntary certification program in 2019. Certification requirements include experience, adherence to ethical standards and model rules, and continuing education. *See* Southern California Mediation Association, Mediator Certification – MC3, https://scmediation.org/page/mediator-certification-program (last visited Oct. 1, 2021).

[220] Joseph B. Stulberg, *Training Interveners and Processes*, 81 KY. L. REV. 977, 980 (1993) ("The presumption was that all arbitrators possessing the requisite professional training and experience would be familiar with trial court processes and relevant legal guidelines, as well as know how to research and analyze relevant legal materials.").

[221] We note that FINRA is a private corporation, not a government agency, but given its regulatory role and its arbitral experience, we discuss its practices for reference.

[222] For the purposes of this Report, we consider FINRA's ADR activities to provide useful background information. Although the SEC must give final approval to all FINRA rules, *see FINRA Rulemaking Process*, FIN. INDUS. REGUL. AUTH., https://www.finra.org/rules-guidance/rulemaking-process (last visited Aug. 23, 2021), FINRA is a self-regulatory organization registered with the SEC as a national securities association.

or outside of the securities industry—and at least two years of college-level credits."[223] After selection to the FINRA roster, arbitrators must complete a mandatory training session, and additional voluntary training opportunities are also available.[224]

By contrast, most private rosters of arbitrators rely heavily on qualifications and secondarily on in-house training. The AAA has extensive requirements to serve on its rosters, including 10 years of "senior level legal, business or professional experience," among other qualifications.[225] AAA also requires in-service training for new arbitrators.[226] The arbitration requirements of other major providers, including JAMS, are not publicly available, and those organizations ask prospective arbitrators to contact their local offices to obtain more information about addition to the roster.

People who wish to become arbitrators can also look to the private marketplace to receive training in arbitration. For example, the ABA Section of Dispute Resolution offers an Arbitration Institute, usually a multi-day training event covering important topics in arbitration practice, such as managing discovery, running hearings, drafting awards, and case management.[227] The AAA makes its extensive training library open to both AAA panelists and the public.[228] These types of programs can also be used to train arbitrators in state or federal programs.

Mediation

The greatest amount of literature regarding training exists in the area of mediation, although even the mediation training literature is sparse and inconsistent.[229] Few mediation programs require specific educational backgrounds, but many programs target mediators with degrees in law, conflict resolution, education, or social sciences.[230] Despite this lack of research, the clearest trend in mediation training is the requirement for some sort of mediation training class, usually around 40 hours, although the hour requirement differs from program to

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[223] *Become an Arbitrator Frequently Asked Questions (FAQ)*, FIN. INDUS. REGUL. AUTH., https://www.finra.org/arbitration-mediation/become-arbitrator-frequently-asked-questions-faq (last visited Aug. 23, 2021).
[224] *Id.*
[225] *Qualification Criteria for Admittance to the AAA National Roster of Arbitrators*, AM. ARB. ASS'N 1, https://www.adr.org/sites/default/files/document_repository/Qualification_Criteria_for_Admittance_to_the_AAA_National_Roster_of_Arbitrators.pdf (last visited Aug. 23, 2021) (discussing requirements for inclusion on the roster).
[226] *AAA Offers New Training for Arbitrators*, DISP. RESOL., Jan. 2001, 5 (2001) (noting training requirements for AAA arbitrators). The AAA Consumer Due Process Protocol Statement of Principles discusses the importance of neutral competency and training. AAA, *Consumer Due Process Protocol Statement of Principles*, at 16 (1998), https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20%281%29.pdf.
[227] *See, e.g.*, *2021 Dispute Resolution Arbitration Training Institute*, AM. BAR ASS'N SECTION OF DISP. RESOL., https://web.cvent.com/event/285fd4a2-ae29-48f0-840f-0642f77f25ce/summary (last visited Aug. 23, 2021) (outlining 2021 training program).
[228] *Education Services*, AM. ARB. ASS'N, https://www.aaaeducation.org/courses/ (last visited Aug. 23, 2021).
[229] Susan Raines et al., *Best Practices for Mediation Training and Regulation: Preliminary Findings*, 48 FAM. CT. REV. 541, 541-43 (2010) (summarizing the literature on mediator training and qualities of successful mediators).
[230] *See, e.g.*, *How to Become a Florida Supreme Court Certified Mediator: A Step-by-Step Guide*, at https://www.flcourts.org/content/download/526739/file/HowToBecomeAMediatorGuideJuly2021.pdf.

program.[231] For mediators who work in specific areas of law, some researchers suggested a core 24 hours of mediation training, followed by 20 hours of training in a specialized area (such as court mediation or family mediation, etc.).[232] These programs are considerably shorter than other types of professional training – and well short of any training required for most professional licenses.[233]

Mediation training usually focuses on learning the mediation *process* as well as the *skills* necessary to navigate the process. Programs may also include modules on mediation theory, as well as background in law specific to the program. The use of role play exercises is required in most mediation training programs.[234] Role play exercises give new mediators the chance to practice new skills in a low-risk environment. In addition, role play exercises give new mediators the chance to debrief in small mediation groups, as well as large groups as instructors debrief with the entire class. Ethics is also an important training component required in most mediation training programs.[235]

Mediation programs usually require training prior to inclusion on a roster. FINRA, for example, seeks neutrals with multi-day training (including role play experience) and experience as a mediator among its mediator qualifications.[236] Most court-connected mediation programs involve training requirements.[237] Finally, many mediation programs require continuing education, sometimes called "continuing mediator education."[238]

Ombuds Practice

Compared to arbitrators and mediators, many ombuds receive their first training *after* being hired for the position. While mediators and arbitrators in the private sector often serve as independent contractors, ombuds are overwhelmingly employees of the organization they serve. Like other ADR professionals, ombuds come from a variety of professional backgrounds,

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[231] The State of Florida has the most comprehensive set of mediation qualification and training standards in the United States. The educational requirement for court mediators ranges at a low of 20 hours of training for county court to a maximum of 40 hours of training for most other types of mediation. Supreme Court of Florida, No. AOSC17-25, *Mediation Training Standards and Procedures Including Appointments to the Mediation Training Review Board*, Standard 2.01 (2011) (governing length of training); *see also* Sheila Purcell & Janet Martinez, *Mediators in the Field: Experiences from Around the Globe*, DISP. RESOL. MAG., Mar. 2014, 27, 28 (2014) (reporting training hours for mediation across the globe, reporting on whether the trainings were more than or less than 40 hours). Online training courses are often around 40 hours, as well.

[232] Raines, *supra* note 229, at 545 (describing the recommendation as the "core plus" model).

[233] Donald T. Weckstein, *Mediator Certification: Why and How*, 30 U.S.F. LAW REV. 757, 760 (1996) (noting that mediation certification is different from mediator licensing and cautioning against using the words interchangeably).

[234] *Id*. (discussing the prevalence of role-play activities).

[235] *Id.* at 548 (recommending ethics training in mediation programs).

[236] *Qualifications & Need per Location*, FIN. INDUS. REGUL. AUTH., https://www.finra.org/arbitration-mediation/qualifications-need-location (last visited Aug. 23, 2021).

[237] For example, to maintain good status, Florida Supreme Court-certified mediators must report 16 hours of continuing education every two years. *See supra* note 233 (discussing Florida requirements).

[238] *CME Requirements for Florida Supreme Court Certified County, Family, Circuit, Dependency and Appellate Mediators*, FLA. DISP. RESOL. CTR. (2019), https://www.flcourts.org/content/download/402722/file/cme-reporting-form.pdf.

including law, conflict resolution, human resources, labor relations, social sciences, and other fields.[239]

The ACUS Ombuds Report provides a good framework for best practices in ombuds training. It suggests:

> (a) To promote accountability and professionalism, agencies should provide training to ombuds with regard to standards and practice, whether offered by one of the ombuds professional organizations or working groups, or from within the government.
>
> (b) ombuds should identify steps to build general competency and confidence within the office and to provide specific support to ombuds when cases become highly emotional or complex. More generally, as a regular practice to support and improve their skills, federal ombuds should participate in relevant professional working groups or ombuds association training programs.
>
> (c) ombuds offices should consider the use of developmental assignments via details to other agencies or offices, as appropriate, supplemented by mentoring, which can be helpful as part of their training program.[240]

The ACUS Ombuds Report recommends that ombuds be trained and allows flexibility for training either in-house or by a national ombuds organization, such as the International Ombudsman Association (IOA).[241] The report ties ombuds training to quality and competency, and recommends continuing education, as well as mentoring and learning from one another.

The IOA offers a popular training for new ombuds. Although the IOA previously offered this course primarily in person, now the training is also available online in synchronous instruction.[242] When the class is in person, it lasts three days. The online version lasts five half-days. The training includes the following elements: understanding the role of an ombuds, active listening skills, trust building, ethics, conflict resolution, and working within organizations to effectuate change.[243]

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[239] Brian Clauss, *Protecting Civilian Employment and Providing Healthcare to the Citizen Soldier in the National Guard and Reserve Components*, 45 U. MEMPHIS L. REV. 915, 932 (2015) (noting professional backgrounds particularly useful to ombuds work).
[240] ACUS Ombuds Report *supra* note 66, at 64.
[241] The International Ombudsman Association offers a three-day training for new ombuds, focusing on professional standards. *See The Foundations Course*, INT'L OMBUDSMAN ASS'N, https://www.ombudsassociation.org/the-foundations-course (last visited Aug. 23, 2021).
[242] *Events and Training*, INT'L OMBUDSMAN ASS'N, https://www.ombudsassociation.org/index.php?option=com_jevents&task=icalrepeat.detail&evid=169&Itemid=115&year=2021&month=09&day=27&title=sold-out--virtual-foundations-course--september-2021&uid=cd39e275aecdf8915e60b731a11c3b66 (last visited Oct. 1, 2021).
[243] *The Foundations Course*, INT'L OMBUDSMAN ASS'N, *supra* note 241.

Many ombuds have training in mediation, as well as training in the role of an ombuds.[244] In some instances, ombuds will mediate disputes, and ombuds with mediation training can provide that service to the individuals in conflict.

2. Agency Practices

About half the agencies interviewed or surveyed (and nearly all of the environmental agencies) have specific training programs and procedures for ADR personnel. Of those, most stated that they hold regularly-scheduled training programs whether biennial, annual or more frequently. Some also include ad hoc training as needed or for new personnel. Among those that do not presently offer any training, at least one noted that it is interested in creating a training program should it receive approval to do so in its next program review.

Agencies involved in environmental collaboration and conflict resolution are required to report on training undertaken for neutrals and the number of people trained to the Chair of the Council on Environmental Quality and Director of the Office of Management and Budget annually, using a prescribed template.[245] The most recent reports, for 2019, contain detailed descriptions of ADR training given by agencies or taken by their employees at another agency. DOI's report characterizes training as a cornerstone of its effort to build capacity for effective conflict management and collaborative problem solving and describes 39 training sessions delivered by the Office of Collaborative Action and Dispute Resolution and its in-house trainers of its foundational course "Getting to the CORE of Conflict and Communication." It also convened a webinar on the use of situation and conflict assessments for ECCR staff.[246] EPA's report describes its training strategy to strengthen staff's skills and promote the use of environmental collaboration and conflict resolution throughout the agency. In total, 92.5 hours of such training was delivered over the course of eighteen sessions at EPA headquarters and six regional offices. Notably, EPA reported having conducted annual training evaluations for the past twelve years, through both employees and contractors, although it also reported that its activities in 2019 were limited by constrained agency appropriations.[247]

Environmental agencies also reported taking advantage of training offered by the National Center. The National Center offers a certificate in ECCR that requires the completion of five of its courses within a five-year period.[248] Federal employees across the ECCR community (as well as some nonfederal persons) have been certified under the program and feedback for the

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[244] *See* Lawrence D. Mankin, *The Role of the Ombudsman in Higher Education*, 51 DISP. RESOL. J. 46, 48 (Oct. 1996) (discussing the usefulness of mediation training for ombuds).

[245] Memorandum from the Off. of Mgmt. and Budget and the Council on Env't Quality on Environmental Collaboration and Conflict Resolution to All Executive Branch Agencies (Sept. 2012), https://www.udall.gov/documents/Institute/OMB_CEQ_Memorandum_2012.pdf.

[246] Department of Interior, 2019 ECCR Report, https://www.udall.gov/documents/ECRReports/2019/DOI%20CEQ%20ECR%20Policy%20Memo%20Report%20FY%202019%20Final%20for%20CEQ.pdf (last visited Aug. 23, 2021).

[247] U.S. ENV'T PROT. AGENCY, *supra* note 141, at 6.

[248] *See Certificate in Environmental Collaboration and Conflict Resolution (ECCR)*, UDALL FOUND., https://www.udall.gov/OurPrograms/Institute/TrainingCertificate.aspx (last visited Aug. 23, 2021). DOI's CADR page states that all its trainers are CADR-certified.

program has been quite positive.[249] For example, the 2019 ECCR Report by the U.S. Army Corps of Engineers (USACE) notes:

> Professional certifications are highly valued in an engineering organization like USACE, and the increasing numbers of USACE staff earning the Udall certificate in Environmental Collaboration reflects this importance. Through the annual training, Public Involvement Specialists receive a minimum of one in-person yearly training to build consistent expertise. As a result of strategic investments in these training classes, many Public Involvement Specialists either have earned their Udall certificate or will achieve certification this year.[250]

Outside the environmental area, there is much less transparency about training. Training varies and appears to fluctuate with agency budgets. Some agencies rely on the staff to seek out relevant training that is funded by the agency as the budget allows. The type and amount of training offered may vary based on the size of the ADR program. Some agencies encourage and expect ADR personnel to seek out training on their own to improve their skills. Others only hire individuals with certain levels of training and expertise, such as those that demonstrate they have been certified by a private or public certification program.[251]

Some agencies created in-house training programs. The OSC created its own forty-hour program to train new mediators.[252] The Department of Health and Human Services' Departmental Appeals Board provides ADR training to groups across the departmental offices.[253]

Agencies use a mix of internal or private trainers. Some of the contracts described in the prior section include requirements for training as well as the provision of neutrals. Some agencies rely on the FMCS Center for Conflict Resolution Education for continuing education for their neutrals. The OSC forty-hour program includes participation by some local law professors. Agencies use both online and in-person (hybrid) training, although many acknowledge that the availability of in-person training depends on funding and on conditions such as the pandemic.

As noted in the previous section on selection of neutrals, FMCS has highly developed training programs for its own staff. FMCS recently launched a two-year certification program for existing mediators called the "Conflict Management Professional," focusing on comprehensive

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[249] Email from Melanie Knapp, Training Program Manager, National Center, to Judith Starr (June 3, 2021).

[250] U.S. ACE 2019 ECCR REPORT, https://udall.gov/documents/ECRReports/2019/USACE_Use%20of%20ECCR%20in%20USACE%20FY2019%20Report%20to%20OMB%20CEQ%20FINAL.pdf (last visited Oct. 22, 2021)

[251] One agency representative noted that although that agency purports to hire individuals with prior training, many staff enter the program with very little training. There is a significant range of backgrounds and those with little training are not brought up to the level of others.

[252] Interview with Jane Juliano, Melissa Liebman & Whitney Sisco, OSC (Feb. 8, 2021).

