1993-06

Alternative dispute resolution: a viable method for settling government contract disputes

Eaton, David S.

Monterey, California. Naval Postgraduate School

(2)

NAVAL POSTGRADUATE SCHOOL
Monterey, California

THESIS

ALTERNATIVE DISPUTE RESOLUTION:
A VIABLE METHOD FOR
SETTLING GOVERNMENT CONTRACT DISPUTES

by

David S. Eaton

June 1993

Thesis Advisor: David R. Henderson

Approved for public release; distribution is unlimited.

REPORT DOCUMENTATION PAGE

1a Report Security Classification: Unclassified		1b Restrictive Markings	
2a Security Classification Authority		3 Distribution/Availability of Report	
2b Declassification/Downgrading Schedule		Approved for public release; distribution is unlimited.	
4 Performing Organization Report Number(s)		5 Monitoring Organization Report Number(s)	
6a Name of Performing Organization Naval Postgraduate School	6b Office Symbol *(if applicable)* 36	7a Name of Monitoring Organization Naval Postgraduate School	
6c Address *(city, state, and ZIP code)* Monterey CA 93943-5000		7b Address *(city, state, and ZIP code)* Monterey CA 93943-5000	
8a Name of Funding/Sponsoring Organization	6b Office Symbol *(if applicable)*	9 Procurement Instrument Identification Number	
Address *(city, state, and ZIP code)*		10 Source of Funding Numbers	
		Program Element No / Project No / Task No / Work Unit Accession No	

11 Title *(include security classification)* ALTERNATIVE DISPUTE RESOLUTION: A VIABLE METHOD FOR SETTLING GOVERNMENT CONTRACT DISPUTES.

12 Personal Author(s) David S. Eaton

13a Type of Report	13b Time Covered	14 Date of Report *(year, month, day)*	15 Page Count
Master's Thesis	From To	1993 June	120

16 Supplementary Notation The views expressed in this thesis are those of the author and do not reflect the official policy or position of the Department of Defense or the U.S. Government.

17 Cosati Codes			18 Subject Terms *(continue on reverse if necessary and identify by block number)*
Field	Group	Subgroup	Alternative Dispute Resolution, ADR, Arbitration, Mediation, Mini-trials, Contract Disputes

19 Abstract *(continue on reverse if necessary and identify by block number)*

While arbitration and mediation have gained almost universal acceptance for settling commercial contract disputes, resolution of contract disputes in the Federal Government has continued to be slow, time consuming, and expensive. The participants in these processes have turned toward a new approach that offers an expedient, inexpensive, and less adversarial method for settling these disputes known as Alternative Dispute Resolution (ADR).

This thesis provides information on various methods of ADR, detailing advantages, disadvantages, and characteristics for case suitability. The research found, through the interviews conducted and the literature reviewed, that there are general misconceptions and impediments to the implementation of ADR. There was a general lack of knowledge of the different methods of ADR available. Many of the personnel interviewed did not know of their full authority to use ADR as provided by the Administrative Dispute Resolution Act. One major obstacle that was found in evaluating ADR is that there is an absence of reliable data to support the claims of ADR. Personnel interviewed in the Federal Government indicated that there is a lack of incentives for the Government to use ADR. One reason for this was due to the use of the "continued performance" clause. What the interviews and literature do point to is that ADR methods may not save the participants as much money as was originally believed, but that the cases are generally processed more quickly and that the parties are more satisfied with the process and outcomes. However, a final determination as to whether ADR is a viable method for settling contract disputes in the Federal Government cannot be made until more empirical data have been established.

20 Distribution/Availability of Abstract	21 Abstract Security Classification	
XX unclassified/unlimited __ same as report __ DTIC users	Unclassified	
22a Name of Responsible Individual David R. Henderson	22b Telephone *(include Area Code)* (408) 656-2524	22c Office Symbol AS/Ht

DD FORM 1473,84 MAR 83 APR edition may be used until exhausted
All other editions are obsolete

Approved for public release; distribution is unlimited.

Alternative Dispute Resolution:
A Viable Method for
Settling Government Contract Disputes

by

David S. Eaton
Captain, United States Marine Corps
B.A., Colorado State University, 1983

Submitted in partial fulfillment
of the requirements for the degree of

MASTER OF SCIENCE IN MANAGEMENT

from the

NAVAL POSTGRADUATE SCHOOL
JUNE 1993

Author: [redacted]

David S. Eaton

Approved by: [redacted]

David R. Henderson, Principal Advisor

[redacted]

Nancy C. Roberts, Associate Advisor

[redacted]

David R. Whipple, Chairman
Department of Administrative Sciences

ABSTRACT

While arbitration and mediation have gained almost universal acceptance for settling commercial contract disputes, resolution of contract disputes in the Federal Government has continued to be slow, time consuming, and expensive. The participants in these processes have turned toward a new approach that offers an expedient, inexpensive, and less adversarial method for settling these disputes known as Alternative Dispute Resolution (ADR).

This thesis provides information on various methods of ADR, detailing advantages, disadvantages, and characteristics for case suitability. The research found, through the interviews conducted and the literature reviewed, that there are general misconceptions and impediments to the implementation of ADR. There was a general lack of knowledge of the different methods of ADR available. Many of the personnel interviewed did not know of their full authority to use ADR as provided by the Administrative Dispute Resolution Act. One major obstacle that was found in evaluating ADR is that there is an absence of reliable data to support the claims of ADR. Personnel interviewed in the Federal Government indicated that there is a lack of incentives for the Government to use ADR. One reason for this was due to the use of the "continued performance" clause. What the interviews and literature do point to is that ADR methods may not save the participants as much money as was originally believed, but that the cases are generally processed more quickly and that the parties are more satisfied with the process and outcomes. However, a final determination as to whether ADR is a viable method for settling contract disputes in the Federal Government cannot be made until more empirical data have been established.

TABLE OF CONTENTS

LIST OF FIGURES

LIST OF TABLES

I. INTRODUCTION

A. BACKGROUND

Rule 1 of the Federal Rules of Civil Procedure concludes with, "[These rules of civil procedure] shall be construed to secure the just, speedy, and inexpensive determination of every action." Yet, no one today would seriously believe that America's civil justice system is speedy or inexpensive. Delay and high costs, often attributed to congested dockets and excessive discovery, are considered to be major problems in America's courts.[Ref. 1] Participants in these processes, frustrated by the slow pace and high transaction costs that accompany the current system of regulation and litigation, have sometimes turned toward a new approach to address the problem: Alternative Dispute Resolution (ADR).[Ref. 2]

During the past 65 years, while arbitration and mediation have gained almost universal acceptance for settling commercial contract disputes, Federal Government contract disputes have continued to bear the burden of slow dispute resolution.[Ref. 3] The need for inexpensive, expedient, and effective techniques to resolve disputes in Federal Government contracts is a pressing concern that must be addressed.[Ref. 4]

Contracts, even those written with meticulous detail, may produce disputes between the contracting parties. Despite the best wishes and efforts of the parties, disputes can and do occur for many reasons, some of which are outside their control. Because disputes are going to occur, the question then arises as to what is the "best" method for resolving the dispute in an amicable and expeditious manner?[Ref. 5] Within the United States Government, contract disputes are currently handled through the methods and procedures established by the Contract Disputes Act of 1978.[Ref. 6] But are these the "best" procedures available for the settlement of these disputes? This thesis explores another potential route available for resolving contract disputes known as alternative dispute resolution.

B. OBJECTIVES

This thesis has the following objectives:

1. To provide information on the various types and methods of alternative dispute resolution, detailing the advantages, disadvantages, and characteristics for case suitability.

2. To provide a historical synopsis of the legislation and statutes leading up to and authorizing alternative dispute resolution methods.

3. To assess current published reports and research of empirical data as to the effectiveness of alternative dispute resolution methods.

C. RESEARCH QUESTIONS

1. PRIMARY RESEARCH QUESTION

Are alternative dispute resolution methods a viable technique for settling Federal Government contract disputes?

2. SUBSIDIARY RESEARCH QUESTIONS

a. What methods of alternative dispute resolution are currently authorized for settling Federal Government contract disputes?

b. What are the objectives of alternative dispute resolution and to what extent are these objectives being met?

c. What are the impediments or barriers to successfully implementing alternative dispute resolution?

d. What are the advantages and disadvantages from utilizing alternative dispute resolution in the settlement of Federal Government contract disputes?

D. SCOPE

The scope of the thesis is to provide information, analysis, and references for Federal Government agencies that will help assess the viability and practicality of using alternative dispute resolution as an efficient and effective means of settling Federal Government contract disputes. It is not the intent of the researcher to generate new empirical data or to develop a specific model to test the data. The researcher will assimilate and correlate the multitude of articles and data available and highlight the important factors found.

E. LIMITATIONS

This study is limited by the main factor that there is little or no empirical data currently available as to the cost and economic benefits possibly derived from the use of alternative dispute resolution. There are ongoing research projects into this area, but no verifiable conclusive data has been generated to date. What little data are available has been generated from the study of one or two of the well-known alternative dispute resolution methods, mainly arbitration and mediation. Therefore, the recommendations and conclusions drawn from this thesis are based more on the theoretical basis than from a verifiable empirical data basis.

F. ASSUMPTIONS

This thesis was written with the assumptions that:

1. The reader has a need for information on alternative dispute resolution methods, its advantages, disadvantages, and characteristics for case suitability.

2. That the reader is in a position to use alternative dispute resolution as a settlement means.

3. That the reader has further legal assistance available.

G. METHODOLOGY

The methodology for this thesis entailed a comprehensive literature review and phone interviews with organizations that are currently using alternative dispute resolution or that are leading advocates.

A comprehensive literature search and review was conducted in which over 150 articles, books, reports, theses, and hearings were reviewed by the researcher. The majority of the literature was provided by academia, professional organizations (American Bar Association, American Arbitration Association, National Contract Management Association), Government agencies (Department of Justice, Administrative Conference of the United States), and from practitioners of the different methods. The literature was gathered from journals and periodicals including economics, legal, judicial, law review, business, management, conflict resolution, and policy manuals. Although the search was by no means exhaustive of the articles that have been published on alternative dispute resolution, the data reviewed provided an adequate sampling and cross-section of what was available. The bibliography contains a listing of the materials reviewed by the researcher. Appendix A provides a listing of other literary materials that were not reviewed.

Telephone interviews were conducted with 35 personnel from various organizations, private and public. Personnel from the Federal Government were selected from a listing of Dispute Resolution Specialists that was provided by the Administrative Conference of the United States. Other personnel or organizations were selected from the literature reviewed. All personnel interviewed were very helpful and were a rich source of information for ongoing research projects, suggesting other

points of contact, providing source material and pamphlets, and clarifying ideas and perceptions. The following is a listing of some of the organizations that were interviewed:

1. American Arbitration Association
2. National Mediation Board
3. Defense Systems Management Command
4. University of San Francisco, Law School
5. Department of Justice, Civil Division
6. Administrative Conference of the United States
7. U.S. Army Corps of Engineers, Litigation Division
8. State Justice Institute
9. General Accounting Office
10. Administrative Office of the United States Courts
11. Federal Judicial Center
12. Institute for Social Analysis
13. RAND Corporation, Institute for Civil Justice
14. United States Air Force, Litigation Division
15. United States Navy, Litigation Division

The following is a list of general questions that were asked during the interview.

1. Does your organization use alternative dispute resolution methods for settling Federal Government contract disputes?
2. If yes, what methods have been used? To what extent have they been successful or unsuccessful?
3. What goals is your ADR program pursuing?
4. Do you keep or have any data or statistics on the use of ADR within your organization?

5. What obstacles or impediments do you see affecting the implementation and use of ADR programs?

6. What areas or concerns need to be addressed or emphasized in order to get ADR programs established?

H. ORGANIZATION OF THESIS

This thesis is organized around five chapters. Chapter I provides a brief introduction and outlines the objectives and research questions of the thesis. It establishes the framework and ground rules for the thesis in the scope, limitations, assumptions and methodology.

Chapter II introduces the reader to the concept of alternative dispute resolution (ADR), provides a definition of ADR, and states the objectives, advantages, and disadvantages generally associated with ADR. Chapter II closes with a look at contract disputes legislation to include the Contract Disputes Act of 1978 and the Administrative Dispute Resolution Act.

Chapter III discusses the three "primary" dispute resolution methods, (arbitration, mediation, and negotiation), and four "hybrid" methods (private judging, neutral expert fact-finding, mini-trial, and summary jury trial). The advantages, disadvantages, and case suitability are discussed for each method.

Chapter IV involves an analysis of the research that has been done on the ADR methods. In the analysis, impediments to implementing ADR programs are identified and discussed, along

with certain "misconceptions" surrounding ADR. The chapter then is broken into sections assessing the current research and outcomes published for the ADR methods.

Chapter V is a summary of the thesis and answers the primary and subsidiary research questions that were asked in Chapter I. Specific recommendations are offered by the researcher for improvements in the overall ADR program. Two areas for further research are then identified and discussed. The thesis and the chapter are wrapped up in a final conclusion.

II. BACKGROUND ON ALTERNATIVE DISPUTE RESOLUTION

A. INTRODUCTION

The search for alternatives to traditional litigation is not new. Alternative dispute resolution methods have been widely used for centuries. In Thucydides' history of the Peloponnesian War, written in the fifth century B.C., arbitration is repeatedly mentioned as the mechanism for resolving disputes between city-states.[Ref. 7] As stated by J. Auerbach in Justice Without Law?, that as early as 1250 A.D. litigants were required to take a "love day" prior to bringing suit in order to establish "concord."[Ref. 8]

Alternatives to litigation have been sought throughout American history. Arbitration goes back to 1705 in Pennsylvania as enacted in Act 1705, ch. 150, 1 Pa. Laws (Sm.I.) 49.[Ref. 9] Arbitration clauses can also be found in construction contracts as early as 1871.[Ref. 10]

There has been an explosive growth in the use of alternative dispute resolution techniques in recent years.[Ref. 11] For example, as shown in Figure 1, the American Arbitration Association, a prominent leader in the use of ADR methods, has seen a 161 percent increase in

case filings from 1982 to 1991. Yet, despite the long history of these dispute resolution techniques, there have been few empirical studies and there has been little effort to compare empirically these methods to traditional litigation.[Ref. 12]