[253] *ADR Training*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/about/agencies/dab/adr-services/training/index.html (last visited Aug. 23, 2021).

management and prevention services to enhance the ability to work on systemic conflict issues and a larger universe of conflict types.[254]

Two agencies we spoke to use co-mediation, in which a novice mediator is paired with a more experienced mediator which enables the novice to learn both from observing the more experienced mediator and through feedback from the latter.[255] In addition, mediators may be teamed up to deal with more complex and/or multi-party cases. Co-mediation exposes experienced mediators to other techniques and methods and can be a useful practice for continuing mediator education.

The length of training programs also varies. Some are self-directed for mediators or other actors to carry out independently and asynchronously. Others can be as long as one week in-person. There is also a difference in training programs between contract or volunteer professionals and agency staff. Some agencies noted that the staff receive training, but contractors work on their own or provide sufficient credentials.

Several agencies mentioned how funding has affected their ability to carry out trainings. When the agency has the budget to do so, it will bring in external trainers for as many as three different levels of specialized trainings. Those same agencies also vary the mode of training: in some years if funding permits, they will bring staff to the agency headquarters for training whereas in years with a tighter budget, video conferencing will suffice.

Some agencies try to update training to reflect agency needs as new issues arise. Feedback from participants will inform types of training. These agencies have used survey data from participants to "help us figure out where the needs were for training."

Most agencies find ways to support staff in between trainings such as with monthly phone calls to take up common issues. A minority of agencies noted that each individual ADR staff person is on his or her own as agency management is not equipped to provide that level of support. During the pandemic, many staff were trained on using virtual tools for dispute resolution.

A handful of agencies conduct evaluations of their training programs and procedures after staff complete them. They use different mechanisms to do so such as through summary reports, employee surveys, and "internal, informal evaluations." These sorts of strategies have been used by some agencies to determine which offices were struggling with issues. Very few agencies have formal review processes that provide a means for those evaluations to be converted into changes in their training regimes. The EPA, as noted above, is one agency that does so. Notably, the National Center incorporates into the goals of its annual Performance Accountability Report,

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[254] Survey response from FMCS, Feb. 2021; email from Peter Swanson, Director of Office of Conflict Management and Prevention, FMCS, to Judith Starr (Aug. 25, 2021).

[255] The federal Shared Neutrals program, a workplace program that relies on volunteers that serve as neutrals for agencies other than their own, uses a co-mediation model; among other things, lead mediators evaluate the more junior mediator's readiness to serve as lead mediators in future cases.

metrics for measuring the success of its training, which is used for the agency's strategic planning.[256]

3. Recommendations

The training across the agencies surveyed tends to be tailored to the individual programs that the agency administers. And, as we have seen, training is vulnerable to budget cuts that can constrain the activities of even the most committed agencies. These factors can adversely affect the quantity and quality of available training, creating a reputational risk not just for the agency but also for perceptions of ADR from the public and from private actors involved in these programs.

One agency director observed that although higher degrees in dispute resolution are deemed sufficient from agency management, the quality of master degrees in ADR can itself vary, leading to problems with adequate training of new staff. One way to provide a baseline to avoid this haphazard landscape would be to direct more agencies to the interagency training programs that are sustained through their own federal funding. As discussed below, that is part of the reason those interagency centers exist. Therefore, we make the following five recommendations, which are crafted with sensitivity toward resource constraints. We do not make any recommendations for particular ADR modalities, apart from facilitation training across multiple modalities, as such specific advice would exceed the scope of this project but we recommend that such information be made available through an interagency mechanism.

Refresher/interagency continuing training. We recommend that agencies seek to add refresher trainings to ensure all participants have the latest available resources or take advantage of the robust training opportunities offered by FMCS and the National Center discussed in more detail below.

Certification opportunities. Federal employee neutrals should have career development paths through certification opportunities. States that have certification programs for mediators generally require recertification on a regular basis which requires a certain number of hours of continued mediator education.[257] There can be multiple levels of certification that enable mediators to handle more complex and/or larger cases as well.[258] The ECCR certification program from the National Center is an example of a well-regarded certification program.

The Conflict Management Professional certification that FMCS recently launched will be a more generalized subject matter training, which can benefit neutrals in enabling them to take on more challenging cases, and benefit agencies in getting better services and possibly helping them retain experienced neutrals. Offering the FMCS certification program to other agencies as

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[256] UDALL FOUND., FY 2020 PERFORMANCE AND ACCOUNTABILITY REPORT 11–32 (2020), https://udall.gov/documents/PDF/UdallFoundationPARFY2020.pdf.

[257] *See, e.g.*, Supreme Court of Florida, Administrative Order AOSC 19-26 (May 28, 2019), https://www.floridasupremecourt.org/content/download/526133/file/AOSC19-26.pdf; JUD. COUNCIL OF VA., GUIDELINES FOR THE TRAINING AND CERTIFICATION OF COURT-REFERRED MEDIATORS (2020), http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/training/tom.pdf.

[258] *See, e.g.*, sources cited *supra* note 257.

part of the FMCS catalog of services could be a more affordable approach for those agencies where resource constraints limited training opportunities.

Certification and specialized education are less prevalent among arbitrators, particularly compared to mediators. Similar types of programs could be instituted for continuing education for arbitrators, particularly as practice changes with the times. For example, agencies might consider training to build competency in holding proceedings online.

Facilitation training. Many federal mediators and ombuds are asked to work, in essence, as facilitators. Facilitation is similar to—but not the same as—mediation or ombuds work. Facilitators work with large numbers of parties or representative stakeholder groups. Because of the large number of parties, the facilitator may need to be more creative in meeting small groups and finding various participation formats to encourage active participation. Agencies that use neutrals to facilitate should invest in training specific to facilitation, including training offered by FMCS or the National Center. Agencies may also consider training mediators and ombuds in facilitative practice so they can switch roles, if necessary.

Ethics training. A specific recommendation is to ensure that training on ethics for neutrals be conducted at regular intervals. Ethics training should be specific to the type of neutral, i.e., arbitration ethics, mediation ethics, or ombuds ethics. It need not stand alone but rather could be part of a larger training, provided that the neutrals in the program receive ethics training in regular intervals.

Co-mediation and co-facilitation. Agencies may wish to consider having some cases co-mediated or co-facilitated to enable their mediators to learn from each other and enhance their ability to reevaluate their own techniques. In some specialized cases, learning on the job with a senior colleague may be more fruitful than in those sorts of proceedings where the topics vary considerably or expert knowledge is not necessary. Likewise, in larger ADR proceedings involving multiple actors or communities, shadowing senior colleagues could help junior neutrals and facilitators build confidence. Co-mediation has benefits to parties as well. In large and/or complex cases, a second mediator can ease the logistical burden and ensure that issues are not overlooked and all parties get the attention they require. Agencies that use a co-mediation model should encourage the co-mediators to debrief after each case to discuss their strengths and opportunities for growth. Agencies should create a short list of guided questions to encourage debriefing.

Reflective practice. One important learning technique we did not observe being used in the federal ADR community is reflective practice. Reflective practice arose from research showing a weak relationship between years of experience, reputation, and actual observed mastery.[259] It is a technique designed to enable practitioners to reflect on their assumptions and motivations to move beyond "unconscious competence" to true mastery. Reflective practice groups are composed of mediators who support one another in non-judgmentally exploring the assumptions and motivations that underlie their interventions. A presenter discusses a moment of uncertainty, surprise or discomfort in a mediation and is helped by questions from the group to

[259] *See* Michael Lang & Rochelle Arms Almengor, *Why Case Consultation/Reflective Practice Groups Matter for Mediators*, MEDIATE.COM (Aug. 2017), https://www.mediate.com/articles/langarmsreflective.cfm.

recognize the reasons for their reactions and methods for dealing with similar situations in the future.

In the federal system, reflective practice groups can be created within an agency, or through interagency groups. There is a substantial body of literature on reflective practice and there are many examples on which programs can build.[260] The State of Virginia's Dispute Resolution Center has published a handbook with helpful guidance and checklists for engaging in reflective practice.[261] The ABA Dispute Resolution Section's Mediation Committee also runs a monthly reflective practice session that is open to all members.

D. Ethics and Confidentiality Requirements for ADR Personnel

Ethics and confidentiality are the foundation of any ADR program. As neutral conflict resolvers, ADR programs and processes only have credibility if they have integrity. Ethics and confidentiality rely, in part, on the moment-to-moment responsibility of personnel to act ethically. More important, however, are the foundational policies and training necessary to ensure quality dispute resolution programs.

ADR scholars generally concur that "ethical behavior is a critical principle" in dispute resolution.[262] Scholars also agree, however, that ethics and standards of practice are the same across different types of dispute resolution.[263] While some rules of ethics may apply broadly—such as the duties of neutrality and confidentiality[264]—other ethical standards may apply to one type of dispute resolution that do not apply to another. For example, the ethics surrounding mediation will rightly be different than the ethics surrounding arbitration, ombuds practice, or factfinding processes. And even within a type of dispute resolution, the ethics and standards of practice may vary based on the programmatic goals.[265]

This section begins with a discussion of ADR ethics both within the federal government and more broadly. Following the general discussion, this section will detail the responses from surveys and interviews, and it will conclude with recommendations for the future.

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[260] *See* Judith Starr, *Author, Author! An Interview with Michael Lang, Author of* The Guide to Reflective Practice in Conflict Resolution, JUST RESOLUTIONS E-NEWS (Mar. 22, 2019), https://www.americanbar.org/groups/dispute_resolution/publications/JustResolutions/2019-march/.

[261] *See* SUP. CT. OF VA. DIV. OF DISP. RESOL. SERVS., MEDIATOR SELF-REFLECTION 1 (2018), http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/resources/treasury.pdf.

[262] Charles Pou, Jr., *Embracing Limbo: Thinking About Rethinking Dispute Resolution Ethics*, 108 PENN. ST. L. REV. 199, 200 (2003); *see also* Mary L. Walker & R. Philip Deavel, *The Strategic Relationship Between Ethics and Dispute Resolution: What Every CEO Should Know*, 8 PEPP. DISP. RESOL. L.J. 355, 360 (2008) (noting that ethics and dispute resolution should go hand-in-hand, including in program development and design).

[263] Pou, *supra* note 262, at 200.

[264] Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949, 956-63 (2002) (discussing the importance of conflicts of interest and confidentiality not only in arbitration but also in dispute resolution more broadly).

[265] *See* Pou, *supra* note 262, at 201 ("Different mediators will propose entirely different responses to fulfilling their ethical commitments. Many think this is fine; others do not."); *see also* ACUS Ombuds Report, *supra* note 66, at 7 (noting that most ombuds offices share at least three core principles of practice, while acknowledging that there is no uniformity on this issue).

1. Background

"Ethics" is a broad subject, even within dispute resolution. In some instances, federal law regulates ADR ethics as a whole, while other laws are specific to individual programs or processes. In addition, all federal employees are subject to the Standards of Ethical Conduct for Employees of the Executive Branch ("Federal Ethics"), which are organized around fourteen general principles.[266] Of these the following seven appear especially relevant to neutrals:

(1) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain.
(2) Employees shall not hold financial interests that conflict with the conscientious performance of duty.
(3) Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.
(4) Employees shall not use public office for private gain.
(5) Employees shall act impartially and not give preferential treatment to any private organization or individual.
(6) Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.
(7) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part.

Prior ACUS recommendations may also be applicable. For instance, ACUS Recommendation 2016-4 regarding adjudicators states that these persons be free from bias, including personal and financial biases.[267] ACUS also adopted recommendations for Compliance Standards for Government Contractor Employees-Personal Conflict of Interest and Use of Certain Non-Public Information to prevent conflicts of interest.[268]

For ease of discussion, this section is divided into the following sub-sections: neutrality and impartiality, confidentiality, and process-specific ADR ethics. Because most processes treat neutrality, impartiality, and confidentiality similarly, those topics can be discussed across processes; other ethical issues can be more process-specific.

Neutrality and Impartiality

Neutrality and impartiality, while familiar terms, can be difficult to define with precision. The scholarly literature reveals debate over the nuances of these concepts and even their

[266] 5 C.F.R. § 2635.101(b).
[267] Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94314 (Dec. 23, 2016).
[268] Admin. Conf. of the U.S., Recommendation 2011-3, *Compliance Standards for Government Contractor Employees-Personal Conflicts of Interest and Use of Certain Non-Public Information*, 76 Fed. Reg. 48792 (Aug. 9 , 2011).

importance.[269] Although not a precise distinction, neutrality relates primarily to whether the neutral is biased or has an interest in the outcome. For example, in a 2016 recommendation, ACUS recognized the importance of neutrality for adjudicators, advising that adjudicators be free from biases, such as financial or personal biases, and prejudgment of facts.[270] Impartiality relates to the neutral's actions, such as running a process in a way that does not benefit one party over another and following procedural protocols.[271]

At their core, both neutrality and impartiality are rooted in the ideal of party autonomy, fairness, and freedom in decision-making. In adjudicative processes, neutrality and impartiality help ensure that the third party decides the matter on the merits, as opposed to self-interest or outside influence. In both adjudicative and consensual processes, neutrality and impartiality help ensure that the process itself is fair and not skewed towards one party or another.

Given these important foundational principles of neutrality and impartiality, the ADRA notes that a "neutral":

> may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.[272]

The ADRA's definition of "neutral" is consistent with federal ethics rules regarding conflicts of interest and financial disentanglements. Further, the ADRA notes that a neutral "who serves as a conciliator, facilitator, or mediator serves at the will of the parties.[273] Some agencies adopted similar definitions within their own regulations, such as FMCS,[274] the EPA,[275] and the Federal Maritime Commission.[276]

The ADRA definition of "neutral" guards against the appearance of bias by not only requiring the neutral to be free from conflicts of interest but also to disclose conflicts. Neutrality

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[269] *See, e.g.*, BERNARD S. MAYER, BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN DISPUTE RESOLUTION (2004) (arguing that the dispute resolution profession places too much emphasis on neutrality); Panel Discussion, *Core Values in Dispute Resolution: Is Neutrality Necessary*, 95 MARQ. L. REV. 805 (2012) (transcribing a debate on this topic among scholars Lawrence Susskind, Joseph Stulberg, and Bernard Mayer); Deseriee A. Kennedy, *Predisposed with Integrity: The Elusive Quest for Justice in Tripartite Arbitrations*, 8 GEO. J. LEGAL ETHICS 749, 749 (1995) (discussing litigation, and by extension other forms of dispute resolution, as upholding "neutrality and impartiality as fundamental goals").
[270] Recommendation 2016-4, *supra* note 267.
[271] *Id.* Many of the remaining recommendations for adjudicators meet the needs of impartiality, including recommendations concerning notice of hearings, availability of counsel, argument format, and evidentiary rules.
[272] 5 U.S.C. § 573(a).
[273] *Id*. § 573(b).
[274] 29 C.F.R. § 1440, Appx to Part 1440 – FIFRA Arbitration Rules § 8 (regarding disclosures for arbitrators).
[275] 40 C.F.R. § 791.29(f) (requiring disclosures of conflicts of interests for hearing officers appointed by the American Arbitration Association for cases under the Toxic Substances Control Act); *id.* Part 85, Subpart V, App. II, § 6 (requiring disclosures of conflicts of interests in Air Program arbitrations).
[276] 46 C.F.R. § 502.404 (2021) (defining "neutral" and requiring disclosures).

and disclosure of conflicts of interests is also required for industry standards of ethics in mediation,[277] arbitration,[278] and ombuds practices.[279] The most robust law regarding conflicts of interest can be found in California, requiring arbitrators to disclose personal, financial, or business conflicts involving not only the arbitrator but also the arbitrator's immediate family.[280]

One additional element of neutrality is freedom from the possibility of financial gain that arises out of the dispute resolution process. Although not addressed specifically in the ADRA, as noted above, this is one of the 14 ethical principles applicable to all federal employees, and national standards in mediation,[281] arbitration,[282] and ombuds practice[283] generally prohibit the neutral from receiving a gain or incurring a loss as a direct result of the process. Neutrals who are lawyers may have additional responsibilities to disclose conflicts of interest resulting from work arising out of a former engagement as a neutral.[284]

FMCS maintains explicit rules prohibiting its neutrals using the position for private gain. FMCS Directive 8101 on Ethics and Conduct prohibits "[u]sing FMCS employment for private gain,"[285] and the Code of Conduct for Labor Mediators states: "The mediator should not use his [*sic*] position for private gain or advantage."[286] Research has not uncovered any specific ethical rules based on the employment status of the neutral (i.e., employee vs. contractor), other than the FMCS rule cited.

Confidentiality

Confidentiality is a bedrock principle underlying ADR processes. Confidentiality protects the outside disclosure of both oral and written communications; confidentiality is not limited to disclosure in court or before a tribunal. Confidentiality protections apply to nearly all processes, whether they are based on consensual decision-making or adjudication. In consensual processes such as mediation, the guarantee of confidentiality encourages frank discussion and disclosure of

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[277] MODEL STANDARDS OF CONFLICT FOR MEDIATORS, Standards II and III (regarding impartiality and disclosure of conflicts of interest); UNIF. MEDIATION ACT § 9 (2003) (requiring mediators to make an inquiry into potential conflicts and to disclose conflicts of interest).

[278] CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Canon II (2004) (discussing disclosure obligations); REVISED UNIF. ARB. ACT § 12 (2000) (defining the duties of an arbitration regarding disclosures). In arbitration, the presence of conflicts may lead to vacatur of an arbitration award under 9 U.S.C. §10(a)(2) for "evident partiality."

[279] IOA STANDARDS OF PRACTICE § 2.1 ("The ombudsman is neutral, impartial, and unaligned.")

[280] ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION §7 (2003) (listing mandatory disclosures for neutral arbitrators).

[281] MODEL STANDARDS OF CONFLICT FOR MEDIATORS, Standard III (f) (prohibiting mediators from establishing relationships after mediation that would "raise questions about the integrity of the mediation").

[282] CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Canon VI (D) (prohibiting certain post-arbitration relationships with the parties).

[283] IOA STANDARDS OF PRACTICE, 2.1 (noting that the ombuds should have no "personal interest or stake in, and incur no gain or loss from, the outcome of an issue")

[284] MODEL R. PROF. RESP. § 1.13 (2020) (discussing ethical obligations for lawyers creating a conflict of interest based on prior work as a third-party neutral).

[285] FMCS Directive 8101, §5 (2018).

[286] 29 C.F.R. Part 1400 app., § III (2019).

information;[287] in adjudicative processes, confidentiality protects the parties from intrusion by the press or others.[288] For all processes, confidentiality works to protect specific disclosures while also protecting ADR processes as a whole.[289] Whether all aspects of the ADR processes are confidential even from requests made under the Freedom of Information Act is a complicated question outside the scope of this project.[290]

Confidentiality also has some downsides such as its reduction of transparency in government disputes.[291] Some conflicts handled through ADR might be of great public importance, and ADR processes take them out of the public view. In addition, ADR processes, unlike traditional adjudicative or judicial processes, do not result in public law.[292] They do not create precedent, which may make outcomes more unpredictable and inconsistent by comparison to ordinary government adjudication systems.

Privilege, by contrast, protects the disclosure of an ADR communication before a court or tribunal, but does not necessarily protect disclosures to other third parties. The Uniform Mediation Act (UMA) provides the clearest example of the distinctions between the two. Although the UMA is not federal law and only adopted in about one-quarter of U.S. states, its provisions are still instructive to this inquiry. Under UMA Section 8, mediation communications are confidential only "to the extent agreed by the parties or provided by other law."[293] Unlike other common privileges, such as the attorney/client privilege, the UMA treats mediation communications as privileged even if they are not kept confidential.[294]

The ADRA provision entitled "confidentiality" covers both confidentiality and privilege. The statute provides that neutrals and parties "shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication."[295]

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[287] Mark. H. Grunewald, *Freedom of Information and Confidentiality Under the Administrative Dispute Resolution Act*, 9 ADMIN. L.J. AM. U. 985, 997 (1996) (noting the "importance of confidentiality to settlement effort").
[288] *See* Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1284 (2006) (discussing expectations of confidentiality for parties in arbitration).
[289] *See* John E. Hartsell, *The Sounds of Silence: Promoting Alternative Dispute Resolution in Air Force Procurement by Putting Confidence into Confidentiality*, 53 AIR FORCE L. REV. 183, 193 (2002) ("The importance of confidentiality is an axiom of ADR because it protects the present disclosures and future successes of ADR.").
[290] *See generally* Grunewald, *supra* note 290 (discussing the interaction of the ADRA and the FOIA); INTERAGENCY ADR WORKING GROUP STEERING COMM., PROTECTING THE CONFIDENTIALITY OF DISPUTE RESOLUTION PROCEEDINGS: A GUIDE FOR FEDERAL WORKPLACE ADR PROGRAM ADMINISTRATORS (2006), https://www.adr.gov/pdf/final_confid.pdf (ADRA specifically exempts certain dispute resolution communications between a neutral and a party from disclosure under FOIA). However, other aspects of the process, such as outside evaluations, may be subject to FOIA.
[291] *See, e.g.*, Aseem Metha, *Resolving Environmental Disputes in the Hush-Hush World of Mediation: A Guideline for Confidentiality*, 10 GEO. J. LEGAL ETHICS 521, 528 (1997) (discussing issues of transparency in confidential dispute resolution processes).
[292] Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1211 (2006) (noting the lack of creation of public law in arbitration).
[293] UNIF. MEDIATION ACT § 8 (2003).
[294] *Id*. § 4 (providing privilege for mediation parties, mediators, and third parties participating in a mediation).
[295] 5 U.S.C. § 574(a), (b).

Exceptions apply when the parties and the neutral agree to disclosure, when the communication is already public, or in other limited circumstances.[296] Further, written agreements arising out of dispute resolution processes are not protected.[297] The protections available under the ADRA may be modified or waived by agreement of the parties and the neutral.[298] Similar to other privileges (such as the attorney/client privilege), evidence that is "otherwise discoverable" does not become inadmissible "merely because the evidence was presented in the course of a dispute resolution proceeding."[299]

The confidentiality protections and privilege against disclosure in other proceedings under the ADRA are broad, particularly because they apply to all forms of dispute resolution under the Act. Conceptually, the ADRA provides the same level of privilege as the UMA *and* includes a general law regarding confidentiality. The ADRA, however, provides significantly more protection for arbitration proceedings than the Federal Arbitration Act provides.[300] Most court programs provide confidentiality (but not necessarily privilege) for summary jury trials and minitrials, so the ADRA has broader protections than other types of programs. In addition to the ADRA, specific programs provide for confidentiality through regulations. Some agencies have promulgated regulations specifically addressing confidentiality and privilege, including the Department of Agriculture,[301] the FCC,[302] and the Department of Transportation. [303]

In addition to being a legal obligation, confidentiality is also an ethical obligation of neutrals. National standards in mediation,[304] arbitration,[305] and ombuds practice[306] stress the importance of neutrals maintaining confidentiality. In a similar vein, FMCS Directive 8101 prohibits the misuse of nonpublic information in its standards of ethics and conduct.[307] Further, the Code of Professional Conduct for Labor Mediators also includes a duty of confidentiality.[308]

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[296] *Id.*
[297] *Id*. § 574(g). Dispute resolution communications are similarly unprotected in a dispute between a party participant and a neutral, such as a case for malpractice by the neutral. *Id*. § 574(i).
[298] *Id*. §574(d).
[299] *Id*. §574(f).
[300] The Federal Arbitration Act does not have any provisions governing confidentiality or privilege.
[301] *See* 7 C.F.R. § 780.9(e) (providing for confidentiality of Farm Services Agency mediations); *id*. § 614.11(g) ("Mediation is a confidential process . . . [T[he participants . . . must agree to the confidentiality of the mediation process. The mediator will not testify in administrative or judicial proceedings concerning the issues discussed in mediation, nor submit any report or record of the mediation discussions, other than the mediation agreement or the mediation report, except as required by law.").
[302] 47 C.F.R. § 1.244 (providing for confidentiality for neutral settlement officers under the FCC's general Practice and Procedure regulations).
[303] 49 C.F.R. § 1109.3(d) (providing for confidentiality for mediations conducted under the rules of the Surface Transportation Board).
[304] MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard V(a) ("A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.").
[305] CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Canon VI ("An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.").
[306] IOA STANDARDS OF PRACTICE, 3.1 ("The ombudsman holds all communications with those seeking assistance in strict confidence and takes all reasonable steps to safeguard confidentiality.").
[307] FMCS Directive 8101, § 13 (outlining "Misuse of Information).
[308] 29 C.F.R. Part 1400 app., § V (discussing, among other things, confidentiality expectations of mediators inside and outside of the legal system).

Process-Specific Ethics

While some aspects of ADR ethics may be identical or similar across different modalities, other aspects of ethics may change. Adjudicative ADR processes, such as arbitration and fact-finding, can benefit from ethical guidance regarding the process and decision-making. Consensual processes can benefit from ethical guidance preserving party autonomy and party decision-making. This subsection briefly outlines additional ethical considerations specific to arbitration, mediation, and ombuds practice.

In many ways, arbitration proceeds as a private trial, complete with arguments and evidence. National standards for arbitration ethics include prohibitions on ex parte communication,[309] notice and other due process considerations,[310] and requirements to render an award in a timely and independent manner.[311] The ADRA addresses some of these issues in its sections dealing with arbitrators, their powers, and the process.[312] These elements do not exist in mediation, conciliation, and ombuds practice, and so they would need to be covered within their own programs.

In contrast, national mediation ethics focus more on party autonomy. Mediation codes of conduct emphasize how the mediation process affects the parties and how the mediator fits into that exercise. For example, the Model Standards of Conduct for Mediators emphasizes the right of the parties to what it calls "self-determination" and voluntary participation, making clear that the mediator has an ethical obligation not to coerce the parties.[313] Compared to other ADR processes, mediation participants have more flexibility to guide the process itself, and the standards preserve process flexibility over rigidity.[314] For instance, mediation is ultimately governed by the interests of the parties in determining who may participate in addition to themselves, which processes to follow and in what order, and whether to be in the same room or different rooms.

For ombuds practice, independence may be the most distinctive element of ethics not shared (in the same way) with the other ADR processes. Ombuds are most frequently employees or otherwise financially aligned with the organization to whom they serve. Given the potential conflict of interest, ombuds need independence to investigate, solve conflict, and make recommendations that could be against the organization's interest. Standards of practice for ombuds place great importance not only on neutrality but also independence.[315]

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[309] CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Canon III (providing detailed instructions on how an arbitrator should communicate with the parties and counsel).
[310] *Id*., Canon IV.D (requiring notice prior to a hearing).
[311] *Id*., Canon V.B ("An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.").
[312] 5 U.S.C. §§ 577–80.
[313] MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard I.A (self-determination).
[314] *See also* 29 C.F.R. Part 1400 app., § I (preserving flexibility and party autonomy for labor mediators).
[315] IOA STANDARDS OF PRACTICE §§ 1.1–1.5 (outlining the duties of independence necessary to perform the duties of office effectively); *see also* ACUS Ombuds Report *supra* note 66, at 7 (describing independence as a shared standard of practice across federal ombuds practice).

2. *Agency Practices*

The protections provided under the ADRA give all agency ADR programs baseline ethical grounding for neutrality and confidentiality. Yet how the agencies document and publicize these guarantees vary from program to program. This subsection will proceed topically, rather than from program to program, discussing neutrality, confidentiality, competency, and other issues.

Neutrality

Among the agencies surveyed, neutrality and disclosures of conflicts of interest appear to be important considerations within the programs. Agencies use diverse tactics to ensure that third-parties are neutral, depending on the needs of the program, the funding available, and other considerations. Even agencies without specific policies and procedures relating to conflicts of interests noted the importance of the issue and a general awareness of avoiding conflicts, although some also noted that maintaining neutrality can be difficult where agencies are expected to play multiple roles in disputes.

Some agencies specifically use outside contractors as neutrals to avoid conflicts of interest. One agency noted that outside contractors are not only more likely to be neutral but also give the appearance of neutrality, particularly to outside parties. This agency also noted, however, that the agency needs funds to pay outside contractors and acknowledged that not every program would have the financial means to do so. At least one agency gives the outside participant the choice of using a third-party contractor or an agency ADR specialist as a measure to increase neutrality.

In contrast to agencies that can use outside contractors as third parties, ombuds programs are structured to use agency employees as conflict resolvers. As the ACUS Ombuds Report noted, one way that federal agencies can ensure independence of the programs is through the "reporting structure."[316] Ombuds offices that report directly to the head of the agency, as opposed to compliance departments, human resource departments, or other channels, maintain needed independence to investigate and report.

Within mediation, arbitration, and conciliation programs, agencies reported that neutrals are expected to make disclosures as required by the ADRA. If a conflict of interest arises, a different neutral would need to be assigned to protect the integrity of the process. At least one agency reported that the neutral must make an affirmation that no conflicts exist prior to beginning the process. Another agency reported that conflicts checks are carried out by the general counsel's office.

Confidentiality

Confidentiality is a bedrock principle of federal agency ADR. Survey responses and interviews show that many agencies rely on the confidentiality and privilege protections provided under the ADRA. In addition, some agencies indicated that they created specific

[316] ACUS Ombuds Report, *supra* note 66, at 14.

policies governing confidentiality within their programs, though there are no clear trends according to modality. Some agencies note the confidential nature of ADR processes on their website, presumably to give assurances to stakeholders.[317]

Some agencies execute ADR agreements that include confidentiality clauses for each ADR proceeding. On its website, the NRC makes public a short confidentiality agreement used in enforcement actions.[318] This particular agreement, while only six paragraphs long, covers all the pertinent issues, written in plain language. It covers voluntariness, confidentiality and privilege, the role of the agency "program manager" as it relates to confidentiality, the prohibition of recording the sessions, the treatment of notes, and how an agreement arising from the mediation would be handled.[319]

The Department of Education's case processing manual also specifically requires confidentiality agreements. It further instructs the facilitator to keep all notes from the process, and documents shared by the parties in a separate file not available to enforcement personnel.[320]

The FMCS mediation agreement makes clear who will have access to mediation information. Under its agreement, "[o]nly Parties may attend or have access to any part of the mediation unless all Parties and the mediator agree, or as required by law."[321] The FMCS agreement covers all aspects of the mediation process, while the NRC and Department of Education agreements are specific to confidentiality.