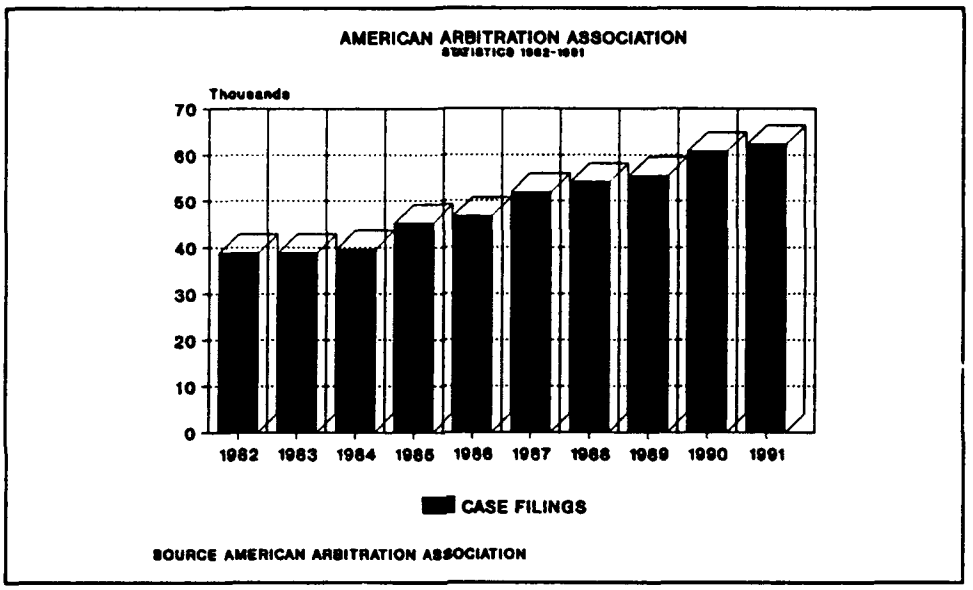

Figure 1 AAA Case Filings 1982-1991

B. DEFINED

What is alternative dispute resolution? The literature researched revealed a number of definitions. The Administrative Dispute Resolution Act defines alternative dispute resolution simply as "any procedure that is used in lieu of adjudication."[Ref. 13] Page and Lees notes that "it encompasses several procedures which have evolved

over time (including arbitration and mediation) as well as those new procedures which may be devised by the parties to meet their specific needs."[Ref. 14] Another defines alternative dispute resolution as "a mechanism in which the parties have voluntarily decided to engage, as an alternative to formal litigation, in a variety of expeditious dispute resolution techniques."[Ref. 15]

As can be derived from the above definitions, alternative dispute resolution can be viewed as any voluntary method taken by the parties to resolve the dispute in an expeditious and amicable manner without resorting to traditional litigation. It is important to remember, though, that it is not the sole purpose of ADR to achieve faster and cheaper resolution of disputes. The purpose of ADR is to achieve "better" resolutions of disputes, or at least to generate a wider range of possible solutions (not just decisions) for any given problem.[Ref. 16] It is also important to state up front that ADR is not a replacement for the courts and traditional litigation, but is a tool to be used to supplement and to help the system work more effectively and efficiently.[Ref. 17]

C. PROBLEMS WITH TRADITIONAL LITIGATION

The number of Federal Government contract disputes has grown and grown. Because ADR techniques are designed to alleviate the problems associated with traditional litigation,

it is important to address those problems in order to gauge the effectiveness of any particular ADR technique. It is also important to determine why there have been so many disputes. The following are factors that have been identified as being major problems and sources of dissatisfaction with traditional litigation.

1. Congestion, Costs, and Delay;
2. Inferior solutions provided by litigation;
3. Unpredictability of litigation;
4. Lack of confidentiality; and
5. Deterioration in business relationships [Ref. 18]

There are many reasons why the number of disputes has risen over the years. All of the following are possible reasons and have an impact on the use of ADR.

1. Historical reasons- The growing impact of Federal Government contracting, the increased complexity of contracts, new auditing and other regulatory requirements;
2. More contractors have developed a dependence on the Federal Government for their existence. In this day of shrinking resources and declining budgets, contractors are fighting to the end to ensure their existence;
3. There has been an increased willingness to resort to litigation among contractors, and an expanding Federal Government contracts bar;
4. There has been increasing public division or controversy over the wisdom of some kinds of expenditures;
5. The increased scrutiny by many congressional sources may discourage contracting officers or their superiors from risking close calls, taking on politically sensitive cases, or handling "hot potatoes;"

6. The establishment or expansion of intra-agency audit offices and inspectors general, and statutes or rules enhancing their authority.[Ref. 19]

All of these factors have produced an atmosphere and culture of litigation. These factors must be taken into consideration when formulating or planning for the use of an alternative means to litigation.

Agencies Boards of Contract Appeals, which were originally established to provide relatively quick and uncomplicated alternatives to congested courts, are now hindered with formalized procedures and a vastly increasing caseload. Statistics from the Armed Services Board of Contract Appeals, the largest of the boards, shows in Figure 2 that there has been steady growth in the number of new appeals filed. Figure 3 shows that the average number of days that an appeal is on the docket, filed until decision rendered, has remained at about 425-450 days. Figure 4 shows that the total number of appeals pending before the Armed Services Board of Contract Appeals has more than doubled in the last thirty years.[Ref. 20] With an increasing caseload and an already excessive amount of time on the docket, it makes sense to find a more expeditious method. After all, the Armed Services Board of Contract Appeals is only a small step in the long tedious trek through litigation, appeals and the courts.

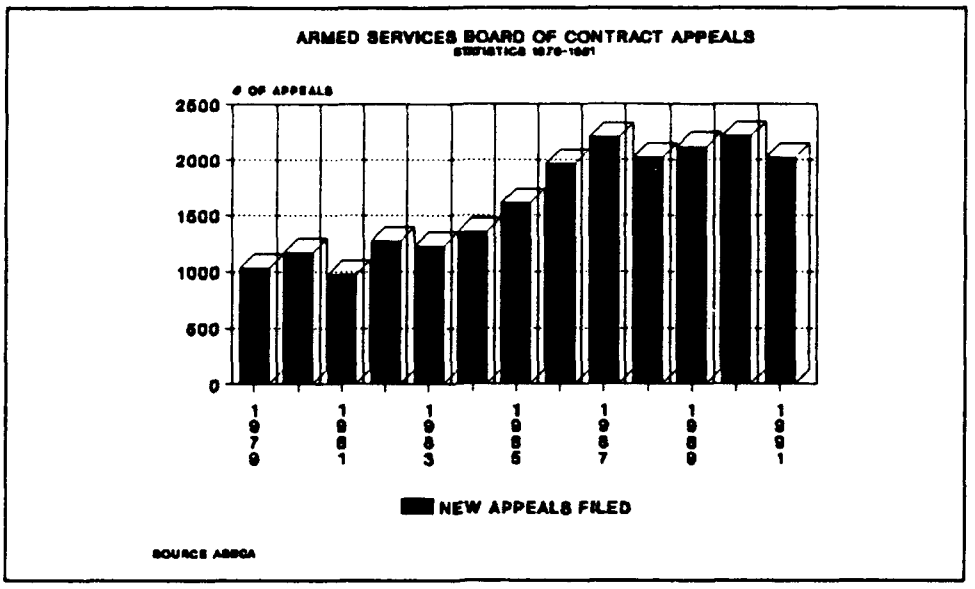

Figure 2 ASBCA New Appeals Filed 1979-1991

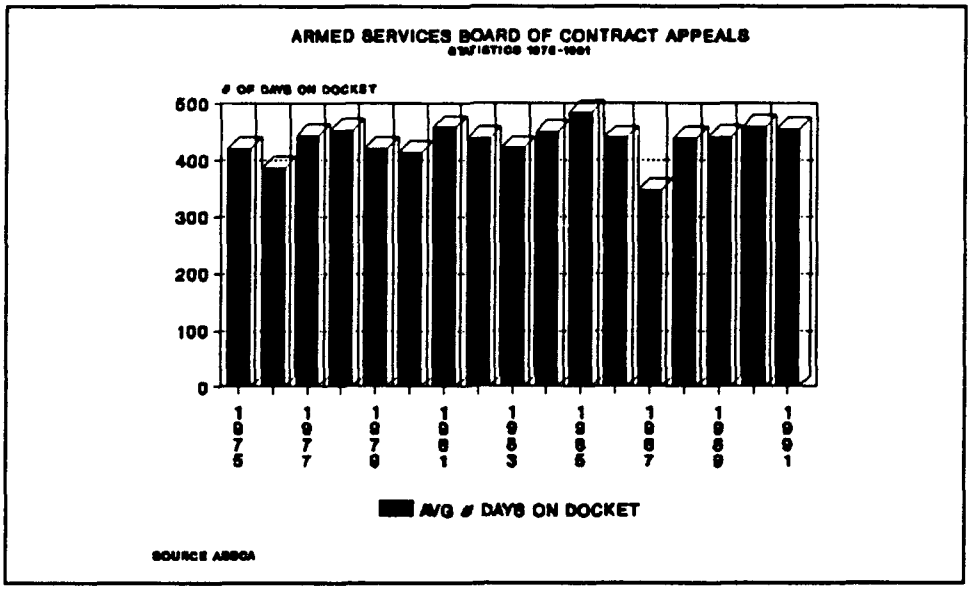

Figure 3 ASBCA Avg # of Days on Docket 1979-1991

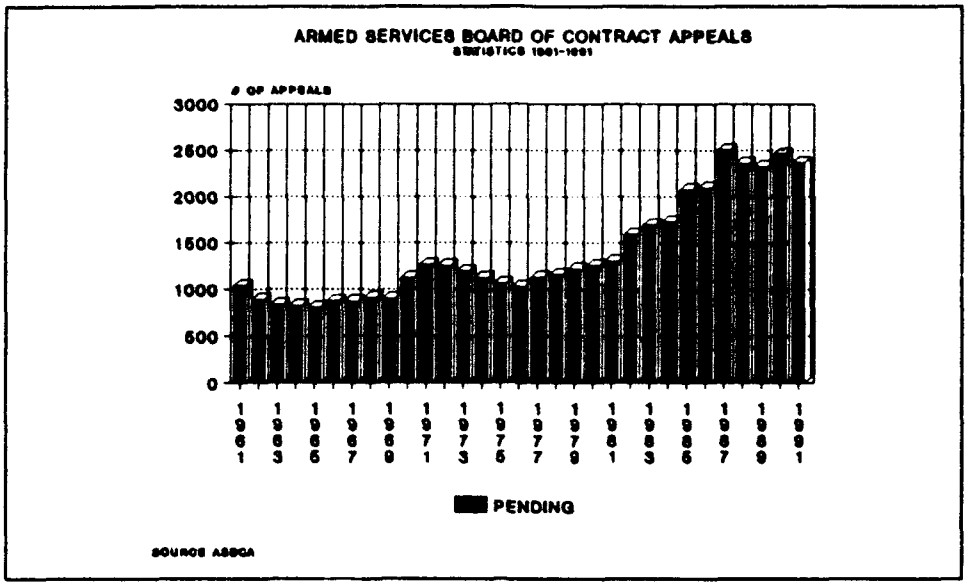

Figure 4 ASBCA Appeals Pending 1961-1991

D. OBJECTIVES

Now that the definition of alternative dispute resolution has been identified, the next question is what are its objectives? One of the main objectives of alternative dispute resolution, as stated by Green and Jordan-Walker, is to avert litigation and facilitate the settlement of disputes. If a suit is more than likely to be settled eventually, why not settle it early, before the huge costs of discovery and the major expenses of litigation are incurred, before tempers flare out of control, before positions harden to the detriment of all, before a company's business opportunities are squandered, before executives must spend frantic working hours closeted with a lawyer and a stenographer answering questions at a deposition.[Ref. 21] A second objective is that

of minimizing or reducing the costs associated with the resolution of the dispute for all parties involved. Another objective is that of ensuring that the settlement is fair and reasonable. A fourth and important objective of alternative dispute resolution is that of preserving the ongoing business relationship between the two parties. It is important to keep the parties focused on the key issues of the dispute at hand and to encourage them not to lose sight of their long-range mutual interests and economic benefits. In summary, the objective of alternative dispute resolution is the avoidance of a formal, protracted, costly litigious relationship which may adversely impact the performance under existing or future contracts.[Ref. 22] As President Abraham Lincoln once stated:

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser in fees, expenses, and waste of time.[Ref. 23]

E. ADVANTAGES

Why should the Federal Government or the contractor use alternative dispute resolution methods for solving their disputes? The reason is that it makes good business sense to use any method that will provide the "best" output with fewer inputs. In many areas ADR provides a "best" output with fewer inputs.

One of these areas is that of time. As shown earlier litigation can take years before the dispute is heard. Even after a case is heard and a decision rendered, the litigation process may still continue from appeal to appeal. On the other hand, ADR procedures can settle disputes in a matter of days or months. As the parties take an active role in defining the process and in reaching the settlement, the resolution is generally more acceptable to both sides. In addition, if a binding process is selected, then the award will be binding except under extreme circumstances. An example of extreme circumstance would be where the award was procured by fraud, the arbiters were evidently partial, the conduct of the proceedings was prejudiced by one of the parties, or the arbiter exceeded his or her authority.[Ref. 24]

A second advantage of ADR is the ability of the parties to select the person or third-party neutral who will help in the process. By controlling this selection, the parties are able to mutually select a person who has knowledge or expertise in the area of the dispute. In litigation, the parties have little or no say over which judge or jury will be hearing their case. This means that time and resources must be spent educating the judge or jury on the technical aspects of the dispute. As stated by H. Fielder Martin:

> Arbiters, mediators, and other third party facilitators or decision makers are 'prequalified' on the basis of previous experience, and a case can be disposed of more

> rapidly than before a judge or jury who must be educated about the problems and customs of the industry.... In any ADR proceeding, the parties are able to select party neutrals who are familiar with the terms, customs and uses of the industry, and who have technical expertise on the subject matter. Therefore, the parties using ADR have a greater chance of a 'blue ribbon' panel or third party neutral than a 'blue ribbon' judge or jury in litigation. Furthermore, the parties avoid the necessity of having to educate the trier of fact (or mediator) as they would a judge or jury.[Ref. 25]

The parties also have the ability in ADR to determine the authority of the neutral. In mediation the mediator acts as a facilitator and has no authority over the outcome. Arbitration can be selected as binding or non-binding. In non-binding arbitration the arbitrator acts essentially as a mediator. For the mini-trial the neutral personnel are senior representatives of the parties who have the authority to commit their company. They hear arguments from both sides and using their business judgment work out a solution. In addition, since ADR is voluntary, either party may withdraw at any time.[Ref. 26]

An additional advantage of ADR is that it has the potential for costing less than traditional litigation. If the dispute is settled in an expeditious manner then the injured party receives his or her money or restitution in months rather than years. This is important in Federal Government contracting as the Government ends up paying less interest on the money awarded. If the case is decided against the Federal Government, then the Government must pay interest

on the amount of award starting from the date that the claim was filed. Therefore, if the dispute is settled sooner, then less interest will have accumulated and become due. Another area of cost reduction is that of legal fees. If the dispute is settled in months instead of drawn out years, then fewer hours will be charged by the lawyers. It has been estimated that only about one-third of the processing costs of litigation actually reaches the plaintiff. The rest goes to pay legal fees and transaction costs.[Ref. 27]

ADR processes are flexible and the parties are able to select the best method to fit their needs. In litigation, formal procedures are followed and are set by the specific jurisdiction as to where the case is to be heard. In ADR, the parties determine where the dispute will be heard, who will hear it, what procedures and rules will be followed, what the time limit is, whether it is binding or non-binding, and whether evidence uncovered may be used in further litigation.