Whether the confidentiality guarantees are in a standalone agreement or in a broader ADR agreement (mediation agreement, facilitation agreement, etc.), these disclosures help ensure that everyone understands whether and how statements made in ADR can be used after the process. As discussed more below, having such agreements is a best practice that should be considered by agencies not currently using them.

In addition to agreements, some agencies have rules or practices regarding access to ADR processes and information as a means to protect the information disclosed. Multiple agencies reported that only ADR practitioners and the participants have access to the records of individual

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[317] *See, e.g.*, *Office of Collaborative Action and Dispute Resolution*, *supra* note 112 ("CADR provides a fair, impartial, and confidential resource to discuss your concerns and explore different options to help you anticipate and resolve conflicts and disputes, build stronger relationships and achieve more effective and lasting results."); *Natural Resources and Environmental Conflict Resolution*, DEP'T OF THE INTERIOR, https://www.doi.gov/pmb/cadr/programs/natural-resources#cadr (last visited Aug. 23, 2021) ("The Office of Collaborative Action and Dispute Resolution (CADR) has more than two decades of experience providing DOI Bureaus and Offices and external stakeholders with independent, confidential, and impartial collaborative problem-solving and alternative dispute resolution (ADR) expertise and services."); *Chapter 3 Alternative Dispute Resolution for EEO Matters*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/federal-sector/management-directive/chapter-3-alternative-dispute-resolution-eeo-matters (last visited Aug. 23, 2021) ("Confidentiality is essential to the success of all EEO ADR proceedings.").

[318] *ADR Pilot Program – Confidentiality Agreement*, U.S. Nuclear Regul. Comm'n, https://www.nrc.gov/about-nrc/regulatory/enforcement/adr_confidentiality_agreement_form.html (June 8, 2020).

[319] *Id*.

[320] *See Case Processing Manual*, Section 203, U.S. DEP'T OF ED. OFFICE OF CIVIL RIGHTS, https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf (Aug. 2020).

[321] *Mediation Agreement*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/wp-content/uploads/2020/04/Mediation-Agreement_fillable.pdf (Apr. 2020).

cases. The NRC agreement also notes that while the program manager has access to ADR records, that access is limited to management of the proceeding.

Confidentiality as discussed in this subsection refers to confidentiality of individual cases, and any identifying case information. The ADRA specifically allows agencies to collect data for reporting, as well as educational and research uses of aggregate data, provided "the specific issues in controversy are not identifiable."[322] Many ADR programs and ombuds offices compile reports that provide and make public valuable aggregate data regarding their services. Annual reports often provide information, such as, but not limited to: 1) cases opened in the year, 2) cases closed in the year, 3) number or percent of cases that closed successfully, 4) and the topic area of the case. Some also aggregate data from participant evaluations including satisfaction with results, satisfaction with the process, and willingness to use the program again.[323]

Competency

In addition to serving as a measure of quality control, credentials and training can be used to meet the ethical duty of competency. These items are discussed in more detail above and will not be repeated here.

Agencies also indicated other measures of competency outside of qualifications and training. For instance, one agency reported using settlement rates as a measure of competency. Settlement rates have long been considered a measure of success for mediation programs, particularly pilot programs.[324] Settlement rates are not always an indicator of competency, however. Individual mediators or conciliators with extraordinarily high settlement rates may be disguising coercive behaviors on the part of the neutral, thus decreasing party autonomy. On the other end, a neutral's low settlement rate may be attributable to parties' unwillingness to settle, no matter the skill level of the neutral.

Other Issues

Four agencies stated they have a hierarchy in place for neutrals to reach out to other officials during cases to receive guidance on ethics issues. All four of those agencies mentioned either their agency's general counsel or a comparable connected attorney as a place to go to receive guidance on ethics issues in a case. This type of structure helps neutrals find answers to difficult questions and to solve issues before they escalate. Although these processes are available, the agencies also noted that they are rarely needed.

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[322] 5 U.S.C. § 574(h).

[323] *See, e.g.*, *Enforcement,* U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/enforcement (last visited Oct. 1, 2021) (citing 2019 aggregate mediation data and satisfaction rates).

[324] *See* Naman J.L. Wood, *Can Judges Increase Mediation Settlement Rates? Of "Coase" They Can*, 26 OHIO ST. J. DISP. RESOL. 683 (2011) (discussing factors outside of a mediator's performance that impact case settlement rates); Ignazio J. Ruvolo, *Appellate Mediation – "Settling" the Last Frontier of ADR*, 42 SAN DIEGO L. REV. 177, 190-91 (2005) (discussing settlement rates in pilot data of appellate mediation program).

Finally, at least one agency noted that its office also relies on national ethical codes of conduct and standards of practice. That agency expects its neutrals to be familiar with standards approved by organizations such as the AAA, ABA, and the Association for Conflict Resolution.

3. Recommendations

We recommend the following to enhance the ethical practice of dispute resolution across agencies and across programs:

Increasing transparency regarding ethics and standards of practice. While many agencies provide valuable information regarding their conflict resolution programs, few agencies include information on ethics and standards of practice on their web pages. Including this information on agency websites should provide additional information to participants, as well as demonstrate the agency's commitment to ethical practice.

Use of ADR agreements, including confidentiality agreements. The use of ADR agreements that outline expectations—including expectations of confidentiality—should be used for all ADR programs. Agencies not currently using these forms on a regular basis should consider creating and adopting such forms.

Standards of practice for specific programs. Although the ADRA provides legal standards for issues such as confidentiality and neutrality, the ADRA does not address a number of ethical issues, particularly in mediation, conciliation, and ombuds practices. Agency programs may consider adopting standards of practice for their programs or committing to follow national standards, such as the Model Standards of Conduct for Mediators or the International Ombudsman Association Standards of Practice.

Harmonizing ethics rules. As this section demonstrates, federal neutrals may be bound by ethical considerations from multiple sources, including ethics due to federal employment, the ADRA, and codes of ethics specific to a process or a program. Training on how these ethical laws and guidelines work together might be particularly useful.

Creating lines of communication for neutrals. The agencies that created lines of communication for neutrals to raise questions or issues related to ethics matters succeeded in solving problems before they arose in a way that could have disrupted proceedings. Agencies may wish to consider clearly identifying an office or individual within the agency that can serve in this role to the extent they do not have such a resource at present.

E. ADR Case Management Processes

ADR case management is another underexplored area of study that our project sought to unearth. While ACUS has conducted work on case management in agency adjudication, no similar study has examined case management in the ADR context.[325] We asked each agency to address the present contours of its case management system, if any, and the level of robustness of

[325] Admin. Conf. of the U.S., Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication,* 83 Fed. Reg. 30686 (June 29, 2018).

that system. We sought information on the actors involved at the operational and leadership levels of case management. We were also interested in the effectiveness and efficiency of the case management process, especially with respect to any electronic platform in place, any challenges and opportunities for improvement.

1. Background

Case management is an important, practical consideration for the orderly operation of any ADR program. Important case management components include, among other things, issues of personnel, software for records and case progression, the ability to conduct conflict checking, and the possibility of use of records for educational and research purposes.

ADR programs employ personnel to manage the flow of cases. Outside of federal agency practice, ADR organizations often deal with hundreds, if not thousands, of cases per year, depending on the organization's reach and community served. For many programs, case managers are assigned and bear administrative responsibility for each individual case. At FINRA, for example, all cases, whether arbitration or mediation, are initially assigned a "case manager" at one of its regional offices.[326] Whether the program is a court-connected program, a government program, a program run by an ADR provider organization, or a community program, case managers may have a wide variety of duties, such as appointing individual neutrals, facilitating conflicts checking, docketing, site logistics, and transmitting agreements, awards, and other types of close-out documents.[327]

Case managers may or may not also be ADR professionals. Although case managers have at least a working understanding of the services provided through their office, they do not necessarily engage in providing ADR services. In some instances, one of the biggest benefits of using case managers may be to provide distance between the parties, the neutrals, and the management of the case. The presence of independent case managers can be particularly useful to handle ethical issues arising out of the conduct of the neutrals without the need to alert the neutral in the first instance.[328]

In addition to good case management personnel, good case management software can be instrumental in running a quality ADR program. Case management software can serve multiple purposes. On the one hand, the software keeps an electronic file in one place for the case manager. Secondarily, the software may also include a portal that allows ADR neutrals to follow the progression of a case. FINRA has a particularly robust system for case management.[329]

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[326] Kristen M. Blankley, *FINRA's Dispute Resolution Pandemic Response*, 125 PENN. ST. L. REV. __ (forthcoming 2021) (describing FINRA case management).

[327] *See e.g.*, Peter Leibold & Michael Schaff, *Healthcare ADR*, APR. N.J. LAW., Apr. 2011, at 67, 69 (discussing pros and cons of using case management providers, such as the AAA or JAMS, for arbitration cases); Tracey S. Wiltgen, *Different Models of Mediation: Finding the Right Fit?*, HAW. B.J., Feb. 2004, at 35, 36 (discussing duties of case managers at community mediation centers).

[328] *See, e.g.*, Thomas Kinkade Co. v. White, 711 F.3d 719, 722 (6th Cir. 2013) (describing a situation in which a challenge to an arbitrator was made to the AAA case manager and resolved without having to alert the arbitrator to the potential challenge).

[329] *See* Blankley, *supra* note 326 (describing the online docketing system for FINRA and the differences in the party portals and the neutral portals).

FINRA's arbitration cases have portals for both the neutrals and the parties, each with different functionality due to the participants' different roles.[330] This software allows parties to submit documents to the arbitrators, and arbitrators have the ability to upload orders, both of which streamline the process by making it paperless. In recent years, there has been also some commercial software for mediation case docketing.

An important aspect of case management is the detection and disclosure of conflicts of interest. As discussed above, neutrality and disclosure of conflicts are bedrock ethical principles that underpin all ADR programs. Case managers, and case management software systems may serve a role in discovering conflicts of interest, either through electronic conflicts checking or by making ADR professionals' conflicts disclosures a standardized part of the case progression.

Records retention raises unique issues for federal agency ADR case management. In mediation practice, it is typical to destroy notes nearly immediately following the conclusion of the mediation to safeguard confidentiality. Agencies, however, must manage all their records under federal records laws.[331] The National Archives and Records Administration (NARA) issues general records schedules to provide disposition authority for records common to multiple agencies. These schedules authorize agencies after specified periods of time to either destroy temporary records or transfer permanent records to NARA (only a narrow category of records is permanent; ADR records, like case records, are generally treated as temporary). "Mission" records (ADR records that are produced as part of an agency's primary mission and thus unique to the agency) are generally not covered in the general records schedules but must be separately scheduled by the agency and approved by NARA. NARA is required by law to issue a notice in the Federal Register of a schedule proposing the disposal of unscheduled series of records or a reduction in the retention period of a series already approved by disposal. Members of the public can review and comment on the proposed schedules and NARA considers the comments and consults with the agency before approving them.[332]

Although some documents generated during an ADR proceeding may be federal records, designation as a federal record does not affect confidentiality. In its 2006 publication, *Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide to Federal Workplace Program Administrators*, the Interagency ADR Working Group discussed the interplay between federal records law and confidentiality.[333] While a federal record is being maintained, substantive law on confidentiality still applies.

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[330] *Id.*

[331] 44 U.S.C. § 31.

[332] *See NARA Schedule Review and Approval Process*, U.S. NAT'L ARCHIVES & RECS. ADMIN., https://www.archives.gov/records-mgmt/scheduling/nara-review (last visited Aug. 23, 2021). The creation of agency records is also governed by the Privacy Act of 1974, as amended, 5 U.S.C. § 552a. The Privacy Act requires agencies to public a notice in the Federal Register for each system of records they collect. A system of records is any group of information about an individual that is retrievable by personal identifiers, such as name or social security number. These notices, called SORNs, are available on agency websites. For an example of an SORN for an electronic system of ADR records, *see* https://www.govinfo.gov/content/pkg/FR-2012-11-09/pdf/2012-27431.pdf.

[333] *See* INTERAGENCY ALT. DISP. RESOL. WORKING GRP. STEERING COMM., PROTECTING THE CONFIDENTIALITY OF DISPUTE RESOLUTION PROCEEDINGS: A GUIDE FOR FEDERAL WORKPLACE PROGRAM ADMINISTRATORS 38–43 (2006), https://www.adr.gov/pdf/final_confid.pdf. Although the guide is addressed to workplace ADR, the legal and practical points apply to ADR generally.

As discussed in other parts of this report, ADR programs often collect information and data that may be useful for research and educational purposes. In fact, the ADRA specifically exempts such data from its sweeping confidentiality requirements, and does "not prevent the gathering of information" for such purposes.[334] Some of the national ADR standards specifically call for the study of such information to inform and better the practice and the field.[335] Some scholars have called for increased transparency regarding data collection and consistency of such collection for research purposes, including comparative research.[336] Many agencies currently publish annual reports regarding their programs, including aggregate case information, although such annual reporting does not appear to have requirements for consistency from agency to agency or program to program.

2. Agency Practices

There is considerable variation in case management across the executive branch ADR programs. Given the many levels of case management, we will take each in turn.

Intake

Some agencies assign a staff member to serve as a case manager. Not all have formal case manager titles, and in some cases the staff member that oversees the ADR proceeding is also the case manager within the agency's adjudicative process. Other agencies have staff that act as administrators that are quasi-case managers. Typically, among the smaller agencies or programs with as few as three ADR staff, all the management is handled across those three staff members. Still others have clerks that assign case numbers and handle docketing in a quasi-judicial manner. Their roles differ but their primary task is the same: to acknowledge the dispute, and to put the paperwork together to commence the proceedings. From that moment forward, tasks diverge considerably in the way the case is handled.

Agencies apply different case management procedures depending on the type of dispute, the form of dispute resolution, and whether the process is confidential. Some agencies categorize their cases by distinct types whereas others have only a single track. Further, sometimes agency counsel advises the parties on whether to proceed with ADR at all; occasionally, agency counsel serves some other gatekeeping role such as pre-screening. Staff at certain agencies are trained in the review process to determine whether ADR would be beneficial in the settling of a dispute. Some staff noted that their advice may turn on agency resources rather than the facts of the dispute, legal arguments, or the situation of the parties. Elsewhere, that determination is set out in statute.

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[334] 5 U.S.C. § 574(h).

[335] *See* MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard IX (recommending that a mediator participate "in research when given the opportunity, including obtaining participant feedback when appropriate"); IOA STANDARDS OF PRACTICE, Standard 3.7 (requiring confidentiality when gathering information for reporting purposes).

[336] *See, e.g.*, Nancy A. Welsh, *Bringing Transparency and Accountability (With a Dash of Competition) to Court-Connected Dispute Resolution*, 88 FORDHAM L. REV. 2449 (2020) (discussing information that court-connected ADR programs should be collecting to promote transparency and accountability).

One agency noted a pre-filing process for its disputes where one of the attorneys in its ADR office will meet with the parties to discuss their situation and to receive feedback. This process allows the parties to have an assessment of their respective positions prior to the commencement of the ADR proceedings.