Finally, ADR procedures are usually confidential. In litigation the court proceedings and records are a matter of public record. Confidentiality allows the parties to openly discuss problems that have occurred on the project, their attitudes toward a solution and their bottom line. [Ref. 28]

Alternative dispute resolution is appropriate for those situations where there is room for compromise. As stated by Stephen Marcus:

> The situation appropriate for alternative dispute resolution is the situation where there are colorable, factual issues which lend themselves to the type of compromise and middle ground which leaves all parties comfortable. It is a situation where resolution by compromise does not cause any party to feel violated by the system.[Ref. 29]

In summary, some of the stated advantages and benefits of ADR are that it enhances communication among the disputing parties, that it offers the options of developing creative solutions to disputes that might not be available in traditional dispute resolution forums, and that it encourages negotiations that focus on the parties' real interests. With the emphasis placed on problem-solving as opposed to gearing up for protracted legal battles, ADR consumes fewer resources in time, management, and finances. As ADR is more timely and cost effective, it may prove to be more accessible to a larger segment of the population. However, the Catch-22 is that by providing a more accessible means of dispute resolution, then more disputes may be brought forward to be resolved, thus causing additional delays by further congesting the dispute resolution machinery.[Ref. 30] Additionally, decisions rendered through consensus are more likely to be honored because the parties are actively involved in developing the process and terms of the resolution. These positive approaches to joint problem-solving can maintain and improve ongoing business relationships. Alternative dispute resolution provides an increased opportunity for confidentiality with the parties retaining control of the

process and the outcome, unlike formal litigation[Ref. 31]

F. DISADVANTAGES

There are some general disadvantages and skepticism associated with alternative dispute resolution and instances where ADR should not be used. One of these disadvantages is that ADR may lack the due process and procedural safeguards offered by the courts. Another disadvantage is that ADR depends on the willingness and "good-faith" intentions of the parties to meet and put forth an honest effort to resolve the dispute. If a party is not acting in good faith, e.g., using ADR to gather more time or to delay the resolution process, then ADR will fail.

Alternative dispute resolution methods may hide the dispute from public scrutiny and oversight. This is due to the confidentiality offered by ADR. This disadvantage may affect the society overall, as public standards and norms may not be able to be imposed if ADR is used.

As a non-binding process, ADR may lack finality of a resolution process and may lack the power to induce settlements or enforce its decisions. ADR lacks the ability to "force" the disputing parties to come to the bargaining table. It also lacks the ability to "impose" a decision on a non-willing party. ADR lacks the ability to enforce its

decisions. This may mean that a party would have to initiate another lawsuit in order to have a decision enforced.

Alternative dispute resolution methods will not work in all circumstances. It should not be used where there is a "question of law" or where precedent needs to be followed or set. Disputes that involve a criminal matter should remain in the jurisdiction of the courts.

In addition to its limited use, one of the more frustrating problems of ADR, identified by industry, is that settlement is often hampered by the lack of authority of the Federal Government participant to settle the case; one cannot commit Federal Government funds without authority and the corresponding degree of scrutiny associated with settlement on behalf of the Government.[Ref. 32]

G. CONTRACT DISPUTES LEGISLATION

1. BACKGROUND

Today's system of handling contract disputes has evolved from judicial and administrative procedures. These methods included a mixture of contract provisions, agency regulations, judicial decisions, and statutory coverage.

General legislation was enacted as early as 1855 that allowed for monetary claims against the Federal Government to be filed in the Court of Claims.[Ref. 33] The first "board" to hear contract claims was appointed during the Civil War. Boards were used extensively throughout the First and

Second World Wars to settle claims and disputes.[Ref. 34] The official Armed Services Board of Contract Appeals, the largest of the boards, was established in 1949.[Ref. 35]

The proceedings before the Board of Contract Appeals were relatively informal and expeditious. In most cases, there was little or no discovery, and the hearing resembled more a model of arbitration than a court trial.[Ref. 36]

In 1963, the Supreme Court in U.S vs. *Carlo Bianchi and Co* (373 US 709 (1963)) held that the findings of fact made by the boards on disputes arising under a Federal Government contract were final and binding, and were subject to judicial review only on the administrative record in the Court of Claims. No new evidence could be introduced or considered during an appeal. Thus, the Boards became the only forum in which a dispute arising under the remedy-granting contract disputes clause could be tried.[Ref. 37] The contractor had no direct access to the courts for a dispute and had little say in the matter.

The Boards, in an attempt to protect Federal Government and contractor rights, became more judicial and formalized. This led to an increase in caseloads and backlogs, more dependence on lawyers, and the expansion of discovery. More and more decisions took longer and longer to reach.[Ref. 38]

In 1969, the Commission on Government Procurement was established to study the Federal procurement process and to make recommendations to improve its efficiency. The Commission delivered its findings to the Congress in 1973. One of the areas that the Commission addressed was that of contract disputes. In its report to Congress, thirteen recommendations were directed at the contract dispute process. These thirteen recommendations provided the framework upon which the Contract Disputes Act of 1978 was built.[Ref. 39]

2. CONTRACT DISPUTES ACT OF 1978

The purpose of the Contract Disputes Act of 1978 was to:

> ...provide a fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims. The act's provisions help to induce resolution of more contract disputes by negotiation prior to litigation; equalize the bargaining power of the parties when a dispute exists; provide alternate forums suitable to handle the different types of disputes; and insure fair and equitable treatment to contractors and Government agencies.[Ref. 40]

The Act established formal procedures and time frames for the contractor and the Federal Government as to where and when to file disputes or appeals. To start with, the Contract Disputes Act made its dispute process mandatory for all contract disputes. The first step prescribed is to attempt to negotiate and settle the dispute. If the negotiations fail, then the next step requires that the contractor obtain a

"final decision" from the contracting officer. For claims of $50,000 or less the contracting officer must issue his final decision within 60 days of when the claim was filed. For disputes involving more than $50,000, the final decision must be issued within a "reasonable time," but the contracting officer must notify the contractor within 60 days of the filing date as to how long that "reasonable" period will be. If the contracting officer fails to issue the final decision within the required time, then the failure will be deemed a denial and will authorize commencement of an appeal or a suit.[Ref. 41]

Once the contracting officer has issued the final decision the contractor may accept the decision or file an appeal either to 1) the Board of Contract Appeals within 90 days, or 2) U.S. Claims Court within one year. The Board of Contract Appeals (BCA) also has time constraints placed upon it. For disputes less than $50,000, the contractor may elect an accelerated procedure where the board will issue its findings within 180 days. If the dispute is less than $10,000, then the contractor may elect the expedited procedure and have a decision rendered within 120 days. For claims greater than $50,000, the standard process of appeals before the BCA is used. As shown in Figure 3 on page 13, the average number of days on the docket for non-accelerated and non-expedited appeals was around 425 - 450 days, nearly 2 1/2

times longer than the accelerated process and 3 1/2 times the expedited process.[Ref. 42]

Appeals from the Board of Contract Appeals go directly to the Court of Appeals Federal Circuit and must be filed within 120 days of receipt of the BCA's decision. Appeals from the U.S Claims Court are also sent to the Court of Appeals Federal Circuit and must be filed within 60 days of the Claims Court decision. The next step of appeals, if necessary, would be to the U.S Supreme Court. As can be seen, the process can be a long drawn-out affair. Figure 5 shows a flow chart of the current disputes process.

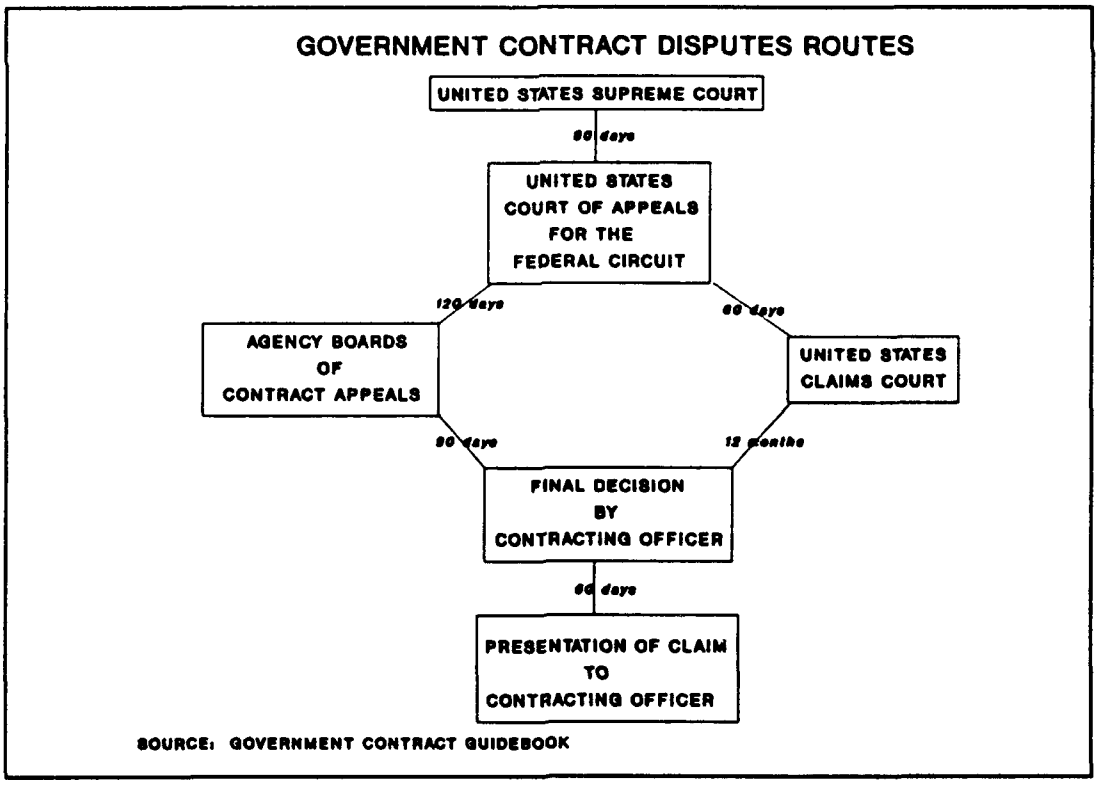

Figure 5 Government Contract Disputes Routes

3. ADMINISTRATIVE DISPUTE RESOLUTION ACT

The Administrative Dispute Resolution Act (ADRA) was an attempt by Congress to authorize and encourage Federal agencies to use mediation, conciliation, arbitration, and other techniques for the prompt and informal resolution of disputes and for other purposes. The purpose of the Act is to:

> ...place government-wide emphasis on the use of innovative ADR procedures by agencies and to put in place a statutory framework to foster the effective and sound use of these flexible alternatives to litigation.[Ref. 43]

and the stated goal is to:

> ...send a clear message to agencies and private parties that the use of ADR to resolve disputes involving the Federal Government is an accepted practice and to provide support for agency efforts to develop and/or enhance individual ADR programs.[Ref. 44]

The Administrative Dispute Resolution Act was signed into law on November 15, 1990 and was based on the recommendations made by the Administrative Conference of the United States (ACUS) in 1986. It amends the Contracts Dispute Act of 1978 to encourage contracting officers to resolve disputes consensually.[Ref. 45] It authorizes, by law, a contractor and a contracting officer, subject to all of the provisions of the ADRA but not withstanding any other provision of the CDA, to use any alternative means of dispute resolution for resolving claims and disputes.[Ref. 46] This statute also contains a so-called sunset provision stating that Federal agencies' authority to engage in alternative means of dispute resolution

proceedings under the amended CDA will cease to be effective on 1 October 1995.[Ref. 47]

The ADRA authorizes parties to agree to binding arbitration, in appropriate cases, provided that the arbitral award does not become final and binding on the Federal Government agency for 30 days. During this period, the agency head has authority to vacate the arbitral award. If the award is vacated, then the agency would be responsible for all attorneys' fees and expenses of the arbitration. After 30 days, the award would become final and enforceable on the agency, as on the other parties.[Ref. 48]

The ADRA provides clear and unambiguous Government authority for the voluntary use of virtually every form of ADR, to include binding arbitration, by contracting officers during the period before the notice of appeal is filed with the Board of Contract Appeals. During the pre-appeal period, the use of ADR is up to the contracting officer and the contractor. Once a contracting officer's final decision has been issued and a notice of appeal has been filed, then jurisdiction passes to the Board of Contract Appeals. The Board of Contract Appeals can still encourage settlement using ADR. Given the ADRA, there is now clearly no lack of authority for the use of alternative dispute resolution methods for the settlement of disputes. The issue is whether the contracting community will give them a fair trial.[Ref. 49]

The ADRA establishes a framework for agencies both to train their personnel in the use of ADR methods and to specifically encourage the use of ADR methods in settling Federal Government contract disputes. The ADRA gives the parties great authority to decide the ADR methods to be employed. Agencies are permitted to use ADR methods except in the following six instances where the agency should consider not using ADR:

1. Where precedential value is needed and will not be obtained through ADR;
2. When the matter involves significant questions about Government policy that would require additional procedures before reaching final resolution;
3. Where maintaining established policies is of such special importance that variations, which might occur through ADR, cannot be allowed;
4. Where the matter significantly affects persons or organizations that are not parties to the proceedings;
5. Where a full public record is important, since that might not be created through ADR; and
6. When ADR might interfere with the agency's ability to maintain continuing jurisdiction over the matter which must be maintained.[Ref. 50]

H. SUMMARY OF CHAPTER

This chapter introduced the theory of alternative dispute resolution and identified some of its goals and objectives. ADR was defined as any dispute resolution method, other than litigation, used to resolve disputes. Some of the general advantages and disadvantages of using ADR were identified and

discussed. The chapter ended with a historical synopsis of the statutes and legislation leading up to the authorization of ADR methods. Specifically identified were the Contract Disputes Act of 1978 and the Administrative Dispute Resolution Act. As pointed out by Robert Raven in his article "Alternative Dispute Resolution: Expanding Opportunities:"

> Probably because of its name, most of us think of ADR as an alternative to court resolution of disputes. Developed properly, however, the choice of an ADR procedure or conventional litigation will not be an 'either/or' proposition. Instead, these ADR mechanisms - mini-trials, mediations, arbitrations, summary jury trials, and others - will complement the court system and become part of an expanding menu of choices for resolving disputes.[Ref. 51]

III. ALTERNATIVE DISPUTE RESOLUTION METHODS

A. INTRODUCTION

Now that I have defined alternative dispute resolution, identified its objectives, identified when it should and should not be used, and given a brief history of the current contract disputes method and legislation leading to ADR, it is time to identify and discuss the main forms of alternative dispute resolution. The primary forms are arbitration, mediation, and negotiation. There are many hybrids and combinations of these different methods, including private judging, neutral expert/fact findings, mini-trials, and summary jury trials.[Ref. 52]

B. ARBITRATION

Arbitration is defined as "a process by which parties voluntarily refer their disputes to an impartial third person, an arbitrator, selected by them for a decision based on the evidence and arguments to be presented before the arbitration tribunal. The parties agree in advance that the arbitrator's determination, the award, will be accepted as final and binding upon the parties."[Ref. 53]

Prior to the ADRA, this type of Arbitration, binding, was not authorized for use by Federal Government agencies. However, a hybrid known as non-binding Arbitration is

authorized. The Comptroller General of the United States has relied on two statutes to bar the use of arbitration. The two statutes are:

> 31 USC 1346: Prohibits the use of Federal funds to pay- (a) the pay or expenses of a commission, council, board, or similar group, or a member of that group, or (b) expenses related to the work or the results of work or action of the group unless authorized by law.
>
> 31 USC 3702 (a) The Budget and Accounting Act of 1921. Section 304 states that "the Comptroller General shall settle all claims of or against the U.S. Government. This statute gives the Comptroller General jurisdiction over disputes involving money due on contracts; however,claims based on tort or breach of contractual obligations are not part of section 3702 settlement authority.[Ref. 54]

1. ADVANTAGES

There are certain advantages and benefits derived from arbitration. It is seen as less adversarial than litigation and is thus more likely to provide a dispute mechanism that maintains the relationship between the parties and is more likely to lead to a successful conclusion. The perception is that arbitration provides a quick, inexpensive alternative to litigation, one that avoids the overcrowded court dockets and the expensive and drawn-out discovery that comes with litigation.[Ref. 55] An average time from submission of a dispute to a final decision is only 60 days.[Ref. 56]

The parties to the dispute have direct control over the process and the selection of the third party neutral.