Management means different things to different agencies. Some are very hands-off following the commencement of the ADR proceedings. Others manage closely all the filings and other materials as well as the needs of the third-party neutral. In most instances, agencies are the keeper of the confidentiality and ethics materials to ensure the integrity of the proceedings. At least one member of staff will carry out the conflicts check process.

Some agencies assign counsel and a neutral to the proceedings while others just take note of the proceedings but allow the parties to identify their own neutral from a roster or suggested list. There may be no engagement at all with the agency after the notification of the dispute.

For those that do involve agency staff as non-neutrals, their roles vary. Some serve informational roles only while others are more involved assisting either parties, depending on needs, or the neutral.

Records and platforms

Most agencies today use electronic records but at least one agency is still using paper records. Among those with electronic records management software, most often they are licensed from a contractor although some have developed their own in-house proprietary systems. Firewalls are critical for ethical reasons. As noted above, agency case files are subject to federal recordkeeping rules. In July 2019, NARA and the Office of Management and Budget (OMB) jointly issued guidance on how to maintain and manage electronic records that also applies to ADR programs.[337]

As the ADR Working Group has observed, the individual neutral's notes generally are not subject to disclosure pursuant to an exception in the ADRA.[338] One ombuds explained that he regularly destroys his personal notes quarterly unless a matter is still ongoing, while maintaining basic tracking information in a database that is subject to records retention rules.[339]

Agencies maintain strict separation of case files from other files to protect confidentiality and shield against conflicts of interest. For example, in the EPA Environmental Appeals Board process, the settlement judge and the staff attorney assigned to the case must maintain strict confidentiality within the office so that the remaining Board members do not receive information that the parties intend to be confidential that may influence the decision-maker's view of the case.

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[337] Arian D. Ravanbakhsh, *New OMB/NARA Memorandum on Transition to Electronic Records*, RECORDS EXPRESS (July 1, 2019), https://records-express.blogs.archives.gov/2019/07/01/new-omb-nara-memorandum-on-transition-to-electronic-records/.
[338] 5 U.S.C. § 574 (a) (discussing confidentiality afforded to neutrals).
[339] Interview with Marcus Stergio, Ombuds, Office of Federal Contract Compliance Programs (June 23, 2021).

Post-dispute follow-up

Some agencies follow-up or continue to track dispute settlements after the conclusion of the ADR proceeding but not all do. In fact, most consider a case to be successful only where they do not hear from participants after a proceeding's conclusion. In some instances, any follow-up may involve adjudication that is handled by another part of the agency. Some agencies noted that they have case follow-up programs in place but due to limited resources they have not reviewed those, sometimes in several years.

Maintaining records of proceedings following their conclusion could help agencies develop a fuller understanding of the long-term success of their programs and strategies that create enduring solutions for parties. However, most agencies lack resources to maintain close contact and it may be difficult to isolate the variables to draw conclusions from such tracking.

3. Recommendations

The variation among the agencies' ADR programs is greatest when it comes to their case management practices. There are also notable disparities in agency participants' evaluations of their case management experiences. Among survey respondents, about half were very satisfied with the systems that their agencies use for case management. The other half were only mildly satisfied or were neutral. About half of respondents believe that their agency's present practices are very effective for smooth operation of cases. Among those who feel differently, they have commented that they are not able to identify particular weaknesses. It is difficult for individual agency staff to identify the range of options for case management and how to implement them given the competing demands on their time.

External audit. Across the agencies studied here, costs were a problem but with additional funding, each agency would have several areas for improvement as highlighted above (better electronic platforms, more staff, tracking proceedings following their conclusion). Among those agencies that were able to identify problems, the report team identified still others. This review suggests that most of the programs would benefit from an external audit by an outside actor (whether a private consulting firm, a specialized agency, or a trained research team, among others) that could advise them on case management amendments and opportunities. Such a review as to case management could assess objectively how the program is administering its ADR functions and could recommend best practices in an area that is presently underserved by existing research. Further, case management tends to be highly targeted to individual programs. A personalized review would help bridge any gaps in information-sharing across agencies intended to improve case management techniques.

Software review. To the extent that agencies are using case-management software, those programs should be periodically reviewed internally (or externally where possible) not only for efficacy but also for security and ability to maintain confidentiality. Software should have firewalls and encryption that are reasonable for the industry.

Ethics policies. Offices that offer both adjudicative services and settlement services should have clear, written policies regarding the ethical walls between the adjudicative staff and

the settlement staff. For example, policies should outline (1) who has access to which materials and (2) how passwords or other protocols ought to be implemented to ensure those walls are constructed. The responses we received indicate that such ethical walls or separation is occurring; we advise that these offices have written policies if none currently exists.

F. Interagency Mechanisms to Facilitate ADR and Provide Support

This section describes interagency arrangements in place to support and facilitate ADR. In addition to those mentioned here, we are aware of several informal and formal arrangements maintained by different groups of ADR practitioners in the federal government. Some of those extend beyond the work of this study. Some also are difficult to capture in any documented way. Thus, we focus here on programmatic interagency initiatives.

1. Agency Practices

There are four different organizations or groups with missions that include assisting federal agencies with alternative dispute resolution programs: the Interagency Alternative Dispute Resolution Working Group, FMCS, the National Center, and COFO. Each has a different statutory basis, structure, and resource base.

The Interagency Alternative Dispute Resolution Working Group

In addition to authorizing agencies to use alternative dispute resolution to resolve issues in controversy in administrative programs, the ADRA of 1996 directed the president to designate an agency or designate or establish an interagency committee to facilitate and encourage agency use of dispute resolution. The designee, in turn, was required to (1) encourage and facilitate agency use of alternative means of dispute resolution, and (2) develop procedures that permit agencies to obtain the services of neutrals on an expedited basis.[340] On May 1, 1998, President Clinton created an Alternative Dispute Resolution Working Group (the "ADR Working Group") comprised of Cabinet departments and other agencies with a significant interest in dispute resolution to be convened by the Attorney General.[341]

The ADR Working Group's mission is to facilitate, encourage and provide coordination for agencies in such areas as: (1) development of programs that employ alternative means of dispute resolution, (2) training of agency personnel to recognize when and how to use alternative means of dispute resolution, (3) development of procedures that permit agencies to obtain the services of neutrals on an expedited basis, and (4) recordkeeping to ascertain the benefits of alternative means of dispute resolution.[342] The ADR Working Group also periodically advises the president, through the Director of the Office of Management and Budget, on its activities.[343]

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[340] Pub. L. No. 104-320, § 573.
[341] *See* Memorandum, *supra* note 32. The Office of Dispute Resolution within the Justice Department's Office of Legal Policy originally represented the Attorney General in leadership of the ADR Working Group. *See* archived content at www.doj.gov (last visited Oct. 22, 2021).
[342] *Id.*
[343] *Id*.

To staff its operations, the ADR Working Group established a Steering Committee composed of staff-level ADR experts in various agencies.[344] The Steering Committee's role was to staff the ADR Working Group and support the work of four sections, which include: (1) workplace conflict management; (2) contracts and procurement; (3) administrative enforcement and regulatory process; and (4) litigation. The Attorney General, on behalf of the ADR Working Group, issued reports to the President for 2000, 2007 and 2016, discussed below.

Through its Steering Committee, the ADR Working Group originally actively engaged in providing interagency assistance in the forms of outreach to agencies, publication of guidance, provision of training, and the making of recommendations to further ADR. These achievements were especially impressive because all members were volunteers and the ADR Working Group lacked a dedicated source of funding. Over the past decade, however, the support provided by and to the ADR Working Group has dwindled, and the source of its leadership and resources is unclear.

For its first year of operation, the Working Group reported that it had created a website and had held more than 50 training sessions, meetings and colloquia on all aspects of ADR with more than 500 participants from across the federal government.[345]

The Civil Enforcement Section of the ADR Working Group[346] reported that 26 federal agencies with unique statutory and regulatory missions, requirements, and regulated communities participated in its activities. These activities included holding section meetings to share knowledge, educational sessions to develop skills necessary to support an ADR program, and the development of a cadre of experts to serve as specialized consultation teams.[347] One example, according to the Report, was the provision of a consultation team to assist FERC staff to move from a vision to fully established program.

The ADR Working Group also created a Federal ADR Manager's Resource Manual, a comprehensive guide to creating and operating an ADR program in the federal government, and asked its members to complete surveys on its ADR activities, posting the results on its website.[348]

Finally, the Report discussed plans for the future. It stated that the ADR Working Group would coordinate with the newly created ADR Council, a group of senior executives who would develop ADR policy guidance for the executive branch, to focus on issues that cut across ADR programs at all agencies, such as confidentiality, best practices and procedures for the use of

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[344] *See* Interagency Alt. Disp. Resol. Working Grp., *About the Interagency ADR Working Group*, https://adr.gov/about-adr.html. (last visited Oct. 22, 2021).
[345] *See* INTERAGENCY ALT. DISP. RESOL. WORKING GRP., REPORT TO THE PRESIDENT ON THE INTERAGENCY ADR WORKING GROUP (1999).
[346] In 2002, the Civil Enforcement Section's name was changed to the Civil Enforcement and Regulatory Section to recognize the expansion of ADR to areas involving regulatory conflicts.
[347] INTERAGENCY ALT. DISP. RESOL. WORKING GRP., *supra* note 345.
[348] *Id*.

arbitration.[349] The Civil Enforcement Section reported plans to create additional trainings and manuals, as well as to offer periodic symposia on relevant issues.[350]

In 2007, the ADR Working Group reported that the Steering Committee had published an updated governance document that identified the mission, authority, and structures of the Working Group's Sections and Steering Committee. It identified three new guides it had published, including guides on mediation confidentiality in workplace disputes, ethical guidance for federal employee mediators. It also published a survey of ADR operations at over 100 agencies and agency components.[351]

In looking at the future of ADR in the federal government, the 2007 Report observed:

> While workplace dispute resolution – particularly in the EEO arena – still represents a significant portion of ADR activity in the federal government, many agencies have broadened their application of ADR into other areas. As more data are collected and analyzed in these areas, it is becoming clear that ADR has met and exceeded the challenge of providing parties a cost-effective and time-efficient approach to resolving conflict.[352]

Finally, the 2007 Report contained recommendations for fulfilling the promise of ADR in the coming years. They included: establishment of a Federal Council and annual conference for agency dispute resolution specialists, a government-wide biennial ADR achievement awards program, incorporating conflict management principles into agency performance management structure, use of conflict management as a selection and performance appraisal criterion for executive and management positions, programmatic review and evaluation that show measures of progress in implementing ADR programs, external promotion and facilitation of ADR, broadening the provision of ADR training, and interagency sharing of federal resources.

The next ADR Working Group report was issued nearly a decade later and contained considerably less content and no recommendations for agencies. It reported that the Working Group was meeting bi-monthly to share expertise and best practices in dispute resolution across the executive branch and was facilitating ADR training and program development for agencies seeking to initiate or expand existing programs (unlike the prior reports, it did not identify any examples of the latter). Forty-seven agencies, fewer than half those responding in 2007, responded to the Working Group and DOJ's survey regarding their ADR activities.[353]

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[349] There is no mention in of the Council in the two subsequent ADR Working Group reports and it does not appear on the ADR.gov website.
[350] INTERAGENCY ALT. DISP. RESOL. WORKING GRP., *supra* note 345.
[351] *See* LINDA A. CINCIOTTA ET AL., REPORT FOR THE PRESIDENT ON THE USE AND RESULTS OF ALTERNATIVE DISPUTE RESOLUTION IN THE EXECUTIVE BRANCH OF THE FEDERAL GOVERNMENT 24–25 (2007), https://www.adr.gov/pdf/iadrsc_press_report_final.pdf (last visited Oct. 22, 2021).
[352] *Id.*
[353] INTERAGENCY ALT. DISP. RESOL. WORKING GRP., 2016 REPORT ON SIGNIFICANT DEVELOPMENTS IN FEDERAL ALTERNATIVE DISPUTE RESOLUTION 2 (2016), https://www.adr.gov/pdf/2016-adr-rpt.pdf (last visited Oct. 22, 2021).

The Department of Justice abolished the Office of Dispute Resolution in June 2018.[354] This left the ADR Working Group without funding to update its website. The last newsletter of the ADR Working Group was issued in June 2018. Throughout 2019, the committee offered quarterly seminars on workplace ADR issues through the Department of Energy but there are no seminars listed on the website currently. Little new content has been added to the website over the past decade.[355]

In 2020, responsibility for the website was transferred to FMCS, which received funding to perform an update. FMCS currently is working on updating the website to make it a resource center with model forms, guidance and training materials.[356]

It is unclear who is responsible for the Working Group since the termination of the Attorney General's leadership designee with no replacement. As it is an all-volunteer group with no committed resources either as a freestanding entity or as a responsibility of an agency with budget resources granted to it by Congress (except for some funding to FMCS for the website), support for its functions has been, and continues to be, uneven.

The Federal Mediation and Conciliation Service

Although originally created to provide mediation services to private sector labor disputes, FMCS has grown in both statutory authority and programmatic offerings to play a major role in promoting and supporting the use of ADR across the federal government.

The Taft-Hartley Act created the FMCS to promote labor-management peace and cooperation and to provide neutrals to assist in the resolution of private sector labor disputes.[357] In 1978, Congress expanded the FMCS mission to provide ADR to federal agencies and unions that reach impasse in labor negotiations,[358] and in 1980, extended this authority to encompass labor disputes within the U.S. Postal Service.[359] The ADRA of 1996 expanded FMCS's role in federal ADR, authorizing FMCS to assist agencies with their ADR programs, provide neutrals and training, and consult with the Interagency ADR Working Group on a roster of neutrals.[360] Today FMCS provides mediation and conflict resolution services to industry, government

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[354] Memorandum from Att'y Gen. Jeffrey B. Sessions III on Eliminating the Office of Dispute Resolution to Beth Ann Williams, Assistant Att'y Gen. Office of Legal Policy (June 25, 2018), https://www.justice.gov/olp/page/file/1324721/download (last visited Oct. 22, 2021). Congress approved this action in the spring of 2019.

[355] *See* Interagency Alt. Disp. Resol. Working Grp., *ADR Resources and Guidance*, https://www.adr.gov/guidance.html (last visited Aug. 23, 2021).

[356] Interview with David Moora, Commissioner, FMCS (Feb. 8, 2021).

[357] Pub. L. No. 80-10, § 203 (1947).

[358] Pub. L. No. 95-454, codified at 5 U.S.C. § 7119(a).

[359] Pub. L. No. 96-326 (1980).

[360] Section 7 of the 1996 ADRA, amending Section 203 of the Labor-Management Act of 1947 (29 U.S.C. § 173). For a discussion of the ADR work of FMCS in the early years of its expanded mandate, *see* Jerome T. Barrett, *The FMCS Contribution to Nonlabor Dispute Resolution*, MONTHLY LAB. REV., Aug. 1995, https://www.bls.gov/opub/mlr/1985/08/art4full.pdf.

agencies and communities.[361] It is the nation's largest independent public agency dedicated solely to ADR and conflict management.[362]

FMCS provides a wide range of conflict resolution services to other agencies for both workplace and administrative program disputes, maintaining separate programs for each.[363] The services FMCS makes available for interagency administrative program disputes include assessments and system design, the provision of neutrals, training, and the sharing of best practices through education and outreach.[364] As FMCS does not receive appropriated funding for this program, it provides these services through interagency agreements that reimburse it solely for staff time.