Because the arbitrators are chosen by the parties, it is more likely that they will be experts in the areas of the dispute at hand. Presenting a case before an informed expert will be easier and faster than before a non-expert, and should result in a more informed decision. By controlling the process, the parties can tailor the process and streamline it to the case at hand.

Another advantage of arbitration is the limited or narrow scope of judicial review that is available to an arbitrator's decision; therefore lengthy drawn-out appeals will be avoided. The advantage of less time is that costs directly related to the time involved in settling the dispute are lower. An additional benefit is that of confidentiality. The proceedings of the arbitration can be kept confidential and out of the public arena.

2. DISADVANTAGES

Arbitration does have its disadvantages though. Arbitration, as a kind of adjudication, is not far removed from litigation and its adversarial characteristics. Arbitration is an adversarial process designed to result in a binding decision. [Ref. 57]

One disadvantage is that arbitrators are not bound by precedence of previous court or arbitration decisions. It is therefore harder for the parties to predict the outcome of the arbitration process. Parties who have participated in the

process have complained that they felt "stuck" with whatever the arbitrator decided and a concern that too often the arbitrators "split the difference."[Ref. 58]

Arbitration, though thought of as inexpensive and expedient, may be as costly and time consuming to the participants as litigation. The principal reason for this is that while the services of judges and court machinery are provided to the litigants free of charge, the arbitrating parties must bear all of the costs of the arbitration proceedings, including the arbitrator's fees, travel, and living expenses. In addition, there are still the fees of the attorneys and clerical fees for getting ready for the arbitration. The arbitration expense can potentially exceed any savings realized as a result of avoiding the "motions practice" and "liberal" discovery associated with litigation.[Ref. 59]

Another possible disadvantage, one which will affect any method that uses a neutral third party, is that the third party, unlike judges in the public system, is paid by the parties who consent to their use.[Ref. 60] A possibility exists that an arbitrator's decision may favor or be influenced by a desire for future employment by the parties.[Ref. 61] This should be taken into account by both parties when deciding on the neutral third party. It may not be a large factor, but the possibility does exist,

especially if there is an imbalance of power between the two parties.

One final disadvantage of arbitration is that the enforcement of an arbitral decision or award may create new areas of litigation.

3. CASE SUITABILITY

Numerous factors make a dispute a good candidate for arbitration. Arbitration is especially well-suited for those cases where the standard to be applied is already established by statute, rule, or precedent. Disputes that don't need to set a precedent or establish major new policies are well-suited for arbitration.[Ref. 62] In addition, those disputes where time or transaction costs are more important than the accuracy of any one decision are excellent candidates.[Ref. 63]

C. MEDIATION

Mediation is, simply, a negotiation involving a mediator. A Mediator is a neutral third party who assists the parties in negotiating an agreement.[Ref. 64] Mediation is less formal than arbitration and is non-binding. In this informal and voluntary approach, both sides meet to negotiate a settlement. While the agreement is non-binding, the benefit is that the decision won't be imposed or forced on them by a judge or arbitrator.[Ref. 65] The job or functions of a Mediator are various and may range from urging the

participants to talk to one another to helping the parties set an agenda to suggesting solutions.[Ref. 66] At a minimum, the Mediator serves to facilitate agreement on minor issues, narrow the differences between the two parties on major issues, and to remind the parties of the consequences of not reaching an agreement.[Ref. 67] Mediation is the most flexible ADR mechanism, and probably will become the most widely used.[Ref. 68]

1. ADVANTAGES

Mediation has numerous advantages. One of these is that the parties themselves control the entire process. The parties select the neutral third party, set the rules and guidelines, set the agenda to be followed, and make the final acceptance of a mutually derived settlement. The process is relatively quick and inexpensive. In addition, the negotiations can be confidential. To preserve future business relations, mediation can be informal and non-adversarial.

2. DISADVANTAGES

Mediation has many disadvantages that are similar to disadvantages found in negotiations. Because mediation is a voluntary process, the parties may not mediate in "good faith." The absence of a guaranteed outcome or settlement could simply lengthen the dispute process. Mediation is also unsuitable for those cases needing precedent or uniform decisions.[Ref. 69]

3. CASE SUITABILITY

Mediation is appropriate for disputes in which the parties have reached or anticipate a negotiation impasse based on personality conflicts, poor communication, multiple parties, or inflexible negotiating postures.[Ref. 70] Mediation is also appropriate in disputes where the legal standards for decision are fairly clear, or where neither party has a need to clarify them.[Ref. 71] Mediation is also preferable when the likelihood of winning or losing is unclear and attorney's fees for litigation may vastly exceed the cost of mediation. When small sums are at stake, the wear and tear of a courtroom battle may not be worth the cost of litigation.[Ref. 72]

D. NEGOTIATION

Negotiation is communication between people in an effort to reach an agreement. It is a voluntary, usually informal, unstructured process used by the disputants in arriving at a mutually acceptable settlement.[Ref. 73]

Negotiations happen all of the time as we negotiate among our families and friends and even within ourselves.[Ref. 74] With negotiation being so frequent and continuous, it is often overlooked as a method of dispute resolution.

While there are no established rules and procedures for negotiating, numerous articles and books suggest the need to

follow certain fundamentals. These are a thorough knowledge of the facts, a prepared plan for the negotiation, and active listening during the negotiations. Robert Fisher and William Ury in their book Getting to Yes provide five basic points in defining their principled approach to negotiation.[Ref. 75] These are:

1. Separate the people from the problem. Negotiators should see themselves attacking the problems in dispute, not each other.

2. Focus on interests not positions. Your positions are what you want. Your interests are why you want them. Focusing in on interests may uncover the existence of mutual or complementary interests that will make agreement possible.

3. Invent options for mutual gain. Even if the parties' interests differ, there may be bargaining outcomes that will advance the interest of both.

4. Insist on using objective criteria. Set mutually agreeable guidelines for governing the outcome of negotiations.

5. Know your Best Alternative to a Negotiated Agreement. Where do you stand if negotiations fail to reach an agreement. Are you better off negotiating?

1. ADVANTAGES

Many of the advantages of negotiation are derived from the process being a voluntary method that the parties retain control of. At the option of the parties, the negotiations may be kept confidential. By controlling the process, the parties determine the ground rules to be used. No limits are placed on the presentation of evidence, arguments, or interests.[Ref. 76]

2. DISADVANTAGES

Negotiations have some disadvantages. First, since negotiations are voluntary, both parties must be willing to negotiate. Negotiations will not work if one side is not willing to "come to the table." There is no guarantee that a solution will be found to the dispute or, if a solution is found, that both parties will adhere to it. Thus, negotiations may end up adding an additional layer of lost time and costs. An additional disadvantage is that the outcome may hinge on the abilities of the negotiator and not on the facts available.

3. CASE SUITABILITY

Negotiation is suitable for disputes that are similar to those suitable for Mediation, but where a neutral third party is not needed. Negotiations are unsuitable for disputes which need to establish precedent or major public policy.[Ref. 77]

E. PRIVATE JUDGING

Private judging, often referred to as rent-a-judge, involves the dispute being heard by a third party neutral who has statutory authority to make a decision that is binding on the court. It differs from arbitration in that the dispute is referred to the third party neutral by the court. The procedure is usually governed by statutory procedure but is flexible as to time, place, and process.[Ref. 78]

The parties present their arguments to the decision maker and a judgment is reached that may be appealed through the regular appeals process.[Ref. 79]

1. ADVANTAGES

One of the advantages is that the parties retain some control over the process. They are able to choose a mutually agreeable third party neutral who will hear the case. The parties are likely to lend more credibility to a decision handed down by a person they had some role in choosing.[Ref. 80]

Another advantage is that of speed and convenience. The parties decide with the third party neutral on the time and location of the hearing. They can go to trial as soon as the parties are ready.

Additionally, an advantage of Private Judging is that of confidentiality. Unless the decision is appealed, the proceedings are confidential except for the final decision, which contains at least brief findings of fact and conclusions of law.[Ref. 81]

2. DISADVANTAGES

A major disadvantage is that the process is a "winner-take-all" approach just like traditional litigation. Even though the parties may control the process in regards to time and location, the third party neutral is required to follow the statutory law.[Ref. 82]

3. CASE SUITABILITY

A majority of cases is suitable for private judging. Cases relying on established statutory laws are excellent choices. In addition, those cases on the brink of, or already into, formal litigation may benefit from the use of Private Judging.[Ref. 83]

F. NEUTRAL EXPERT FACT-FINDING

Neutral Expert Fact-Finding is an informal process whereby a neutral third party, selected by the parties or the court, investigates the specific question at issue and submits a report or testifies in court. The outcome may be binding or non-binding as agreed in advance by the parties.[Ref. 84]

Fact-Finding uses informal procedures because it is an investigatory procedure with a primary objective of narrowing factual or technical issues in dispute. The Federal Government may participate in Fact-Finding that is binding only if the Government can decline to accept the Fact-Finder's decision before it becomes final and binding.[Ref. 85]

1. ADVANTAGES

Many disputes arise from questions of a "factual" basis. One of the advantages is that a Neutral Expert Fact-Finder can sift through the complex and confusing technical issues and questions and present a more logical summary to

the parties. This appraisal of the data and facts will help the parties come to a fast and fair settlement.

Another advantage is that the parties remain in control of the process. They mutually select the Neutral Fact-Finder and decide on the rules and procedures to be followed.[Ref. 86] In addition, the parties decide whether the findings are to be binding or non-binding. The parties may agree with all of the findings or reject them all, but may not pick and choose from the facts to suit their case.[Ref. 87]

2. DISADVANTAGES

Many of the disadvantages found are the same as those discussed for any voluntary non-binding procedure. Both parties must be willing to accept a Neutral Expert Fact-Finder. A problem occurs if the findings are brought into court as testimony as the parties then lose their confidentiality.

3. CASE SUITABILITY

This process is useful in resolving complex technical, scientific, business or economic issues where the presentation of proof on issues is extremely difficult, expensive, and time consuming. It is also effective as an alternative to extensive discovery.[Ref. 88]

G. MINI-TRIAL

The mini-trial is a hybrid of mediation, traditional settlement negotiation, and adjudication. It has been described as "a highly flexible, expedited procedure where each party presents an abbreviated version of its case to a neutral advisor (a judge other than the presiding judge) who then assists the parties to negotiate a settlement." [Ref. 89] It is a voluntary mock trial designed to present each side's view of the dispute in an orderly and abbreviated manner.[Ref. 90] The mini-trial involves a one to three day process where senior executives of the disputing parties summarizes the strengths and weaknesses of each party's position to a neutral advisor. The mini-trial is more structured than mediation, yet still avoids the high costs associated with discovery in traditional litigation. The mini-trial is one of the most popular ADR methods currently in use and has been the preferred approach used in the resolution of Federal Government contract disputes.

1. ADVANTAGES

Speed is one advantage of the mini-trial. Specifically, it is much faster when compared to court time. Another key advantage is that the executives have a direct role in the process. Because of this participation, the outcome tends to be more creative and business oriented than the win-lose approach of arbitration or

litigation.[Ref. 91] An additional benefit of mini-trials is that of reduced costs as compared to litigation. The costs of a mini-trial are estimated to be approximately ten percent of ordinary litigation costs.[Ref. 92] Another major advantage is the flexibility of the process as the parties set the rules themselves. In summary, the advantages of mini-trials include cost reduction, brevity as compared to litigation, creative problem solving, preservation of continuing business relationships, choice of a neutral third party, a tailor made process, and maintenance of confidentiality.[Ref. 93]

2. DISADVANTAGES

The mini-trial process has a number of disadvantages. One is that the parties have already incurred costs before the mini-trial has started or is complete. These costs arise from the formal discovery period and in preparation for the mini-trial. Second, there is the problem of selecting an impartial and neutral third party. There are no formal rules of evidence and questioning of witnesses is informal and limited. Thus, witness credibility is not tested during the process. One potential risk that each party takes is that of the other side using the mini-trial to drag out the dispute and to simply test their case prior to going to formal litigation.

3. CASE SUITABILITY

Most all contract appeals are suitable for the mini-trial, except those involving clear legal precedent. The mini-trial is especially well-suited for complex cases arising from high- stakes deals such as a joint venture, partnership, or major construction project.[Ref. 94] Mini-trials are also well-suited for those disputes where a continuing business relationship is desired.

H. SUMMARY JURY TRIAL

The Summary Jury Trial is an involuntary process and was developed by Judge Thomas Lambros, Northern District Of Ohio, in 1980.[Ref. 95] In this method, a Judge or Magistrate presides over a mock jury, impaneled by the court, and hears an abbreviated version of the dispute. The presentations are limited to the evidence that would be admissible at a trial. The jury then deliberates and provides an advisory verdict. This verdict is non-binding and is useful in providing a realistic assessment of the case to the parties. After the verdict is given, the jurors are invited to discuss their observations of the strengths and weaknesses of the case and the reasons why the verdict was reached as it was.[Ref. 96]

Once the verdict has been reached and the jurors questioned, both sides will meet to attempt to come to a settlement based on the information derived. If a settlement

cannot be reached, then the case proceeds to trial.[Ref. 97]

1. ADVANTAGES

The principal advantage of the Summary Jury Trial is that it provides the parties a realistic assessment of the case. The parties are able to assess how a neutral jury would react to the evidence and presentation of the facts. It also provides the parties a chance to see how their lawyers fare in court.

Another advantage is that a Summary Jury Trial may fill the psychological needs of the parties. The parties are able to be heard and to have their case argued in front of a jury. It allows the parties to feel as if they have had their "day in court."[Ref. 98]

2. DISADVANTAGES

The major disadvantage is that the Summary Jury Trial occurs too late in the process. It occurs on the eve of the actual trial. Large quantities of time, money, and other resources have already been expended. By waiting this long into the dispute, the parties have hardened their positions, have increased their hostility, and have jeopardized the good will between the parties.[Ref. 99] An additional disadvantage is that of the loss of privacy and confidentiality.

The parties are not in control of the process because the Summary Jury Trial is involuntary. It can be seen as a mandatory additional layer placed on them prior to going to trial. This is especially true because the verdict is non-binding.

3. CASE SUITABILITY

The Summary Jury Trial works well with those cases that are on the verge of going to a full trial and in which a settlement is still possible.

I. SUMMARY OF CHAPTER

This chapter has introduced and discussed the three "primary" dispute resolution processes and the four "hybrid" processes. The primary processes discussed were 1) Arbitration, 2) Mediation, and 3) Negotiation. The hybrid processes included 1) Private Judging, 2) Neutral Expert Fact Finding, 3) Mini-Trial, and 4) Summary Jury Trial. Along with the identification of the different processes, the advantages, disadvantages, and cases that are suitable for each method were discussed. The following two tables provide a consolidated synopsis of the dispute resolution processes along with a comparison of the processes to adjudication.