Support for administrative program disputes resides in the Office of Conflict Management and Prevention,[365] to which six mediators are assigned.[366] FMCS provides mediators to agencies pursuant to interagency agreements. It currently has over 60 interagency agreements.[367] FMCS also performs a "procedures audit" where requested to study how issues and problems are currently resolved within an organization. After reviewing available improvement paths, it creates a detailed plan for the implementation, maintenance and evaluation of an improved dispute resolution system.[368]

Among the services FMCS offers to other agencies is dispute resolution system design. FMCS performs a "procedures audit" to study how issues and problems are currently resolved within an organization. After reviewing available improvement paths, it creates a detailed plan for the implementation, maintenance and evaluation of an improved dispute resolution system.[369]

The FMCS Institute for Conflict Management provides centralized classroom training, both live and web-based, in mediation, negotiation, arbitration, workplace violence prevention and organizational development. It is an approved recertification provider by the Society for Human Resource Management (one of the largest human resources membership associations focused on professional development and certification of competencies) and many of its courses are approved for continuing legal education for attorneys.[370] Core programs include a 40-hour Basic Mediation Skills course, an Advanced Mediation Skills course, a Mediation Skills Refresher course, and Facilitation and Advanced Facilitation Skills courses. Other courses

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[361] *About Us*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/aboutus/ (last visited Aug. 23, 2021).
[362] Mark Fotohabadi, *What is the Federal Mediation and Conciliation Service?*, ADR TIMES (Dec. 4, 2020), https://www.adrtimes.com/federal-mediation-and-conciliation-service/.
[363] *FAQs*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/resources/faqs/ (last visited Aug. 23, 2021).
[364] *Alternative Dispute Resolution for Government*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/services/alternative-dispute-resolution-for-government/ (last visited Aug 23, 2021).
[365] *Conflict Management & Prevention*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/aboutus/agency-departments/division-of-agency-initiatives/ocmp/ (last visited Aug. 23, 2021).
[366] Survey response from FMCS, Feb. 2021. In addition, to meet the needs of a requesting agency, CM&P has the ability to draw on FMCS mediators.
[367] Interview with Peter Swanson, Director of Office of Conflict Management and Prevention, FMCS (May 7, 2021).
[368] *See FAQs*, *supra* note 365.
[369] *Id.*
[370] *Providing Practical, Customized Conflict Training*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/wp-content/uploads/2017/03/FMCS-InstituteV3.pdf (last visited Aug. 23, 2021).

include an Essential Conflict Resolution Skills series and workshops targeted at specific skills such as mindfulness and trust-building.[371] The Institute also offers customized conflict resolution training to meet an agency's special needs. This includes mediator coaching and mentoring in which FMCS mediators co-mediate cases, observe mediations, and provide one-on-one coaching to enhance the development and competence of new mediators.[372]

FMCS also participates in and promotes conferences and workshops and provides customized training modules.[373] Its website features multimedia presentations featuring summits and symposia that highlight lessons learned from ADR successes and discussions of its potential for problem-solving in various areas.[374]

The National Center

The 1998 EPCRA[375] created the U.S. Institute for Environmental Conflict Resolution (which Congress renamed in 2019 as the John S. McCain III National Center) to assist the executive branch in implementing the National Environmental Policy Act of 1969 by providing assessment, mediation or related services for conflicts dealing with the environment, public lands, or natural resources. The National Center is part of the Udall Foundation, an independent federal agency established in 1992 to honor Morris Udall's impact on the nation's environment, public lands, natural resources and support for the rights and self-governance of Native Americans.[376]

The National Center is a small organization, with a staff of eleven federal employees, all of whom are neutrals and case managers. It leverages its annual appropriation through cost recovery from services fees and the use of contracted private sector providers to augment service capacity.

Services offered by the National Center include consultations, assessments, process design, convening, mediation, facilitation, stakeholder engagement, Tribal consultation, and other related collaboration and conflict resolution activities. As part of this work, the National Center provides a training program to develop skills and build workforce capacity in collaboration, communication, problem solving, and conflict resolution. It specializes in providing assistance in the following areas:

- Nationally and regionally important environmental challenges;
- Multi-party high-conflict cases where an independent Federal neutral is needed;
- Collaborative efforts involving Tribes and Native people;
- Interagency and interdepartmental collaborations;

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[371] *ADR Conflict Resolution Training Courses, Workshops, and Webinars*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/wp-content/uploads/2016/10/ADR-Training-Brochure-2015.pdf (last visited Aug. 23, 2021).
[372] *See id.*
[373] *Conferences and Workshops*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/services/education-and-outreach/conferences-and-workshops/ (last visited Aug. 23, 2021).
[374] *Documents and Data*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/resources/documents-and-data/ (last visited Aug. 23, 2021).
[375] Pub. L. No. 105-156 (1998).
[376] *See* UDALL FOUND., https://udall.gov/ (last visited Aug. 23, 2021).

- Issues involving multiple levels of government (Federal, State, Local, Tribal) and the public;
- Issues that require substantive expertise (e.g., National Environmental Policy Act, transportation infrastructure, endangered species, cultural resources)
- Training and capacity-building in ECCR for individuals and groups; and
- Projects that require funding from multiple agencies and/or private organizations.

In general, environmental agencies request assistance from the National Center when impartiality and process expertise are needed to lead complex conflict resolution and collaborative problem-solving efforts, especially for interagency cross-jurisdictional issues.

Much of the National Center's work is to support ECCR, a high-water mark for multi-agency collaboration in the field of ADR. ECCR refers to third-party-assisted environmental collaboration as well as environmental conflict resolution to resolve problems and conflicts that arise in the context of environmental, public lands, or natural resources issues, including matters related to energy, transportation, and water and land management.[377] We characterize the federal ECCR community as a high-water mark in inter-agency collaboration in the ADR field because of its sharing of knowledge and resources, and its use of common metrics and reporting, which enables comparisons across agencies of the effectiveness of various approaches. This successful interagency collaboration owes much to the fact that the ECCR community shares a common statutory framework for conflict resolution, leadership from the White House through the Council on Environmental Quality (CEQ), and the dedicated resources of the National Center. The federal ECCR community regularly assesses and reports on the value of ADR using both quantitative and qualitative metrics that is it continually refining. ECCR has a relatively long history both inside and outside the federal government, which one official observed has enabled those agencies involved in it to embed its principles into their cultures.[378]

EPCRA established procedures for federal agencies to access these resources and provided funding for them. The law reflected the congressional goal to provide a neutral place inside the federal government but "outside the Beltway" where public and private interests can reach common ground.[379] Specific objectives include:

- Resolving federal environmental, natural resources and public lands disputes in a timely and constructive manner through assisted negotiation and mediation;
- Increasing appropriate use of ECCR and its effectiveness; and
- Engaging in and promote collaborative problem-solving and consensus building during the design and implementation of federal environmental policies.

In 2005, the Chair of the Council on Environmental Quality and the Director of OMB jointly issued a Memorandum on Environmental Conflict Resolution directing agencies to

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[377] Memorandum from the Off. of Mgmt. and Budget and the Council on Env't Quality on Environmental Conflict Resolution to Executive Branch Agencies (Nov. 28, 2005), https://www.udall.gov/documents/Institute/OMB_CEQ_Memorandum_2005.pdf.
[378] Interview with Michael Wolf, Director of Collaboration and Alternative Dispute Resolution, Federal Labor Relations Authority (Sept. 3, 2021).
[379] UDALL FOUND., *supra* note 256, at 6.

increase the effective use of ECCR, which was updated by a Memorandum on Environmental Collaboration and Conflict Resolution in 2012. The 2012 Memorandum requires agencies to leverage all environmental collaboration and conflict management techniques to improve environmental governance.

The 2012 Memorandum set forth the following basic principles for agency engagement in ECCR that demonstrate the values underlying the process. They include: (1) informed commitment, (2) balanced, voluntary representation, (3) group autonomy, (4) informed process, (5) accountability, (6) openness, (7) timeliness and (8) implementation. These principles make it clear that ECCR is not just a docket-clearing exercise, but a way to engage all stakeholders in environmental disputes in a collaborative process to achieve implementable solutions. They provided a good starting point for dispute system design, which is not present in the 1998 Presidential Memorandum.

The 2012 Memorandum further provides for the OMB Director and CEQ Chair to convene periodic leadership meetings of agencies. It requires the National Center to convene a quarterly interagency forum of senior department and agency staff (the "Federal Forum") to provide advice and guidance and facilitate interagency exchange on ECCR. Agencies are required to report to the Director and Chair at least every year on their use of ECCR and on the estimated cost savings and benefits realized through it.[380]

The National Center provides training in ECCR mainly through federal staff; although it is in the process of obtaining contractor-provided training as well.[381] Current offerings include a two-part series in the Fundamentals of ECCR. Course 1 of this series, Understanding Conflict and Planning for Successful Collaboration, addresses the many facets of ECCR using interest-based negotiation to develop a collaborative process and collaborative communication skills. Course 2, Crafting Collaborative Solutions to Environmental Conflicts, focuses on designing collaborative processes and helping multi-party groups use interest-based negotiation and leading groups through the process to find creative solutions to complex environmental and public policy issues. Another offering is Collaboration with Native Nations and Tribal Consultation, designed to improve intergovernmental relations through exposure to a broad array of concepts and skills including history, law, policy, sovereignty, protocol, collaboration, communication skills, and resources available.[382]

The National Center also provides on-site training for groups to develop skills critical to successful collaboration, multiparty problem solving and communication. Its clients have included federal agencies, state agencies and inter-governmental project groups. It also assists individuals in obtaining a certificate in ECCR.

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[380] Since 2005, the National Center has collected individual agency reports and developed an annual synthesis report of ECCR in the Federal Government. The synthesis and individual reports are available at UDALL FOUND., *supra* note 256.

[381] Interview with Stephanie Kavanaugh, Deputy Director of the National Center (Feb. 17, 2021).

[382] Detailed syllabi for courses are available at *Available Trainings*, UDALL FOUND., https://www.udall.gov/OurPrograms/Institute/OpenTrainings.aspx (last visited Aug. 23, 2021).

The National Center assesses its training program both on quantitative metrics (i.e., number of trainings provided) as well as qualitative metrics (trainee evaluations on the impact of the training on their effectiveness). For example, in FY 2020 the Center reported providing twelve training courses (exceeding its goal of nine) and achieving a 97 percent rate of positive responses on the training impact question. It also convened five forums/conferences to promote further awareness and use of ECCR within the federal government.[383]

The National Center provides a broad range of dispute resolution services for any environmental conflict involving the federal government. Its most basic service is case consultation, which it provides free of charge to help federal agencies and other stakeholders explore the potential benefits of ECCR. If ECCR is selected, the Center provides fee-based assessment, mediation and facilitation services to address environmental, public lands and natural resources conflicts involving federal agencies and affected stakeholders, as well as Native Nations or Tribal Issues.[384] Generally, the National Center provides direct facilitation and mediation services when: (1) agencies or stakeholders want help selecting a neutral third party, (2) agencies or stakeholders need help to agree on whether they can work together to reach a common goal, (3) agencies request the Center staff to address intra-agency disagreements or challenges that interfere with the agency's ability to participate effectively in larger collaborative processes, (4) an agency prefers to use "federal family" neutral services or (5) agencies or stakeholders specifically request Center staff.

The National Center measures the success of these services both quantitatively (number of such services provided) and through feedback from stakeholders on whether the Center helped them determine how best to proceed to resolve their conflict, well as whether progress was made toward resolution. For FY 2020, the National Center reported 59 case consultations, and 32 assessments/facilitations/ mediations for environmental matters. It reported fifteen assessments/facilitations/mediations for issues that concern Native Nations or Tribal issues. User satisfaction, as measured by the percentage of cases where the majority of participants responded positively to the above questions, was reported at 100% for both programs.

The National Center maintains an ECCR Roster, which contains information on neutrals that meet its standards for expertise in ECCR. According to the Udall Foundation's 2020 Performance and Accountability Report (" PAR"), the Center is currently assessing the Roster's value and options to improve it, including plans to migrate administrative management of the Roster to an external third party.[385] The Center also maintains a Native Dispute Resolution Network, the only national network of dispute resolvers with expertise in culturally appropriate collaboration and conflict resolution across tribal, federal and state governments.

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[383] UDALL FOUND., *supra* note 256.

[384] The Center defines conflict assessment as helping to identify issues in controversy, the affected interest, and the appropriate form of handling the conflict. It defines facilitation as a collaborative process in which an impartial professional seeks to assist a group of individuals or parties to discuss constructively a number of complex, potentially controversial issues. It defines mediation as a process in which a skilled, impartial third party seeks to enhance negotiations between parties to a conflict by improving communication, identifying interests, and exploring possibilities for a mutually agreeable resolution

[385] UDALL FOUND., *supra* note 256.

The National Center's web site contains a number of summaries of cases in which it successfully assisted resolving complex multi-party disputes using ECCR.[386] Parties in these cases have included federal agencies, state agencies, environmental groups, and local residents. Issues have included environmental cleanup, endangered species protection, impact on residents from federal and state development projects, and land use issues arising from Tribal developments. The website contains multiple resources for persons who may be considering ECCR. For example, during 2021, the National Center hosted a free webinar entitled "Environmental Collaboration for Federal Agencies," providing an overview of ECCR processes and approaches for those who navigate multiparty environmental issues.[387] The site also contains a helpful glossary of ECCR and ADR terminology.[388]

As noted above, the CEQ/OMB Memo requires agencies engaged in ECCR to provide annual reports of their activities and associated cost savings and benefits. The National Center coordinates the submission of agency ECCR reports and prepares an overview and synthesis. The most recent set of reports[389] contains data from 12 agencies reporting a total of 451 active ECCR cases.[390] The DOI reported the highest number of ECCR cases, followed by FERC and EPA. These three agencies together accounted for all but 70 of the reported cases, which the Center stated may in part be explained by their well-established ECCR centers and programs, which provide critical infrastructure, funding mechanisms and personnel for ECCR initiatives.

Benefits cited from ECCR by reporting agencies include savings of time and money through reduction of staff workload, production of faster resolutions and avoidance of litigation. Reported benefits further included improved relationships among Federal agencies and between the agencies and a variety of stakeholders. Many agencies also cited better outcomes, facilitating creative and durable solutions to complex, longstanding environmental issues. These statements are illustrated by case summaries from a variety of agencies.

In 2018, the Federal Forum prepared a report, "Environmental Collaboration and Conflict Resolution: Enhancing Agency Efficiency and Making Government More Accountable to the People."[391] Based on more than a decade of experience and research, the report identified quantifiable benefits of federal government ECCR use, including cost reduction, improved relationships and better outcomes that avoided litigation. The report discussed the methodology used to capture the costs and benefits of ECCR, including the use of comprehensive survey tools. It also recommended steps that government leaders could take to improve and increase the use of

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[386] *Project Case Summaries*, UDALL FOUND., https://www.udall.gov/OurPrograms/Institute/ProjectCaseSummaries.aspx (last visited Aug. 23, 2021).

[387] A recording of the presentation and the slides are available at https://www.udall.gov/News/NewsAndEvents.aspx?Item=12170.