TABLE I PRIMARY DISPUTE RESOLUTION PROCESSES

"Primary" Dispute Resolution Processes				
CHARACTERISTICS	**Adjudication**	**Arbitration ****	**Mediation**	**Negotiation**
Voluntary/ Involuntary	Involuntary	Voluntary	Voluntary	Voluntary
Binding/ Nonbinding	Binding, subject to appeal	Binding, subject to review on limited grounds	If agreement, enforceable as contract	If agreement, enforceable as contract
Third Party	Imposed, Third-party neutral decision maker, generally with no specialized expertise in dispute subject	Party-selected third-party decision maker, usually with specialized subject expertise	Party-selected outside facilitator, usually with specialized subject expertise	No third-party facilitator
Degree of Formality	Formalized and highly structured by predetermined rigid rules	Procedurally less formal; procedural rules and substantive law may be set by parties	Usually informal, unstructured	Usually informal, unstructured
Nature of Proceeding	Opportunity for each party to present proofs and arguments	Opportunity for each party to present proofs and arguments	Unbounded presentation of evidence, arguments and interests	Unbounded presentation of evidence, arguments and interests
Outcome	Principled decision, supported by reasoned opinion	Sometimes principled decision supported by reasoned opinion; compromise without opinion	Mutually acceptable agreement sought	Mutually acceptable agreement sought
Private/Public	Public	Private, unless judicial review	Private	Private

** Court-annexed arbitration is involuntary, nonbinding and public.

TABLE II HYBRID DISPUTE RESOLUTION PROCESSES

"Hybrid" Dispute Resolution Processes				
CHARACTERISTICS	Private Judging	Neutral Expert Fact Finding	Mini-Trial	Summary Jury Trial
Voluntary/ Involuntary	Voluntary	Voluntary or involuntary	voluntary	Involuntary
Binding/ Nonbinding	Binding, subject to appeal	Nonbinding, but results may be admissible	If agreement, enforceable as contract	Nonbinding
Third Party	Party-selected third-party decision maker, may have to be former judge or lawyer	Third-party neutral with specialized subject matter expertise; may be selected by the parties or the court	Party-selected neutral advisor sometimes with specialized subject expertise	Mock jury impaneled by court
Degree of Formality	Statutory procedure but highly flexible as to timing, place, and procedures	Informal	Less formal than adjudication; procedural rules may be set by parties	Procedural rules fixed; less formal than adjudication
Nature of Proceeding	Opportunity for each party to present proofs and arguments	Investigatory	Opportunity and responsibility to present summary proofs and arguments	Opportunity for each side to present summary proofs and arguments
Outcome	Principled decision, sometimes supported by findings of fact and conclusions of law	Report or testimony	Mutually acceptable agreement sought	Advisory verdict
Private/Public	Private, unless judicial enforcement is sought	Private, unless disclosed in court	Private	Usually public

IV. ADR ASSESSMENT

A. INTRODUCTION

Alternative dispute resolution has been proposed as an efficient, cost-effective method of dealing with disputes that is preferable to litigation. However, its theoretical virtues have yet to be empirically substantiated. There has been limited or non-verifiable data and research conducted to date. Research and data collection that have been done are mainly centered around arbitration and mediation. The scant empirical evidence that does exist paints an incomplete picture of the ADR's effects. The following sections provide my assessment of the empirical data that are currently available and an assessment of the interviews that I conducted.

B. ASSESSMENT OF EMPIRICAL DATA

In my assessment of the evaluations conducted on ADR, I have found that the evaluations are premature and that the evidence is not conclusive. I have found that ADR evaluations are extremely difficult to make because the advocates for the programs come from varying positions in society, and all have different reasons for wanting ADR to succeed. One's point of view may very well determine what the evaluation will emphasize, which in turn will affect what outcome is reported.

Through the literature reviewed, I have found that the evaluations that have been conducted are generally focused upon either 1) the reduction of costs to the parties, 2) the decrease in the amount of time in settling disputes, 3) disputant satisfaction with the process and outcomes, 4) the use of ADR as a case management tool for the courts in an effort to reduce backlog, or 5) increasing the accessibility of a dispute resolution forum for all. Many of the studies addressed a combination of the above areas.

An assessment on some of the research that has been conducted and of the available data on ADR methods is discussed below. This assessment is arranged around the "primary" and the "hybrid" methods of ADR that were discussed earlier.

1. ARBITRATION

The majority of the research conducted and data that are available has to do with arbitration, especially court-annexed arbitration. An analysis was conducted by Kritzer and Anderson of arbitration cases processed through the American Arbitration Association (AAA). The analysis compared arbitration against litigation in the courts. Their findings were mixed as to whether arbitration was meeting all of its objectives of obtaining quicker and less costly settlements. Their analysis showed that arbitration cases handled through the American Arbitration Association are processed more

quickly than are court cases. However, the analysis also indicated that the cases were not necessarily less costly than the ones handled by courts. The American Arbitration Association was found to be the least expensive process for small cases, but the most expensive for settling all others. Their cost findings are shown in Figure 6.

In paraphrasing their conclusions, the American Arbitration Association provides a viable alternative to the courts. Cases are processed more quickly, but this comes with an added cost. Overall, arbitration procedures provide a "real" alternative to the courts for processing disputes; however, the size of that difference may not be as significant as alleged.[Ref. 100]

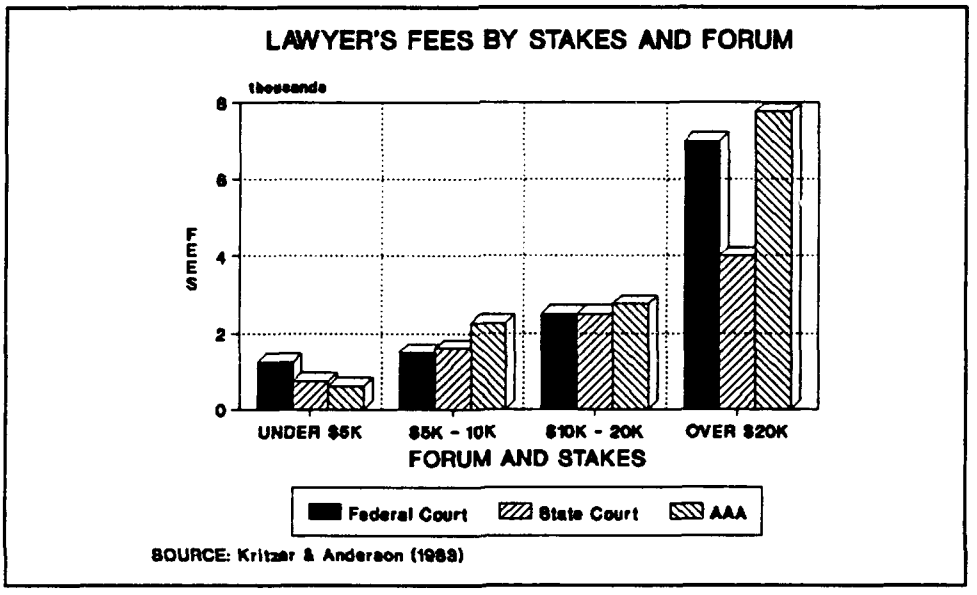

Figure 6 Lawyer's Fees by Stakes and Forum

In Barkai's and Kassebaum's study of Hawaii's court-annexed arbitration program, their findings were that the program appeared to be meeting the goals of reducing litigant cost, increasing pace, and maintaining the satisfaction of the participants. The program is clearly succeeding in reducing pretrial discovery.[Ref. 101]

A study conducted of three Federal district court programs found that, in two of the three districts studied, the time from filing to disposition decreased as a result of arbitration. The programs were judged successful in reducing both costs and delay in the courts.[Ref. 102]

An American Bar Association survey, conducted in 1985-1986, found that the respondents believed that arbitration was superior to trial as a means of dispute resolution. The results were more favorable in cases involving smaller amounts of money. Those surveyed also indicated high satisfaction with the speed, cost, quality of decision-making, and fairness of arbitration. In another survey conducted by Riggs and Schenk, it was shown that the parties were satisfied with the process.[Ref. 103]

A statutorily mandated report was published by the Federal Judicial Center in 1990 on the ten court-annexed programs. The objective of the report was to evaluate participants' satisfaction with arbitration and to report whether ADR had achieved its quantitative goals. The report strongly corroborated earlier studies showing that

participants believe that court-annexed arbitration can help reduce expenses and delay.[Ref. 104]

In summary, my assessment of the empirical research conducted to date generally shows that arbitration is a faster means of resolving disputes than litigation, but not necessarily less expensive. It is clear that arbitration is sometimes more expensive than litigation particularly in larger cases. In addition, users are highly satisfied with the quality and process of arbitration.

2. MEDIATION

In assessing the literature on mediation, I found that there is a belief that costs will be lower. However, the gains to date appear to be smaller than originally believed. The greatest gains from such programs fall in the area of satisfaction. This is especially true with mediation as the disputants are typically very satisfied with the mediated procedures.

The literature showed that settlements are reached in a majority of the cases and appear to be adhered to over time.[Ref. 105] A study conducted by McEwen and Maiman found compliance in 71 percent of successful mediations and 53 percent of unsuccessful mediations.[Ref. 106] I have found through the interviews and literature review, that mediation programs provide impressive rates of user

satisfaction, perceptions of fairness, compliance with outcomes, and reduced levels of relitigation.

3. NEUTRAL EXPERT FACT-FINDING

There was very limited data available on this area. One study conducted by Levine suggested that neutral expert fact-finding does not reduce costs or result in greater settlement rates. The participants have expressed an overall sense of satisfaction with the process as it relates to fact-finding. The impression was that the neutral expert fact-finding was a valuable additional step in the litigation process and contributes to an earlier and less costly resolution.[Ref. 107]

4. MINI-TRIAL

The mini-trial was identified as one of the most commonly used methods of ADR methods with the Department of Defense. In my interviews, the Army Corps of Engineers, the Navy, and Department of Justice have all indicated the use of this method with great success.

Within the literature, the first mini-trial was held in 1977 between Telecredit and TRW. After the suit was filed, the parties agreed to a private two-day hearing where each side would present its case directly to the executives of both companies. A settlement was reached within 20 minutes after the presentation ended, saving the litigants an estimated one million dollars in legal fees.[Ref. 108]

Texaco Inc. and Borden Inc. used a mini-trial in 1982 to resolve a $200 million breach of contract suit. Savings in legal fees alone were estimated at $4 to $6 million. [Ref. 109]

In 1985, the U.S. Army Corps of Engineers settled a $55.6 million dispute with the Morrison-Knudsen company for $17.2 million. The process involved two days of presentations and one day of settlement negotiations. Again, the amount of money saved from legal fees alone was in the millions of dollars.[Ref. 110] In an article by Lewin, it is estimated that most mini-trials save the participants 90 percent of the costs of litigation.[Ref. 111]

Every agency mini-trial except one has avoided the years of litigation, while producing outcomes that have satisfied all of the participants. Even in the one Navy case in which settlement was not produced, ADR significantly narrowed the issues and reduced the hearing burden.[Ref. 112]

It is important to state that while mini-trials have resulted in settlements and the savings of legal fees, they have been used in fewer than a dozen or more of the thousands of contract disputes that are terminated annually.

5. SUMMARY JURY TRIAL

There are very little data available on the use and outcomes of summary jury trials. Judge Richard Posner has

questioned the effectiveness of the summary jury trial (SJT). While expressing confidence that the summary jury trial will increase the likelihood of settlement, he doubts that it will have any "big effects."[Ref. 113]

Proponents of the summary jury trial claim a high degree of user satisfaction among judges, attorneys, and litigants. Currently it is impossible to determine if summary jury trials have had any effect on participants accepting and complying with the results of the SJT.

It cannot be determined whether summary jury trials actually save litigants and the courts money. Even to speak definitively about the degree to which SJTs actually eliminate cases from the trial calendar is beyond the capacity of the current data.

C. ASSESSMENT OF INTERVIEWS

I interviewed 35 personnel from various organizations to include those outlined in Chapter I. While the majority of the literature that I reviewed led me to believe that the use of ADR was strong and ongoing, the interviews provided different views. Three interesting insights garnered through the interviews were that (1) people had little evidence to support the theoretical claims in favor of ADR, (2) people did not know about the different methods available and their authority to use them, and (3) within the Federal Government there is a lack of incentives to use ADR.

Based on the interviews I conducted, the following is my assessment of some of the major impediments identified that affect the implementation of an ADR program.

1. ***A general lack of knowledge of the different methods of ADR available and the authority to use them.***

This response was by far the one most often received from the interviews. Even though many of the different ADR methods have been around for many years, the majority of the personnel interviewed recognized only arbitration and mediation, and believed that this was all that ADR encompassed. I found that there is a general lack of knowledge about the existence of the other methods of ADR, their characteristics, benefits, and costs that each has to offer. In addition, I found that officials who had the authority to use any method of ADR to resolve disputes as provided in the Administrative Dispute Resolution Act, did not know that they had the authority.

2. ***Absence of reliable data to support the claims of ADR.***

I found that a major obstacle alluded to by those interested in implementing or using ADR methods was the lack of verifiable data to support the claims made by ADR. It was stated that before one is willing to commit funds and resources to a new project or method, that reliable data need to be presented in order to substantiate the benefits received from the expenditure of those added resources. What are the

costs and what are the benefits to be received? Yet, very few of the organizations interviewed were keeping track of data on their use of ADR. Speculation and anecdotal evidence have been the main tools of evaluation to this point.

3. ***Absence of public funding.***

One factor brought out in the literature, but not seen as a major impediment by the personnel interviewed, was that of the lack of public funding for ADR programs. The current court system, paid for with our taxes, is basically provided "free" to a certain extent for the parties to use. ADR methods require that the parties pay for the use of that method. The parties must pay for the arbitrator, mediator, or neutral third party. These costs can be quite extensive when figuring travel, lodging, per diem, and other fees. This payment may be on top of fees paid to attorneys, if they are used. It was indicated that was a concern, but not a major deterrence for using ADR.

4. ***Distrust for processes that are new or unfamiliar.***

Many of the organizations whose personnel I interviewed, especially bureaucratic organizations, indicated a reluctance to change. Attempting something new or innovative may bring about dire consequences that open one to risk. The natural tendency is to maintain the status quo and to "follow the path of least resistance." As one interviewee stated, "why should

I put myself in a risky position when a minimal risk route for resolving disputes, i.e., Board of Contract Appeals, is available."

5. *Lack of incentives to use ADR methods.*

One of the most striking things I found, that helps to explain the Federal Government's failure to use ADR, was that there is a lack of incentive for the Federal Government to enter into ADR for resolving contract disputes. The reason for this is, as indicated in the interviews and the literature, is the inclusion in all Federal Government contracts of the "continued performance" clause. The essence of this clause is that while a dispute is being processed or decided, the contractor must continue to perform on the contract or be held in breach.[Ref. 114] There is no incentive, other than the maintenance of a cordial business relationship with the contractor, for the Federal Government to have the dispute resolved quickly. This clause in essence causes there to be an "uneven" playing field between the Federal Government and the contractors.

D. MISCONCEPTIONS ABOUT ADR

Based on the interviews and the literature reviewed, I was able to frame four recurring misconceptions or myths that deter ADR implementation. These are discussed below along

with the reasoning or evidence that attempts to answer or dispel these misconceptions and myths.