[388] *National Roster of ECR Professionals – Glossary*, Udall Found., https://www.udall.gov/OurPrograms/Institute/Glossary.aspx (last visited Aug. 23, 2021).

[389] UDALL FOUND., *supra* note 256.

[390] They are: Department of Energy, Department of the Interior, Department of Labor, Department of Transportation, Department of Veterans Affairs, Environmental Protection Agency, Federal Energy Regulatory Commission, National Oceanic and Atmospheric Administration, National Guard Bureau, U.S. Air Force, U.S. Army, and U.S. Army Corps of Engineers.

[391] *Environmental Collaboration and Conflict Resolution*, NAT'L ENV'T POL'Y ACT, https://ceq.doe.gov/nepa-practice/environmental-collaboration-and-conflict-resolution.html (last visited Aug. 23, 2021).

ECCR, including improving integration of the programs into agency operations and institutionalizing its funding.

Coalition of Federal Ombudsman

COFO is an interagency forum created to support the work of ombuds. Unlike the IADRWG, FMCS, and National Center, COFO is not established by Congress or other law, but it is a voluntary trade organization.[392] COFO was established in July 1996 by interested ombuds who wanted to support one another, grow the profession, and establish best practices.[393] In 2013, its members adopted a Charter, stating that the purpose of the organization is to be the "principal interagency forum that provides collaboration, advice, and guidance on professional Ombuds standards, skills development, program development, and effectiveness."[394] COFO's purposes include sharing ideas and experiences, working together to create standards applicable to ombuds practice, and generally increase the visibility of the work of ombuds.[395] Membership in COFO is afforded to any ombuds (or other ADR practitioner), but voting members are limited to ombuds who work for federal agencies.[396]

COFO has regular meetings, usually monthly, at various locations, including online meetings. COFO also holds an annual conference, which was presented in a virtual format in 2020.[397] COFO events provide education on ombuds practice, skill building for ombuds, as well as topics such as outreach and public education. The organization appears to prioritize ombuds offices learning from other ombuds offices, which is similar to the concept of reflective practice, described above. The COFO website archives past meeting minutes and conference agendas as a resource to ombuds and the public.[398]

The ACUS Ombuds Report noted that the federal ombuds community received a great deal of value from participation within the organization.[399] The authors noted that as they gathered information from federal ombuds, "COFO was mentioned repeatedly as an essential source of inspiration, innovation, best practices, tough-minded guidance, and reliable support, as well as a forum to which federal ombuds bring their professional concerns."[400]

2. Recommendations

The ADRA of 1996 and the 1998 Presidential Memorandum implementing it envisioned an interagency mechanism to encourage and facilitate the use of agency ADR programs. Indeed, the statute requires agencies, in developing their ADR policy, to consult with the committee or

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[392] *See* ACUS Ombuds Report, *supra* note 66, at 226.
[393] *Coalition History*, COAL. OF FED. OMBUDSMAN https://federalombuds.ed.gov/s/history (last visited Oct. 1, 2021).
[394] *Charter*, *supra* note 176.
[395] *Id*.
[396] *Id*.
[397] COFO Annual Conference Attendee Packet, available at https://drive.google.com/file/d/1y3U97Nr4D9eIB6FdMH7p6kpaneZFmhmY/view.
[398] *Prior Conferences and Meetings*, COAL. OF FED. OMBUDSMAN, https://federalombuds.ed.gov/s/prior-conferences-and-meeting-minutes (Sept. 25, 2018).
[399] *See* ACUS Ombuds Report, *supra* note 66, at 226.
[400] *Id.*

agency designated by the president for this role, and the 1998 Presidential Memorandum created the ADR Working Group to do so. Although it had some early successes, the ADR Working Group is no longer fulfilling that role. Our research supports the view that the federal government should not abandon this vision. There is value to agencies in having a centralized hub to pool knowledge and resources, help agencies create ADR programs where warranted, create consistency and transparency in measuring and reporting for those that have programs, and analyze data to make recommendations to improve the effectiveness of agency ADR programs. It is also a more efficient use of federal resources to share basic program building blocks rather than requiring each agency to reinvent the wheel. There are still many programs throughout federal agencies that do not use ADR whose constituents could benefit from it but may never do so without encouragement and assistance.[401]

The ECCR community has had success in these areas, and provides some important lessons learned for other federal agencies. Specifically, the EPCRA of 1998 and implementing executive memoranda together ensured that there was high level leadership, dedicated funding, expert staffing and clear guidance for the development of ECCR ADR programs. Congress created the National Center, authorizing appropriations as well as its ability to charge for its services. The CEQ/OMB Memoranda, most recently that of 2012, laid out policy guidance, a series of principles for agencies to follow, required the development of metrics to measure the benefits of ADR, periodic meetings convened by the head of CEQ and OMB, and required quarterly meetings of senior agency officials under the aegis of the National Center and annual reporting by agencies participating in ECCR.

Federal ADR at the general level does not have the "belt and suspenders" of ECCR, which explains why interagency support there has lagged. The ADRA of 1996 did not create, much less fund, a resource for agencies to draw on in developing ADR administrative dispute resolution programs. Rather, it directed the president to designate an agency or designate or establish an interagency committee to facilitate and encourage agency use of dispute resolution under its authority. President Clinton created an interagency ADR Working Group to consist of representatives of the heads of all participating agencies to accomplish the goals set forth in the statute, to be convened by the Attorney General. The presidential memorandum is quite short and does not set guiding principles or provide a structure of the Working Group's activities. Participation is a collateral duty for those involved. There is no funding for the Working Group and no real way for it to influence agencies whose staff are not already participating in its work.

Much can be done within the executive branch to strengthen the framework using ECCR as a model. The president could issue a new Memorandum designating an expert agency to advocate for and support ADR in administrative disputes. The obvious candidate would be the FMCS, since FMCS already has a role in supporting interagency ADR in the ADRA. To bring in executive leadership, a White House office, such as the OMB, could convene agency head meetings on an annual basis and require reports on the progress of ADR in each agency's administrative programs.

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[401] One official observed that a common understanding of dispute resolution principles, use of consistent terminology, and more education and training across the government is needed to realize the potential of ADR as an integral part of conflict management. Interview with Michael Wolf, Director of Collaboration and Alternative Dispute Resolution, Federal Labor Relations Authority (Sept. 3, 2021).

Another important lesson from the ECCR Community comes from its use of regular and consistent reporting for the collective assessment of the value of the ADR programs, giving agency officials access to broader data and the ability to evaluate different approaches. Although the 1998 Presidential Memorandum envisioned periodic reporting by the ADR Working Group on its activities, it did not dictate a timeframe and only three sets of reports issued in the ensuing twenty-eight years. In addition, the 1998 Presidential Memorandum did not provide any guidance for the content of the reports or authorize the development of any metrics. The ECCR agencies are subject to an annual reporting requirement, with established metrics, and the National Center collates their information to summarize the savings and benefits from the agencies' standpoints. This reporting has been a valuable feedback tool through which the ECCR agencies monitor and assess their results and was used by the senior officials constituting the Federal Forum to develop the 2018 recommendations noted above. As agency strategic planning is tied directly to the Federal budget process, having objective metrics that are consistently applied is critical to gaining support for ADR. Whatever form the Interagency ADR Working Group takes in the future, helping agencies develop and implement metrics to measure success should be a priority.

Finally, we have one recommendation for FMCS. FMCS has an impressive array of services and the strongest training program for neutrals we have seen in the federal government. Nonetheless, because of its mission as a labor relations agency, some agencies with very different statutory missions may not be as familiar with it and may have concerns about its understanding of their mission areas. Cross-agency details (FMCS employees going to other agencies and employees of the other agencies going to FMCS) could help build the necessary understanding across agency cultures. In addition, placing oversight of the Interagency ADR Working Group under FMCS would raise its profile and give it more insight into issues across the federal ADR community.

IV. Issues for Further Study

This study covers the major aspects of federal agency ADR, but much work remains to be done beyond the six research areas selected for this report. For one, this report does not address some of the major issues facing agency ADR programs at present as highlighted to the research team by several agency leaders including employee/participant wellness and diversity, equity, and inclusion.

Further, the COVID-19 pandemic has changed ADR programs and the federal workplace in yet unknown ways. Several agencies noted the challenges of in-person ADR that they had faced since the inception of their programs. While some agencies have regional and local offices, many work only in Washington, DC. This limitation has created difficulty where ADR program participants may be located elsewhere in the United States. The lack of geographic reach has discouraged if not prohibited some participants from taking part. Given the need to convert their programs to videoconference engagements, some agencies are now wrestling with decisions—legal and practical—about whether to maintain virtual ADR programs or to enhance their prior offerings with that option and what that might mean for the financial and human capital. In

nearly every interview and survey, interviewees and respondents highlighted the impact of the pandemic as potentially transformative to their agency's work and the life of the ADR program. Additional work to assist agencies in that exercise would be welcome from ACUS.

Apart from these important internal conversations within the ADR programs surveyed, there was a general question that came to light among interviewees and survey respondents concerning the purpose and future direction of their programs. While space does not permit a deep investigation of those issues, we recommend that ACUS and the interagency centers do more to facilitate conversation among agency programs that will allow them to share best practices and to compare notes on their purpose and strategies. It was not clear that all agencies had a clear vision for their programs, what those programs were intended to achieve, and what would enable success within them. For example, although many ADR staff have strong feelings about their programs, they are relatively siloed within their individual program or a smaller community of staff with similar roles. This study has not examined the possible inclusion of restorative practices in the federal ADR toolkit but such an examination may be useful to some agencies and may build on the research the Department of Justice has started in this area.

Finally, although this question was outside of our original scope of research, we highlight the need for diversity among neutrals. Given the sometimes long list of qualifications required or perceived to be required, neutrals in private sector arbitration tend to be disproportionally older, white males.[402] As recent national conversations have brought to the forefront, many ADR programs continue to suffer from a lack of neutrals from historically underrepresented groups.[403] While federal hiring and contracting principles generally recognize the need for diversity, agencies ought to consider diversity, equity, and inclusion in every aspect of their ADR programs.

V. Conclusion

This study has reviewed six topics concerning agency ADR programs across the federal government. It has made more than two dozen recommendations both for agencies with ADR programs and for those that may wish to explore the possibility of developing ADR programs in the future. In making these recommendations, we have been mindful of the many challenges agencies face in creating or enhancing existing ADR programs—from budgetary and hiring constraints to workload demands. By showcasing effective practices at individual agencies, and describing the interagency resources available for assistance, we hope this report makes it easier for agencies to do their work. There remains potential for ADR to enhance agency work throughout the federal government, subject to careful thought and design considerations such as those we have highlighted in this report.

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[402] *See* ABA Resolution 105 – Diversity in ADR, Summary and Action Steps, https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/leadership/aba-resolution-105-summary-and-action-steps.pdf ("The available data and materials outlined in the report show starkly that diversity in dispute resolution significantly lags the legal profession as a whole.").

[403] Jonathan Stempel, *Jay-Z Wins Fight for African-American Arbitrators in Trademark Case*, REUTERS (Jan. 30, 2019), https://www.reuters.com/article/us-people-jayz-lawsuit-idINKCN1PO32T.

Appendices

Table of Acronyms

AAA	**American Arbitration Association**
ABA	American Bar Association
ACUS	Administrative Conference of the United States
ADR	Alternative dispute resolution
ADRA	Administrative Dispute Resolution Act of 1990
ALJ	Administrative law judge
CEQ	Council on Environmental Quality
COFO	Coalition of Federal Ombudsman
DOI	Department of the Interior
DSD	Dispute system design
ECCR	Environmental Collaboration and Conflict Resolution
EEOC	Equal Employment Opportunity Commission
ENE	Early neutral evaluation
EPA	Environmental Protection Agency
EPCRA	Environmental Policy and Conflict Resolution Act of 1998
FCC	Federal Communications Commission
FERC	Federal Energy Regulatory Commission
FINRA	Financial Industry Regulatory Authority
FMCS	Federal Mediation and Conciliation Service
IDIQ	Indefinite Delivery Indefinite Quantity contract
IOA	International Ombudsman Association
ITC	International Trade Commission
JAMS	Judicial Arbitration and Mediation Service
NARA	National Archives and Records Administration
National Center	National Center for Environmental Conflict Resolution of the Udall Foundation
NLRB	National Labor Relations Board
NMB	National Mediation Board
NRC	Nuclear Regulatory Commission
OMB	Office of Management and Budget
OSC	Office of Special Counsel
PBGC	Pension Benefit Guaranty Corporation
UMA	Uniform Mediation Act
USACE	U.S. Army Corps of Engineers

Appendix A: Agency Websites with ADR Information

Agency	URL
Dept. of Agriculture	
Farm Services Agency Agricultural Mediation Program Fact Sheet	https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/certified-mediation-program-factssheet.pdf
Risk Management Agency Mediation Program	https://www.rma.usda.gov/en/About-RMA/Laws-and-Regulations/Mediation
Natural Resources Conservation Service Mediation Program	https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/alphabetical/?cid=nrcs143_008444
Rural Development Mediation Program	https://www.rd.usda.gov/files/RD-SFH-MediationNotes.pdf
Agricultural Research Service Animal Welfare Ombudsman	https://www.ars.usda.gov/docs/ombudsman/
Dept. of Commerce, Coastal Zone Management Act Mediation	https://coast.noaa.gov/data/czm/consistency/media/CZMA-mediations.pdf
Dept. of Defense	
Office of Inspector General Whistleblower Reprisal ADR Program	https://www.dodig.mil/Components/Administrative-Investigations/Alternative-Dispute-Resolution-ADR-Program-for-Whistleblower-Reprisal-Complaints/
U.S. Army Corps of Engineers Collaboration Center	https://www.iwr.usace.army.mil/About/Technical-Centers/CPCX-Collaboration-Public-Participation/
Dept. of Education Student Loan Ombudsman	https://studentaid.gov/feedback-ombudsman/disputes/prepare
EPA Conflict Prevention and Resolution Center (CPRC)	https://www.epa.gov/adr
Dept. of Health & Human Services, Departmental Appeals Board ADR Program	https://www.hhs.gov/about/agencies/dab/adr-services/mediation/index.html
Dept. of Homeland Security, Office of Citizenship and Immigration Services Ombudsman	https://www.dhs.gov/topic/cis-ombudsman