1. ***The only result of using alternative dispute resolution, especially arbitration, is that the dispute will be "split down the middle" even if we are right.***

The data from research studies disprove this myth. In an American Arbitration Association survey of cases and counterclaims in 1990, only ten percent of the awards fell into the 40 to 59 percent category. These data indicate that, in the vast majority of cases, arbitrators clearly tend to decide in favor of one party or the other. Table 3 shows the specific details and ranges.[Ref. 115]

TABLE III AMERICAN ARBITRATION ASSOCIATION SURVEY OF AWARDS

PERCENT OF CLAIMS AWARDED	NUMBER OF CLAIMS CASES	PERCENT	NUMBER OF COUNTER-CLAIMS CASES	PERCENT
>100%	277	6%	31	2%
80 - 100%	1,295	28%	77	5%
60 - 79%	461	10%	53	4%
40 - 59%	476	10%	52	4%
20 - 39%	482	11%	82	6%
1 - 19%	1,134	25%	110	8%
Claim denied			1,000	71%

SOURCE: American Arbitration Association

2. ***Alternative dispute resolution is the same as arbitration.***

Arbitration is only one of many methods available under the ADR umbrella. Some of these other methods include mediation, negotiation, mini-trials, summary jury trials, and fact-findings. ADR is any process used to settle a dispute without resorting to litigation and the courts.

3. ***Alternative dispute resolution may work in simple cases, but it does not work for complex disputes.***

On the contrary, ADR works especially well with complex disputes, especially those that are technical in nature or are centered around known facts. The mini-trial was identified as an exceptional method well-suited for complex cases. All of the ADR methods help to focus on the dispute itself and not the emotions of the parties.

4. ***Alternative dispute resolution can be as expensive or even more expensive than litigation, and it is a waste of time and money.***

This is not true in all accounts. It is true that arbitration, one form of ADR, may be every bit as expensive and time-consuming as litigation. However, ADR methods encompass much more than just arbitration. A main emphasis of ADR is that the parties to the dispute retain control of the process, and have a say as to the costs and time to be incurred. In ADR, there is little or no discovery or

depositions, and the use of expensive lawyers can be minimized.

As far as ADR being a waste of time, money and effort, even if a settlement is not reached, this is not true. The time, money and efforts are well spent as facts are brought out into the open, the issues in the dispute are focused more clearly, and both sides have a better understanding of the strengths and weaknesses of their cases.

E. SUMMARY OF CHAPTER

This chapter focused on my assessment of the literature and on the interviews I conducted. From these data sources, I concluded that certain impediments are present when implementing ADR programs and that there exist general misconceptions about ADR. I found that while the literature painted one picture of the ADR environment, that the personnel interviewed provided an entirely different view.

In my opinion, there is a clear lack of empirical data upon which to validate the advantages and disadvantages of the individual ADR processes. What the interviews and literature do point to though, is that ADR methods may not save the parties as much money as was once believed, but that the parties are generally more satisfied with the process and outcomes.

V. SUMMARY, RECOMMENDATIONS, AND CONCLUSION

A. SUMMARY

The fact that the empirical evidence does not support all of the benefits and advantages promised by alternative dispute resolution does not mean that ADR should be abandoned. Other benefits, such as participant satisfaction, are important to retain.

The current dispute process of using the Board of Contract Appeals is no longer efficient or cost effective in settling contract disputes. It continues to cost the Federal Government and the contractors an increasing amount of time, money and manpower, and puts a significant strain on working relationships. The ASBCA route is a no-win situation for both parties. If the Federal Government is successful and wins its appeal to the ASBCA, it is still out its legal costs and manpower. If the contractor wins the appeal, he or she only sees a small amount of the money, as the majority of the money will go to pay the legal and administrative costs of filing the appeal.

Theoretically, alternative dispute resolution offers a method for settling contract disputes without the expenses and delay associated with formal litigation. ADR allows managers the opportunity to remain in control of the dispute and to

solve it in an efficient and business-like manner. However, ADR is not a cure-all for all of the problems associated with litigation and the courts. ADR is not meant to be a replacement for the courts; rather, ADR is another process that is available to help augment and supplement the current dispute process.

Within the literature and through the interviews conducted, there were no compelling arguments against the use of alternative dispute resolution methods brought forth. The Federal Government and the contractor both stand to benefit from the potential savings of time and money offered by ADR. However, with such little empirical data available on ADR, there is a pressing need for further evaluation. Only when further data have been accumulated and evaluated can decisions be made as to whether or not ADR is achieving its perceived advantages and objectives.

B. CONCLUSIONS ON RESEARCH QUESTIONS

1. PRIMARY RESEARCH QUESTION

Are alternative dispute resolution methods a viable technique for settling Federal Government contract disputes?

A final evaluation of ADR is premature due to inconclusive evidence available. The limited empirical data that exist do not certify the perceived benefits available from the use of alternative dispute resolution. However, in my opinion, even though some of the claimed benefits lack

empirical foundation, many benefits have been substantiated, e.g., satisfaction and compliance over time. Thus, despite the limited data and evidence to date, I do see some evidence that makes ADR a valuable tool. Yet, these are not the only criteria that ADR must be evaluated against. Cost to parties and processing time may be more important than satisfaction and compliance.

Results at this point look promising, but are not conclusive. Therefore, more research and empirical data are required before a final determination can be made as to whether alternative dispute resolution is a valid method for settling Federal Government contract disputes.

2. SUBSIDIARY RESEARCH QUESTIONS

a. What methods of alternative dispute resolution are currently authorized for settling Federal Government contract disputes?

As provided by the Administrative Dispute Resolution Act, agencies are authorized to use any ADR method to resolve any controversy relating to an administrative program. The term "alternative dispute resolution" is defined in the legislation as any procedure that is used in lieu of an adjudication, to resolve issues in controversy, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, and arbitration, or any combination thereof.

b. **What are the objectives of alternative dispute resolution and to what extent are these objectives being met?**

Some of the major objectives of ADR include settling the dispute at the earliest time possible, before the costs of discovery have been incurred and emotions flare out of control. A second objective is that of reducing the costs for both parties. Another objective is that of ensuring that the settlement and process are fair and equitable. A final objective, is that ADR attempts to help preserve business relationships between the two disputants.

The extent to which these objectives are being met has mixed results. There appears to be a consensus in the literature and research that, generally, ADR methods do process disputes more quickly than litigation. There are exceptions, especially in arbitration, where it may actually take longer than litigation. Meeting the objective of lowered costs for the parties has not been empirically validated. Satisfaction with the fairness, process, and outcome has been documented in all of the ADR methods.

c. **What are the impediments or barriers to successfully implementing alternative dispute resolution?**

There are certain impediments or barriers to the successful implementation of ADR. Specifically identified were:

1. A general lack of knowledge of the different methods of ADR available and the authority to use them.

2. **Absence of reliable data to support the claims of ADR.**

3. **Absence of public funding.**

4. **Distrust for processes that are new or unfamiliar.**

5. Lack of incentives to use ADR methods.

6. **Misconceptions that deter ADR implementation were identified as follows:**

(a) **The only result of using alternative dispute resolution, especially arbitration, is that the dispute will be "split down the middle" even if we are right.**

(b) Alternative dispute resolution is the same as arbitration.

(c) Alternative dispute resolution may work in simple cases, but does not work for complex disputes.

(d) Alternative dispute resolution can be as expensive as, or even more expensive than, litigation, and is a waste of time and money.

All of the impediments, misconceptions and barriers must be addressed when implementing an ADR program, if it is to be successful.

d. **What are the advantages and disadvantages from utilizing alternative dispute resolution in the settlement of Federal Government contract disputes?**

The numerous advantages identified include settling a dispute in less time, which will have a direct impact on costs and on the amount of disruption placed on the organization. The parties have the ability to actively participate in the resolution, to include the selection of a third party neutral if used. By being actively involved, the parties are able to control the process, establish their own rules and time schedules, and control their own destiny. A final advantage

is that the majority of the ADR methods are confidential, if the parties decide it to be, which helps in maintaining good public image and not "airing dirty laundry" in public.

Alternative dispute resolution has some disadvantages. The first is that ADR procedures do not have to follow precedent. In addition, because ADR is not an authorized sworn court, the decisions rendered do no set precedent for follow on cases. Another disadvantage is that ADR does not guarantee a settlement or resolution to the dispute and may end up being an added step prior to litigation.

C. RECOMMENDATIONS

The following recommendations are offered by the researcher and are based on the researcher's assessment of the literature and the interviews conducted.

Recommendation #1: With the increasing use of alternative methods for resolving disputes, there must be an honest evaluation comparing these methods not only against traditional litigation, but against one another. Evaluation can serve a number of different purposes. The evaluation can determine whether an ADR program is worth continuing and how much funding it should receive. It might show which methods are more cost effective or more beneficial. In addition, the evaluation may provide insight as to how to make the program better. Only after an in-depth thorough analysis will we be

able to determine if ADR is meeting its stated goals and objectives.

A concerted effort must be made in tracking information and statistics that will be meaningful in the evaluation of ADR techniques. Successful and unsuccessful ADR ventures should be monitored. The Administrative Dispute Resolution Act, section 592, authorizes the Administrative Conference of the United States to collect data on agency ADR proceedings and requires agencies to provide to the ACUS requested data on their ADR proceedings.[Ref. 116] Data collected to date have been sparse or nonexistent. The following is a partial list of information and statistics that would prove beneficial in evaluating ADR and should be kept:[Ref. 117]

1. Type of client.
2. Date of the first signs of the dispute.
3. Facts of the dispute.
4. Contract language including/not including ADR.
5. ADR method chosen and why.
6. Date the process was initiated.
7. Status of the claim when ADR was initiated.
8. Date the process was accepted or rejected.
9. Demand or offers before ADR.
10. Demands at ADR.
11. Date, type, and amount of settlement.
12. Amount paid for expenses; legal, mediator, or other.

13. Savings: damages/expenses.

14. If not settled, why?

15. Counsel involved or not involved in the process.

16. Background of neutral third party if used.

Recommendation #2: The Administrative Dispute Resolution Act needs to have continued authorization and appropriations. With the authorization expiring October 1, 1995, action must be taken now to ensure reauthorization.[Ref. 118] The provisions of the Act need to be reemphasized to all agencies throughout the Federal Government. The Act authorizes, by statute, the use of any and all methods of ADR. There is no excuse for not using ADR methods wherever and whenever appropriate.

Recommendation #3: Responsibility and authority for implementing ADR must be placed at the lowest level possible, i.e., the contracting officer level. Start the ADR process at the earliest signs of a dispute or claim. Begin when positions haven't hardened and emotions have taken over. The contracting officer must be empowered to make decisions as to the use of ADR, without the frustration, fear, and risk of being second guessed or chastised by superiors, inspectors, or Congress. This is not meant to say that there should be no oversight, but the agency policy must be made clear that senior agency officials will support settlements that were

reached by properly selected ADR methods. An American Bar Association report states:

> The contracting officer should have the authority to fulfill the mission of contracting in the most efficient and economical way, while assuring that the spirit and intent of the law is faithfully implemented.... Rather than stimulating efficiency, initiative and imagination, the current DoD acquisition environment blankets the contracting officer with oversight, laws and regulations. The magnitude of new laws and regulations has thrown a shadow on the contracting officer's authority, and the pace of change is too swift to be effectively absorbed and implemented.... In this atmosphere of intense oversight and close regulation, correct procedure becomes more important than substantive success in acquisition. Contracting officers can be so confined by compliance with regulations ... that they are afraid to express ideas and afraid to act beyond their familiar routines.... Constant change in laws and regulations serve to neutralize the value of past training in contracting procedure.[Ref. 119]

Recommendation #4: Education and training in the use of ADR methods must be continued both in the public and private sectors. The existence of the different types of ADR methods must be made known. The literature on these different methods of ADR has been increasing in recent years as more and more people climb aboard the ADR movement. However, the specific benefits, advantages, disadvantages, and costs associated with each method of ADR still must be identified and published.

D. RECOMMENDATIONS FOR FURTHER RESEARCH

The following are two recommendations for further research in ADR.

1. The development of a taxonomy of dispute resolution methods for the assignment of disputes. Identifying what the "best" type of ADR method is "best" for a specific type of dispute. This would involve the identification of the characteristics of each ADR method, the identification of key characteristics of disputes, and then matching the appropriate ADR method to the appropriate dispute.

2. Development of a cost/benefit analysis model for the various ADR methods. This would allow a comparison of costs and benefits across the ADR spectrum and would aid in the selection of an ADR method to be used.

E. CONCLUSION

Alternative dispute resolution techniques offer contracting officers the opportunity to resolve disputes without having to resort to expensive and lengthy litigation. Disputes inevitably arise because elements such as contracts, specifications, and personnel are not perfect. When a dispute does occur, internal negotiations should be attempted first. If this process does not induce an acceptable settlement, then arbitration, mediation, or other forms of ADR should be tried before commencing with litigation.

Alternative dispute resolution is an approach to dispute resolution that may be less expensive and time-consuming, and is more likely to create "win-win" resolutions and settlements. However, a final determination as to whether ADR is a viable method for settling contract disputes in the Federal Government cannot be made until more empirical data have been established.

LIST OF REFERENCES

1. Barkai, John L. and Kassebaum, Gene, "Using Court-Annexed Arbitration to Reduce Litigant Costs and to Increase the Pace of Litigation," Pepperdine Law Review, Vol. 16, S43, 1989.

2. Nakamura, Robert T., Church Jr, Thomas W., and Cooper, Phillip J., "Environmental Dispute Resolution and Hazardous Waste Cleanups: A Cautionary Tale of Policy Implementation," Journal of Policy Analysis and Management, Vol. 10, No. 2, 1991.

3. Babbin, Jed L., and Cox, Garylee, "Saving time and Money - Arbitration and Mediation of Government Disputes Under the ADRA," Contract Management, Jan 1992.

4. Green, Allen B. and Jordan-Walker, Deneice, "Alternative Dispute Resolution in International Government Contracting: A Proposal," The George Washington Journal of International Law and Economics. Vol. 20, No. 3, 1987.

5. Crowell, Eldon H., and Garvin, Peter F., "Resolution of International Contract Disputes." National Contract Management Journal. Vol 17, Issue 1, Summer 1983.

6. U. S. Congress, Senate, Report of the Committee on the Judiciary, Contract Disputes Act of 1978. S. Rept. 1118, 95th Congress. 2d Session.

7. Babbin, Jed L., and Cox, Garylee, "Saving time and Money - Arbitration and Mediation of Government Disputes Under the ADRA," Contract Management, Jan 1992.

8. Auerbach, J., Justice Without Law?, New York, Oxford University Press, 1983.

9. Rudlin, D. Alan and Shebelskie, Michael R., "The Myths and Realities of Alternative Dispute Resolution Techniques," Eastern Mineral Law Institute, Vol. 9, 1988.

10. Kritzer, H.M., and Anderson, J. K., "The Arbitration Alternative: A comparative analysis of case processing time, disposition mode, and cost in the American Arbitration Association and the Courts," Justice System Journal, Vol. 8, No. 1, 1983.

11. Ogus, Anthony, Jones-Lee, Michael, Cole, William, and McCarthy, Peter, "Evaluating Alternative Dispute Resolution: Measuring the Impact of Family Conciliation on Costs," Modern Law Review, Vol. 53, January 1990.

12. Kritzer, H.M., and Anderson, J. K., "The Arbitration Alternative: A comparative analysis of case processing time, disposition mode, and cost in the American Arbitration Association and the Courts," Justice System Journal, Vol. 8, No. 1, 1983.

13. U. S. Congress. Senate. Report of the Committee on Governmental Affairs. Administrative Dispute Resolution Act. S. Rept. 543, 101st Congress, 2d Session.