Dept. of Interior, Office of Collaborative Action and Dispute Resolution	https://www.doi.gov/pmb/cadr
Dept. of Justice	
Community Relations Service	https://www.justice.gov/crs/our-focus
Victims' Rights Ombudsman	https://www.justice.gov/usao-edar/office-crime-victims-rights-ombudsman
Dept. of Labor, Office of Federal Contract Compliance Programs Ombuds	https://www.dol.gov/agencies/ofccp/ombuds
Dept. of the Treasury	
IRS Appeals Mediation Program	https://www.irs.gov/appeals/appeals-mediation-programs
Office of the Comptroller of the Currency Ombudsman	https://www.occ.gov/about/who-we-are/organizations/office-of-enterprise-governance-and-the-ombudsman/index-office-of-enterprise-governance-and-the-ombudsman.html
Dept. of Transportation	https://www.transportation.gov/CADR/mediation-facilitation-and-consulting
Consumer Financial Protection Bureau Ombudsman	https://www.consumerfinance.gov/cfpb-ombudsman/
Equal Employment Opportunity Commission Mediation	https://www.eeoc.gov/questions-and-answers-about-mediation
Federal Communications Commission Mediation	https://www.fcc.gov/general/eb-market-disputes-resolution-division
Federal Deposit Insurance Corporation Office of the Ombudsman	https://www.fdic.gov/about/ombudsman/
Federal Election Commission Mediation	https://www.fec.gov/legal-resources/enforcement/alternative-dispute-resolution/
Federal Energy Regulatory Commission Dispute Resolution	https://ferc.gov/enforcement-legal/legal/alternative-dispute-resolution/dispute-resolution-service
Federal Labor Relations Authority Collaboration and ADR Office	https://www.flra.gov/components-offices/offices/collaboration-and-alternative-dispute-resolution-office-cadro
Federal Maritime Commission ADR Services	https://www.fmc.gov/databases-services/alternative-dispute-resolution-services/
Federal Mediation and Conciliation Service	https://www.fmcs.gov/services/resolving-labor-management-disputes/alternative-bargaining-processes/
International Trade Commission	https://www.usitc.gov/intellectual_property/mediation.htm

John S. McCain III National Center for Environmental Conflict Resolution, Udall Foundation	https://www.udall.gov/ourprograms/institute/institute.aspx
National Archives & Records Administration Office of Government Information Services	https://www.archives.gov/ogis/mediation-program
National Labor Relations Board	https://www.nlrb.gov/news-outreach/news-story/nlrb-launches-pilot-of-proactive-alternative-dispute-resolution-program
National Mediation Board	https://nmb.gov/NMB_Application/index.php/mission-organization/
Nuclear Regulatory Commission Enforcement Alternative Dispute Resolution	https://www.nrc.gov/about-nrc/regulatory/enforcement/adr.html
Office of the Special Counsel	https://osc.gov/Services/Pages/ADR.aspx
Pension Benefit Guaranty Corporation	https://www.pbgc.gov/prac/other-guidance/pbgc-mediation-program

Appendix B: Survey of Agency Officials

Beginning in December 2020, we reached out to 24 agencies to identify an ADR official willing to complete a Qualtrics survey that we designed on ADR in federal agencies. Most of the emails were addressed to the agency's official representative to ACUS; the remainder were addressed to other ADR or legal contacts that our team could locate. Of the 24 agencies, 12 were cabinet departments and the other 12 were independent agencies.

Fourteen agencies agreed to complete the survey and were provided a link to the survey. Twelve agencies completed the survey in whole or in part. We followed up with those agencies that did not complete the survey on multiple occasions, encouraging submission. Several agencies informed us that they could not complete it due to a lack of time or political personnel to approval their responses (the survey was deployed during a presidential transition), even though respondents were promised that answers would not be tied to their particular agencies.

A PDF version of the online survey instrument is attached to the end of this report.

Appendix C: Interviews with Agency Officials

In the survey sent to agency officials, we asked respondents if they might be willing to speak with us by telephone or via Zoom. We also reached out to agency officials directly about the prospect of conducting an interview, particularly when it was not possible for the official to complete the survey. We also invited officials to meet with us when we presented the project to different organized groups of ADR professionals.

We then reached out to most of the willing respondents and asked to schedule an interview. We conducted sixteen interviews, each of which ranged from 30 to 90 minutes, between January and August 2021. The interviewees came from a range of agencies: six were officials in cabinet departments; the remaining nine came from independent agencies. All of the interviewees were engaged in some form of ADR at their respective agencies (the additional interview was with a retired state court judge). We promised that we would not identify the interviewees or their agencies unless they gave us permission to do so.

These interviews focused on the use of ADR and the research areas highlighted above. We asked all interviewees about best practices from their agencies as well as about criticisms or concerns they had.

Appendix D: Overview of Types of ADR

Process	Uses Neutral?	Role of Neutral?	Who Decides Outcome?	Ideal for Multi-Party Disputes?	Ideal for One Participant?
Negotiation	No	N/A	Parties	No	No
Facilitation	Yes	Lead Conversation	Parties	Yes	No
Mediation	Yes	Lead Conversation to Reach Agreement	Parties	No	No
Conciliation	Yes	Lead Conversation and Makes Recommendations	Parties	No	No
Fact-Finding	Yes	Listens to Arguments and Determines Findings of Fact/Conclusions of Law	Parties, with Non-Binding Recommendation	No	No
Minitrials	Yes	Listens to Arguments, but No Recommendations	Parties	No	No
Arbitration	Yes	Runs Hearing and Issues Award	Arbitrator	Yes	No
Ombuds	Yes	Services, including Coaching, Providing Information, Conflict Resolution	Parties	Yes	Yes
Coaching	Yes	One-on-One Discussions to Create Plan	Parties	No	Yes
Restorative Justice	Yes	Different Processes to Take Accountability, Repair Harm, and Restore Relationships	Depends on Process	Not Usually	No

Which of the following, if any, forms of dispute resolution does the agency use to resolve disputes relating to the agency core statutory mission? Please do not include dispute resolution for negotiated rulemaking, federal cases, customer service complaints, Freedom of Information Act disputes, agency personnel disputes, or procurement disputes.

- ☐ Mediation
- ☐ Conciliation
- ☐ Facilitation
- ☐ Factfinding
- ☐ Minitrials
- ☐ Arbitration
- ☐ Ombuds Services
- ☐ Other
- ☐ None of the Above

Please describe who within the agency chooses whether a given case will occur through an alternative dispute resolution (ADR) process and the type of ADR process to be used if the agency has access to multiple ADR processes.

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_____

_____

_____

_____

For agencies with mediation programs, what type of mediation do you use (please check all applicable boxes)?

- ☐ Facilitative
- ☐ Evaluative
- ☐ Transformational
- ☐ Choice is left to the mediator

What agency authority governs the ADR process(es)? Please provide any relevant citation(s).

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_____

Does the agency evaluate the success of each individual ADR case? If so, please describe how you assess whether a case is successful.

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_____

Does the agency solicit feedback from the participants in the ADR process?

- ○ Yes
- ○ No

If the agency solicits feedback, please upload a copy of the agency feedback form, if any. If you prefer to provide a link to the requested documents, please skip to the next question.

If your agency has a link to the feedback document, feel free to post it here.

_____

If the agency solicits feedback on its ADR processes, please describe (a) how frequently that feedback is reviewed internally, if at all, and (b) how the agency works with that feedback to make changes in its ADR operations.

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Does your agency produce an annual report on its ADR program? If so, please indicate whether it is publicly available and provide a link to any internet copy. If not, please indicate whether the agency is willing to share the most recent annual report with us on a confidential basis.

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Overall, how satisfied are you with your ADR program?

- ○ Very satisfied
- ○ Satisfied
- ○ Neither satisfied nor dissatisfied
- ○ Dissatisfied
- ○ Very dissatisfied

Page Break

End of Block: Research Area 1. The selection and implementation of the appropriate type of ADR

Start of Block: Research Area 2. The qualifications and selection of personnel to conduct and ma

Please indicate the employment status of ADR personnel within the agency.

- ○ Agency Employees
- ○ Federal Employees from Another Agency
- ○ Contract Personnel
- ○ Hybrid

End of Block: Research Area 2. The qualifications and selection of personnel to conduct and ma

---

If you answered "Agency Employees" above:

In what unit or department of the agency is the ADR function located and what official (i.e., what is his/her/their title) or officials is/are responsible for it?

_____

_____

_____

_____

_____

How many agency employees (full- and part-time) are engaged in administering the ADR process?

_____

What qualifications, if any, are required for employees to serve as ADR specialists?

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_____

_____

_____

What training, if any, does the agency provide for its ADR specialists?

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What metrics, if any, does the agency use to monitor the quality of its ADR services?

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If you answered "Federal Employees from Another Agency" above:

Do you have an interagency agreement? If so, please provide a link or indicate whether you are able to provide it.

_____

How are responsibilities allocated between the agencies?

Where within the contracting agency is oversight maintained in the contracting agency and what resources (i.e., financial resources and FTEs) are dedicated to it?

How is quality control of the program maintained?

If you answered "Contract Personnel" above:

What form of contract do you use (e.g., IDIQ)?

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If you're willing to share your contract, please upload it here.

How are responsibilities allocated for selection/training/oversight of personnel?

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_____

What resources are devoted to contract oversight (e.g., full or part-time contracting officer's representative program officials)?

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How is quality control of the program maintained?

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_____

If you answered "Hybrid" above:

Does your hybrid model involve:

- ☐ Agency personnel?
- ☐ Other federal agency employees?
- ☐ Contractors?

Please describe what factors led to that mix.

_____

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_____

Start of Block: Research Area 2 SPLIT II

How satisfied are you with the quality of the personnel staffing your ADR program?

- ○ Very satisfied
- ○ Satisfied
- ○ Neither satisfied nor dissatisfied
- ○ Dissatisfied
- ○ Very dissatisfied

How satisfied are you with the availabile resources for your ADR program?

- ○ Very satisfied
- ○ Satisfied
- ○ Neither satisfied nor dissatisfied
- ○ Dissatisfied
- ○ Very dissatisfied

Start of Block: Research Area 3. The ethics and confidentiality requirements of ADR personnel.

Does your agency have ethics standards or standards of practice governing its ADR processes? If so, please indicate whether those standards are publicly available (include a link to any web information or otherwise indicate whether you can provide them separately).

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If there are no ethics standards or standards of practice governing the agency's ADR processes, does the agency have other guiding principles regarding ethics?

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Does the agency have standards of ethics or practice relating to the following topics (please select all that apply)?

- ☐ Impartiality
- ☐ Conflicts of Interest?
- ☐ Required Disclosures by Neutral?
- ☐ Neutral Competency?
- ☐ Compensation?

Does the agency provide a mechanism for neutrals to obtain guidance on ethical issues that arise during a case? If so, please describe that mechanism.

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Does the agency maintain an ongoing disclosure of certification process to prevent conflicts of interest that may arise? If so, please describe that process.

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_____

How satisfied are you with the agency standards of ethics or standards of practice as applied in its ADR processes?

- ○ Very satisfied
- ○ Satisfied
- ○ Neither satisfied nor dissatisfied
- ○ Dissatisfied
- ○ Very dissatisfied

Are the agency's ADR processes confidential? If yes, how does the confidentiality obligation arise (by statute, by regulation, and/or by contract, e.g.)?

_____

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_____

Does the agency require confidentiality agreements with the participants in the ADR process? If so, please provide a copy of the standard confidentiality agreement. If you prefer to provide a link to the document, please skip to the next question.

Please provide a link to your confidentiality agreement.

_____

Does your agency have a grievance procedure regarding its ADR process? If so, please describe the process or provide a link to additional information. If you prefer to upload a document, skip to the next question.

_____

Please upload any files regarding a grievance procedure here.

Page Break

End of Block: Research Area 3. The ethics and confidentiality requirements of ADR personnel.

Start of Block: Research Area 4. Interagency mechanisms to facilitate ADR and provide support an

What kind of training, if any, is in place for ADR personnel? Please comment regarding both initial training and continuing training.

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Which ADR participants receive training (e.g., neutrals, case management staff, others)?

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_____

_____

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How often is training conducted for returning neutrals?

- ○ Yearly
- ○ Twice yearly
- ○ More than twice yearly
- ○ Less than twice yearly
- ○ As needed

Who conducts the training? (check all that apply)

- ☐ Internal trainers
- ☐ Private trainers (if so, please name the firm/organization and approximate cost, if any, of training) _____
- ☐ Other government actors

Please describe the content of the training in general terms and its typical duration. If you prefer to upload a document, please skip to the next question.

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_____

_____

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_____

Please upload any documents regarding training here.

How is training conducted?

- ○ In Person
- ○ Online
- ○ Hybrid

Does the agency conduct evaluations of the training it provides? If so, please share any summary evaluations that may be available.

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_____

Has the agency considered changing or adding training in response to issues raised in the ADR process? If so, please describe.

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Page Break

End of Block: Research Area 4. Interagency mechanisms to facilitate ADR and provide support an

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Start of Block: Research Area 5. ADR case management practices.

Who are the actors (titles) involved in administering and managing the ADR process at the operational level in your agency?

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Who are the actors (titles) involved in administering and managing the ADR process at the decision-making or leadership level in your agency?

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_____

What is your procedure for case intake. If you prefer to upload a document, skip to the next question.

_____

Please upload any files you would like to share regarding the intake process.

What are the typical steps in case management after intake?

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Is a case manager assigned? If so, is that a standing role or is that a role played by an individual who plays another role apart from ADR case management?

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How are case records kept and how long are they kept? (Electronic, paper, on a separate network or limited access area, e.g.? Using what platforms, databases or document trackers?)

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Are these tools regularly evaluated or renewed through licenses?

_____

Who within the agency has access to case records?

What happens to case records at the conclusion of the case?

How satisfied are you as to the system the agency uses for case management?

- ○ Very satisfied
- ○ Satisfied
- ○ Neither satisfied nor dissatisfied
- ○ Unsatisfied
- ○ Very unsatisfied

How effective and efficient do you feel the present agency practices are for smooth operation of cases?

- ○ Very effective
- ○ Effective
- ○ Neither effective nor ineffective
- ○ Ineffective
- ○ Very ineffective

Are there any weaknesses in your agency case management practices that you or others have identified and seek or have sought to remedy? Please describe in detail.

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If additional financial support were available, are there improvements or changes you would like to see made to the agency's practices? Please describe in detail.

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Page Break

End of Block: Research Area 5. ADR case management practices.

Start of Block: Research Area 6. Interagency mechanisms to facilitate ADR and provide support an

In what areas do you provide support relating to ADR functions to other agencies? (check all that apply)

- ☐ ADR services, such as neutrals
- ☐ Advice/guidance on ADR programs and/or standards
- ☐ Training of program officials and/or neutrals
- ☐ Provision of sample documents
- ☐ Ongoing sharing of best practices

Are there model forms, handbooks and/or training materials that you share with other agencies on request? Please share some samples here. If you would prefer to upload a link, please skip to the next question.

If you would like to provide a link to the training materials, please provide it here.

_____

Where is the inter-agency support function located (i.e., a department/other federal employees/contractors) and what resources does it have?

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Do you have interagency agreements to support other agencies' ADR functions? Please provide a sample copy here.

What sources do you draw upon for models in advising other agencies on ADR matters (e.g., American Bar Association models or guidelines)?

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How do other agencies learn about the support you provide in the area of ADR?

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How could ACUS better promote the support your organization can give to other agencies?

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Which agency practices, if any, pertaining to ADR would you recommend to other agencies and why do you think they are desirable?

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Page Break

Is there anything else you would like to share?

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Who else should we contact, whether or not at your agency, to learn more about ADR within your agency? If you can, please provide email address(es) or telephone number(s). Can we use your name in contacting any of these people?

_____

_____

_____

_____

_____

Your name:

_____

Your contact information (phone and email):

_____

Would you be willing to talk in more detail, either on or off the record?

- ○ Yes
- ○ Maybe
- ○ No

Are you willing to have your responses tied to your agency in the report? The default is that your responses will not be connected to your agency, but we will use the information in the aggregate.

- ○ Yes
- ○ Maybe
- ○ No

Thank you for your help with this important survey!