14. Page, Reba and Lees, Frederick J., "Roles of Participants in Mini-Trial," Public Contract Law Journal.

15. Brittin, Alexander J., "Alternative Dispute Resolution in Government Contract Appeals," Public Contract Law Journal.

16. Dauer, "Litigation v. Alternative Dispute Resolution-Let's Talk About It," Colorado Law, Vol 17, 1988.

17. Edwards, Harry, T., "Alternative Dispute Resolution: Panacea or Anathema," Harvard Law Review, Vol. 99, No. 3, 1986.

18. Rudlin, D. Alan and Shebelskie, Michael R., "The Myths and Realities of Alternative Dispute Resolution Techniques," Eastern Mineral Law Institute, Vol. 9, 1988.

19. Crowell, Eldon H. and Pou Jr., Charles, "Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques," Maryland Law Review, Vol. 49, No. 1, 1990.

20. Armed Services Board of Contract Appeals, "Report of Transactions and Proceedings of the ASBCA," ASBCA, Falls Church, Va.

21. Green, Allen B. and Jordan-Walker, Deneice, "Alternative Dispute Resolution in International Government Contracting: A Proposal," The George Washington Journal of International Law and Economics. Vol. 20, No. 3, 1987.

22. Page, Reba and Lees, Frederick J., "Roles of Participants in Mini-Trial," Public Contract Law Journal.

23. Breger, Marshall J., Statement of, "Testimony Before the Senate Judiciary Committee on the Administrative Dispute Resolution Act of 1988," The Arbitration Journal, Vol. 43, No. 3, September 1988. Reference to T. Basler et al., ed., The Collected Works of Abraham Lincoln, Volume II, (1953-1955) at 81-82.

24. Hester, W.T., Kuprenas, J.A. and Thomas, H.R., "Arbitration: A Look at its Form and Performance," Journal of Construction Engineering and Management, ASCE, 113(3), 1987.

25. Martin Esq., H. Fielder, "Alternative Dispute Resolution For Architects and Engineers," Presentation 28th Annual Meeting of Invited Attorneys, Baltimore, Maryland, June 28, 1989.

26. Harter, Philip J., "Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship," Villanova Law Review, Vol. 29, No. 6, 1983-84.

27. Cullen, Kathleen M., "ADR: Shaking Hands Instead of Shackling Them," Risk Management, June 1987.

28. Stipanowich, Thomas J., "Rethinking American Arbitration," Indiana Law Journal, Vol. 63, No. 3, 1987-1988.

29. Marcus, Stephen D., "Goals and Objectives for Alternative Dispute Resolution," Journal of Performance of Constructed Facilities, Vol. 2, No. 1, Feb. 1988.

30. Goldberg, S. B., Green, E. D. and Sander, F. E. A., Dispute Resolution, Little Brown Company, Boston, Mass., 1985.

31. Administrative Conference of the United States, Office of the Chairman, Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists, ACUS, Washington D.C., Feb 1992.

32. Brittin, Alexander J., "Alternative Dispute Resolution in Government Contract Appeals," Public Contract Law Journal, Vol. 19, No. 2, Winter 1990.

33. Shedd Jr., Joel P., "Disputes and Appeals: The Armed Services Board of Contract Appeals," Law and Contemporary Problems, Vol. 29, 1964.

34. Crowell, Eldon H. and Pou Jr., Charles, "Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques," Maryland Law Review, Vol. 49, No. 1, 1990.

35. Shedd Jr., Joel P., "Disputes and Appeals: The Armed Services Board of Contract Appeals," Law and Contemporary Problems, Vol. 29, 1964.

36. Crowell, E.H., et al, "Applying Alternative Dispute Resolution to Contract Claims," American University Administrative Law Journal, 1987.

37. Crowell, Eldon H. and Pou Jr., Charles, "Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques," Maryland Law Review, Vol. 49, No. 1, 1990.

38. Crowell, Eldon H. and Pou Jr., Charles, "Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques," Maryland Law Review, Vol. 49, No. 1, 1990.

39. U. S. Congress, Senate, Report of the Committee on Governmental Affairs and the Committee on the Judiciary, Contract Disputes Act of 1978, S. Rept. 1118, 95th Congress, 2d Session.

40. U. S. Congress, Senate, Report of the Committee on Governmental Affairs and the Committee on the Judiciary, Contract Disputes Act of 1978, S. Rept. 1118, 95th Congress, 2d Session.

41. Federal Acquisition Regulation, Commerce Clearing House Inc., Chicago, Illinois, 1992.

42. Armed Services Board of Contract Appeals, "Report of Transactions and Proceedings of the ASBCA," ASBCA, Falls Church, Va.

43. U. S. Congress, Senate, Report of the Committee on Governmental Affairs. Administrative Dispute Resolution Act, S. Rept. 543, 101st Congress, 2d Session.

44. U. S. Congress, Senate, Report of the Committee on Governmental Affairs. Administrative Dispute Resolution Act, S. Rept. 543, 101st Congress, 2d Session.

45. Brittin, Alexander J., "Alternative Dispute Resolution in Government Contract Appeals," Public Contract Law Journal, Vol. 19, No. 2, Winter 1990.

46. Parrette, Bernard V., "The Contract Disputes Act and the Administrative Dispute Resolution Act: A Richness of Remedies, Finally Ready for Trial?" Public Contract Law Journal, Vol. 20, No. 3, Spring 1991.

47. Arnavas, Donald P. and Ruberry, William J., Government Contract Guidebook, Federal Publications Inc., Washington D.C., 1987.

48. Administrative Conference of the United States, Office of the Chairman, Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists, ACUS, Washington D.C., Feb 1992.

49. Parrette, Bernard V., "The Contract Disputes Act and the Administrative Dispute Resolution Act: A Richness of Remedies, Finally Ready for Trial?" Public Contract Law Journal, Vol. 20, No. 3, Spring 1991.

50. Babbin, Jed and Cox, Garylee, "Saving time and Money - Arbitration and Mediation of Government Disputes Under the ADRA," Contract Management, Jan 1992.

51. Raven, Robert D., "Alternative Dispute Resolution: Expanding Opportunities," The Arbitration Journal, Vol. 43, No. 2, June 1988.

52. Brittin, Alexander J., "Alternative Dispute Resolution in Government Contract Appeals," Public Contract Law Journal, Vol. 19, No. 2, Winter 1990.

53. Behre, Kirby, "Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?" Public Contract Law Journal.

54. Behre, Kirby, "Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?" Public Contract Law Journal, Vol. 16, No. 1, Aug 1986.

55. Crowell, Eldon H. and Garvin, Peter F., "Resolution of International Contract Disputes." National Contract Management Journal. Vol. 17, No. 1, Summer 1983.

56. Behre, Kirby, "Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?" Public Contract Law Journal, Vol. 16, No. 1, Aug 1986.

57. Crowell, Eldon H. and Garvin, Peter F., "Resolution of International Contract Disputes." National Contract Management Journal. Vol. 17, No. 1, Summer 1983.

58. Stipanowich, Thomas J., "Rethinking American Arbitration," Indiana Law Journal, Vol. 63, No. 3, 1987-1988.

59. Crowell, Eldon H. and Garvin, Peter F., "Resolution of International Contract Disputes." National Contract Management Journal. Vol. 17, No. 1, Summer 1983.

60. Guill, James L. and Slavin Jr., Edward A., "Rush to Unfairness: The Downside of ADR," The Judges Journal, Summer 1989.

61. Behre, Kirby, "Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?" Public Contract Law Journal, Vol. 16, No. 1, Aug 1986.

62. Crowell, Eldon H. and Pou Jr., Charles, "Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques," Maryland Law Review, Vol. 49, No. 1, 1990.

63. Harter, Philip J., "Points on a Continuum: Dispute Resolution Procedures and the Administrative Process," The Administrative Law Journal, Vol. 1, No. 1, Summer 1987.

64. Goldberg, S.B., Green, E.D., and Sander, F.E.A., Dispute Resolution, Little Brown Company, Boston, Mass., 1985.

65. Jacobs, Deborah L., "Keeping it Out of Court," Management Review, Vol 81, No. 10, October 1992.

66. Allison, John R., "Five Ways to Keep Disputes Out of Court," Harvard Business Review, Vol 68, No. 1, Jan-Feb 1990.

67. NCMA Educational Products Department, "Avoiding Litigation: Alternative Methods of Resolving Contract Disputes," Topical Issues In Procurement Series, National Contract Management Association, Vol. 1, No. 4, January 1990.

68. U.S. Department of Justice, Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts, August 1992.

69. Day, Karen K., "An Implementation Guide for Settling Contract Disputes within DOD using Alternative Disputes Resolution Methods," Master Thesis, Naval Postgraduate School, 1989.

70. U.S. Department of Justice, Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts, August 1992.

71. Administrative Conference of the United States, Office of the Chairman, Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists, ACUS, Washington D.C., Feb 1992.

72. Jacobs, Deborah L., "Keeping it Out of Court," Management Review, Vol. 81, No. 10, Oct 1992.

73. American Bar Association, Standing Committee on Dispute Resolution, Alternative Dispute Resolution: An ADR Primer, American Bar Association, Washington, D.C., August 1989.

74. Goldberg, S. B., Green, E. D. and Sander, F. E. A., Dispute Resolution, Little Brown Company, Boston, Mass., 1985.

75. Fisher, Roger and Ury, William, Getting to Yes, Negotiating Agreement Without Giving In, Houghton Mifflin, Boston, 1981.

76. American Bar Association, Standing Committee on Dispute Resolution, Alternative Dispute Resolution: An ADR Primer, American Bar Association, Washington, D.C., August 1989.

77. National Institute for Dispute Resolution, "Paths to Justice: Major Public Policy Issues of Dispute Resolution," Report of the Ad Hoc Panel on Dispute Resolution and Public Policy, Oct. 1983.

78. American Bar Association, Standing Committee on Dispute Resolution, Alternative Dispute Resolution: An ADR Primer, American Bar Association, Washington, D.C., August 1989.

79. Day, Karen K., "An Implementation Guide for Settling Contract Disputes within DOD using Alternative Disputes Resolution Methods," Master Thesis, Naval Postgraduate School, 1989.

80. Goldberg, S. B., Green, E. D. and Sander, F. E. A., Dispute Resolution, Little Brown Company, Boston, Mass., 1985.

81. Neslund, Nancy, "Dispute Resolution: A Matrix of Mechanisms," Journal of Dispute Resolution, Vol. 1990, No. 2, 1990.

82. Rudlin, D. Alan and Shebelskie, Michael R., "The Myths and Realities of Alternative Dispute Resolution Techniques," Eastern Mineral Law Institute, Vol. 9, 1988.

83. Administrative Conference of the United States, Office of the Chairman, Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists, ACUS, Washington D.C., Feb 1992.

84. American Bar Association, Standing Committee on Dispute Resolution, Alternative Dispute Resolution: An ADR Primer, American Bar Association, Washington, D.C., August 1989.

85. U.S. Department of Justice, Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts, August 1992.

86. Neslund, Nancy, "Dispute Resolution: A Matrix of Mechanisms," Journal of Dispute Resolution, Vol. 1990, No. 2, 1990.

87. American Bar Association, Standing Committee on Dispute Resolution, Alternative Dispute Resolution: An ADR Primer, American Bar Association, Washington, D.C., August 1989.

88. Administrative Conference of the United States, Office of the Chairman, Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists, ACUS, Washington D.C., Feb 1992.

89. Brittin, Alexander J., "Alternative Dispute Resolution in Government Contract Appeals," Public Contract Law Journal, Vol. 19, No. 2, Winter 1990.

90. Rudlin, D. Alan and Shebelskie, Michael R., "The Myths and Realities of Alternative Dispute Resolution Techniques," Eastern Mineral Law Institute, Vol. 9, 1988.

91. Jacobs, Deborah L., "Keeping it Out of Court," Management Review, Vol. 81, No. 10, Oct 1992.

92. Henry, James F., "Minitrials: Scaling Down the Costs of Justice to Business," Across the Board, Vol 21, No. 10, October 1984.

93. Green, Allen B. and Jordan-Walker, Deneice, "Alternative Dispute Resolution in International Government Contracting: A Proposal," The George Washington Journal of International Law and Economics. Vol. 20, No. 3, 1987.

94. Jacobs, Deborah L., "Keeping it Out of Court," Management Review, Vol. 81, No. 10, Oct 1992.

95. Enslen, Richard A., "ADR: Another Acronym, or a Viable Alternative to the High Cost of Litigation and Crowded Court Dockets? The Debate Commences," New Mexico Law Review, Vol. 18, Winter 1988.

96. Rudlin, D. Alan and Shebelskie, Michael R., "The Myths and Realities of Alternative Dispute Resolution Techniques," Eastern Mineral Law Institute, Vol. 9, 1988.

97. American Bar Association, Standing Committee on Dispute Resolution, Alternative Dispute Resolution: An ADR Primer, American Bar Association, Washington, D.C., August 1989.

98. Rudlin, D. Alan and Shebelskie, Michael R., "The Myths and Realities of Alternative Dispute Resolution Techniques," Eastern Mineral Law Institute, Vol. 9, 1988.

99. Rudlin, D. Alan and Shebelskie, Michael R., "The Myths and Realities of Alternative Dispute Resolution Techniques," Eastern Mineral Law Institute, Vol. 9, 1988.

100. Kritzer, H.M., and Anderson, J. K., "The Arbitration Alternative: A comparative analysis of case processing time, disposition mode, and cost in the American Arbitration Association and the Courts," Justice System Journal, Vol. 8, No. 1, 1983.

101. Barkai, John L. and Kassebaum, Gene, "Using Court-Annexed Arbitration to Reduce Litigant Costs and to Increase the Pace of Litigation," Pepperdine Law Review, Vol. 16, S43, 1989.

102. Lind, E. and Shepard, J. "Evaluation of Court Annexed Arbitration in Three Federal District Courts," Federal Judicial Center, 1983.

103. Riggs, Leland S. and Schenk, Robert M., "Arbitration: Survey on User Satisfaction," Journal of Performance of Constructed Facilities, Vol. 4, No. 2, May 1990.

104. Dayton, Kim, "The Myth of Alternative Dispute Resolution in the Federal Courts," Iowa Law Review, Vol.76, 1991.

105. Tyler, Tom R., "The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities," Denver University Law Review, Vol. 66, No. 3, 1989.

106. McEwen, and Maiman, "Small Claims Mediation in Maine: A Empirical Assessment," 33 Maine Law Review, 237, 246-248, 1981.

107. Levin, "Early-Neutral Evaluation: A Follow-up Report," 70 Judicature, 236, 1987.

108. Rudlin, D. Alan and Shebelskie, Michael R., "The Myths and Realities of Alternative Dispute Resolution Techniques," Eastern Mineral Law Institute, Vol. 9, 1988.

109. Green, Marks, and Olsen, "Settling Large Case Litigation: An Alternative Approach," 11 Loy. L. A. L. Rev., 493, 499, 1978.

110. Pou, C, Federal Agency Use of 'ADR': the Experience to Date, Center for Public Resources, 1987.

111. Lewin, "New Alternatives to Litigation," New York Times, November 1, 1982.

112. Crowell, Eldon H. and Pou Jr., Charles, "Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques," Maryland Law Review, Vol. 49, No. 1, 1990.

113. Posner, Richard, "The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations," University of Chicago Law Review, Vol. 53, 1986.

114. Federal Acquisition Regulation, Commerce Clearing House Inc., Chicago, Illinois, 1992. Part 52.233-1(h).

115. Babbin, Jed L., and Cox, Garylee, "Saving time and Money - Arbitration and Mediation of Government Disputes Under the ADRA," Contract Management, Jan 1992.

116. U. S. Congress, Senate, Report of the Committee on Governmental Affairs. Administrative Dispute Resolution Act, S. Rept. 543, 101st Congress, 2d Session.

117. Nelson, Sandra L., "ADR - A Different Ritual: An Insurer's Perspective," Journal of Performance of Constructed Facilities, Vol. 1, No. 4, Nov. 1987.

118. Arnavas, Donald P. and Ruberry, William J., Government Contract Guidebook, Federal Publications Inc., Washington D.C., 1987.

119. Crowell, Eldon H. and Pou Jr., Charles, "Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques," Maryland Law Review, Vol. 49, No. 1, 1990.

BIBLIOGRAPHY

AAA Task Force Reports, "Reports of the AAA Task Force on Law and Business Schools," The Arbitration Journal, Vol. 40, No. 3, September 1985.

Administrative Conference of the United States Recommendation 87-11, Alternatives for Resolving Government Contract Disputes. 1 CFR 306.87-11.

Administrative Conference of the United States Recommendation 86-3, Agencies Use of Alternative Means of Dispute Resolution, Adopted June 20, 1986, 1 CFR 305.886-3.

Administrative Conference of the United States, ACUS Office of the Chairman Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution, ACUS, Washington D.C., 1987.

Administrative Conference of the United States, Office of the Chairman, "An Introduction to ADR and the Roster of Neutrals," Resource Papers in Administrative Law.

Administrative Conference of the United States, Office of the Chairman, Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists, ACUS, Washington D.C., Feb 1992.

Alfini, James J., "Alternative Dispute Resolution and the Courts: an Introduction," Judicature, Vol. 69, No. 5, Feb-Mar 1986.

Allison, John R., "Five Ways to Keep Disputes Out of Court," Harvard Business Review, Vol. 68, No. 1, Jan-Feb 1990.

American Bar Association, "Report of the Subcommittee on Alternative Means of Dispute Resolution," Section of Litigation, Committee on Corporate Counsel, 1986.

American Bar Association, Standing Committee on Dispute Resolution, Alternative Dispute Resolution: An ADR Primer, American Bar Association, Washington, D.C., August 1989.

Anderson, John C., "The Impact of Arbitration: A Methodological Assessment," Industrial Relations, Vol. 20, No. 2, Spring 1981.

"Arbitration: A Viable Alternative?" Fordham University Law Journal, Vol. 53, 1974.

Armed Services Board of Contract Appeals, "Report of Transactions and Proceedings of the ASBCA," ASBCA, Falls Church, Va.

Arnavas, Donald, P., "Five Ways to the Merits: Some Suggestions on Seeking Expeditious Resolution of Contract Dispute Litigation," National Contract Management Association Journal, Vol. 19, No. 2, Winter 1985.

Arnavas, Donald, P., "ADR: An Alternative that Might Work," Contract Management, December 1987.

Arnavas, Donald P. and Ruberry, William J., Government Contract Guidebook, Federal Publications Inc., Washington D.C., 1987.

Auerbach, J., Justice Without Law?, New York, Oxford University Press, 1983.

Babbin, Jed L., and Cox, Garylee, "Saving time and Money - Arbitration and Mediation of Government Disputes Under the ADRA," Contract Management, Jan 1992.

Barkai, John L. and Kassebaum, Gene, "Using Court-Annexed Arbitration to Reduce Litigant Costs and to Increase the Pace of Litigation," Pepperdine Law Review, Vol. 16, S43, 1989.

Bednar, Richard J., "Government Contracting Officers Should make greater use of Alternative Disputes Resolution Techniques," Challenge Monograph Series, Vol. 4, National Contract Management Association, Vienna, Va., 1990.

Behre, Kirby, "Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?" Public Contract Law Journal, Vol. 16, No. 1, Aug 1986.

Blomberg, Thomas G., Heald Gary R., and Ezell, Mark, "Diversion and Net Widening: A Cost-Savings Assessment," Evaluation Review, Vol. 10, No. 1, February 1986.

Breger, Marshall J., Statement of, "Testimony Before the Senate Judiciary Committee on the Administrative Dispute Resolution Act of 1988," The Arbitration Journal, Vol. 43, No. 3, September 1988.

Brittin, Alexander J., "Alternative Dispute Resolution in Government Contract Appeals," Public Contract Law Journal, Vol. 19, No. 2, Winter 1990.

Bureau of National Affairs, "Government Agencies, Courts using Minitrial Procedures to Resolve Contract Disputes," Federal Contract Reports, Bureau of National Affairs, Inc., Vol. 44, 589, Sep 23, 1985.

Bureau of National Affairs, "Drop in Minitrials Analyzed at ABA Meeting," Federal Contract Reports, Bureau of National Affairs, Inc., Vol. 46, 352, Aug 25, 1986.

Chabotar, Kent John, Wylie, Kimberly, and Floyd, Kathleen, "Analyzing Costs in the Courts," Issues and Practices, U.S. Department of Justice, National Institute of Justice, Office of Communication and Research Utilization, U.S. Government Printing Office, Washington, D.C., January 1987.

Committee on Judiciary, 100th Congress, 2d session, Report to accompany HR 4807 - Court Reform and Access to Justice Act of 1988 at 30-31.

Cooley, John W., "Arbitration vs. Mediation- Explaining the Differences," Judicature, Vol. 69, No. 5, 1986.

Coulson, Robert, "Business Arbitration: What you need to know," American Arbitration Association, 1980.

Coulson, Robert, "Business Mediation: What you need to know," American Arbitration Association, September 1991.

Coulson, Robert, "Who Pays for Win-Win Solutions?" New York Law Journal, March 5, 1992.

Coulson, Robert, Statement of, "Testimony Before the Senate Judiciary Committee on the Administrative Dispute Resolution Act of 1988," The Arbitration Journal, Vol. 43, No. 3, September 1988.

Crowell, Eldon H., "Arbitrating Commercial Disputes: More Problems than Promise," National Contract Management Journal, Vol. 15(1), Summer 1981.

Crowell, Eldon H. and Garvin, Peter F., "Resolution of International Contract Disputes." National Contract Management Journal. Vol. 17, No. 1, Summer 1983.

Crowell, Eldon H. and Pou Jr., Charles, "Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement

Litigation with Alternative Dispute Resolution Techniques," Maryland Law Review, Vol. 49, No. 1, 1990.

Crowell, E.H., et al, "Applying Alternative Dispute Resolution to Contract Claims," American University Administrative Law Journal, 1987.

Cullen, Kathleen M., "ADR: Shaking Hands Instead of Shackling Them," Risk Management, June 1987.

Dauer, "Litigation v. Alternative Dispute Resolution- Let's Talk About It," Colorado Law, Vol 17, 1988.

Day, Karen K., "An Implementation Guide for Settling Contract Disputes within DoD using Alternative Disputes Resolution Methods," Master Thesis, Naval Postgraduate School, 1989.

Dayton, Kim, "The Myth of Alternative Dispute Resolution in the Federal Courts," Iowa Law Review, Vol.76, 1991.
Department of Defense FAR Supplement, Commerce Clearing House Inc., Chicago, Illinois, 1992.

Dunlop, John T., "The Negotiations Alternative in Dispute Resolution," Villanova Law Review, Vol. 29, No. 6, 1983-4.

Edelman, Lester and Carr, Frank, "The Mini-Trial: An Alternative Dispute Resolution Procedure," The Arbitration Journal, Vol. 42, No. 1, March 1987.

Edelman, Lester, Statement of, "Testimony Before the Senate Judiciary Committee on the Administrative Dispute Resolution Act of 1988," The Arbitration Journal, Vol. 43, No. 3, September 1988.

Edwards, Harry, T., "Alternative Dispute Resolution: Panacea or Anathema," Harvard Law Review, Vol. 99, No. 3, 1986.

Eisele, G. Thomas, "The case against mandatory court-annexed ADR programs," Judicature, Vol. 75, No. 1, June-July, 1991.

Endispute, Making Alternative Dispute Resolution Work: A Guide for Practicing Lawyers, Endispute Inc., 1987.

Engelmann, Kathleen and Cornell, Bradford, "Measuring the Cost of Corporate Litigation: Five Case Studies," Journal of Legal Studies, Vol. XVII (2), June 1988.

Enslen, Richard A., "ADR: Another Acronym, or a Viable Alternative to the High Cost of Litigation and Crowded Court Dockets? The Debate Commences," New Mexico Law Review, Vol. 18, Winter 1988.

Esser, John P., "Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know," Denver University Law Review, Vol. 66, No. 3, 1989.

Executive Order No. 12778, 56 Federal Register 55, 195, October 23, 1991.

Farber, Henry S., Neale, Margaret A., and Bazerman, Max H., "The Role of Arbitration Costs and Risk Aversion in Dispute Outcomes," Industrial Relations, Vol. 29, No. 3, Fall 1990.

Federal Acquisition Regulation, Commerce Clearing House Inc., Chicago, Illinois, 1992.

Felsen, Michael D., "Mediation the Worked: Role of OSHA in L'Ambiance Plaza Settlement," Journal of Performance of Constructed Facilities, Vol. 3, No. 4, November 1989.

Feuille, Peter, "Selected Benefits and Costs of Compulsory Arbitration," Industrial and Labor Relations Review, Vol. 33, No. 1, Oct. 1979.

Fisher, Roger and Ury, William, Getting to Yes, Negotiating Agreement Without Giving In, Houghton Mifflin, Boston, 1981.

Fox, Lawrence J., "Litigation in 2050: A Backward-Forward Topsy-Turvy Look at Dispute Resolutions," Fordham Law Review, Vol. 60, 1991.

Fredlund, April A., "Just, Speedy, and Inexpensive or Just Speedy and Inexpensive? Mandatory Alternative Dispute Resolution in the Western District of Missouri," Journal of Dispute Resolution, Vol. 1992, No. 1, 1992.

Fugh, John L. and Nagle, James F., "The Disputes Process- A Management Tool" Advice for Contracting Personnel," The Army Lawyer, October 1989.

Galanter, Marc, "Reading the Landscape of Disputes: What We Know and Don't Know (and think we know) About Our Allegedly Contentious and Litigious Society," UCLA Law Review, Vol. 31, No. 4, 1983.

Galanter, Marc, "Compared to What? Assessing the Quality of Dispute Processing," Denver University Law Review, Vol. 66, No. 3, 1989.

Galen, Michele, and Cuneo, Alice Z., "Have Business Card, Will Mediate," Business Week, Dec. 7, 1992.

Gellhorn, Walter, Statement of, "Testimony Before the Senate Judiciary Committee on the Administrative Dispute Resolution Act of 1988," The Arbitration Journal, Vol. 43, No. 3, September 1988.

Gerhart, Paul F. and Drotning, John E., "Do Uncertain Cost/Benefit Estimates Prolong Public-Sector Disputes?" Monthly Labor Review, Vol. 103, No. 9, Sep. 1980.

Gnaedinger, John P., "Mediation/Arbitration: Alternative Dispute Resolution Process," Journal of Performance of Constructed Facilities, Vol. 1, No. 3 Aug. 1987.

Goldberg, S. B., Green, E. D. and Sander, F. E. A., Dispute Resolution, Little Brown Company, Boston, Mass., 1985.

Goodkind, Donald R., "Mediation of Construction Disputes," Journal of Performance of Constructed Facilities, Vol. 2, No. 1 Feb. 1988.

Green, Allen B. and Jordan-Walker, Deneice, "Alternative Dispute Resolution in International Government Contracting: A Proposal," The George Washington Journal of International Law and Economics. Vol. 20, No. 3, 1987.

Green, Marks, and Olsen, "Settling Large Case Litigation: An Alternative Approach," 11 Loy. L. A. L. Rev., 493, 499, 1978.

Guill, James L. and Slavin Jr., Edward A., "Rush to Unfairness: The Downside of ADR," The Judges Journal, Summer 1989.

Hardy, Timothy S. and Cargill, R. Mason, "Resolving Government Contract Disputes: Why Not Arbitrate," Federal Bar Journal, Vol. 34, 1975.

Harter, Philip J., "Points on a Continuum: Dispute Resolution Procedures and the Administrative Process," The Administrative Law Journal, Vol. 1, No. 1, Summer 1987.

Harter, Philip J., "Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship," Villanova Law Review, Vol. 29, No. 6, 1983-84.

Hearn, Emmett E., Federal Acquisition and Contract Management, Hearn Associates, Los Altos Ca., 1990.

Henry, James F., "Mini-Trials: Scaling down the Costs of Justice to Business," Across the Board, Vol. 21, No. 10, Oct 1984.

Henry, James F., "ADR and Construction Disputes: The Minitrial," Journal of Performance of Constructed Facilities, Vol. 2, No. 1, Feb. 1988.

Hensler, Deborah R., "Science in the Court: Is There a Role for Alternative Dispute Resolution?" Law and Contemporary Problems, Vol. 54, No. 3, Summer 1991.

Herzel, L., and Salpeter, A.N., "Alternative Dispute Resolution may have limits," Legal Times, Vol. 9, Dec. 23, 1985.

Hester, W.T., Kuprenas, J.A. and Thomas, H.R., "Arbitration: A Look at its Form and Performance," Journal of Construction Engineering and Management, ASCE, 113(3), 1987.

Hinton, Stan, "Reducing the Waste and Expense of Litigation by Retaining Control of Your Dispute," National Contract Management Journal, Vol. 25, No. 1, 1993.

Hoellering, Michael F., "Alternative Dispute Resolution," Arbitration and the Law, American Arbitration Association, General Counsel's Annual Report, 1989-1990.

Houck, Stephen D., "Complex Commercial Arbitration: Designing A Process to Suit," The Arbitration Journal, Vol. 43, No. 3, Sep 1988.

Jacobs, Deborah L., "Keeping it Out of Court," Management Review, Vol. 81, No. 10, Oct 1992.

Kagan, Robert A., "Adversarial Legalism and American Government," Journal of Policy Analysis and Management, Vol. 10, No. 3, Summer 1991.

Kelman, Steven, "Adversary and Cooperationist Institutions for Conflict Resolution in Public Policymaking," Journal of Policy Analysis and Management, Vol. 11, No. 2, Spring 1992.

Knight, H. Warren, "Use of Private Judges in Alternative Dispute Resolution," Journal of Performance of Constructed Facilities, Vol. 2, No. 1, Feb. 1988.

Kressel, Kenneth, Pruitt, Dean G., and Associates, Mediation Research, Jossey-Bass Inc, Publishers, San Francisco, Ca., 1989.

Kritzer, H.M., and Anderson, J. K., "The Arbitration Alternative: A comparative analysis of case processing time, disposition mode, and cost in the American Arbitration

Association and the Courts," Justice System Journal, Vol. 8, No. 1, 1983.

Korthals-Altes, Barbara Z., The Applicability of Alternative Dispute Resolution Techniques to Government Defense Contract Disputes, Endispute Inc., May 1986.

Lambros, Thomas D., "Summary Jury Trials," Litigation, Vol. 13, No. 1, 1986.

Landes, William M., "An Economic Analysis of the Courts," Journal of Law and Economics, Vol. 14, No. 1, April 1971.

Levin, "Early-Neutral Evaluation: A Follow-up Report," 70 Judicature, 236, 1987.

Lewin, "New Alternatives to Litigation," New York Times, November 1, 1982.

Lind, E. and Shepard, J. "Evaluation of Court Annexed Arbitration in Three Federal District Courts," Federal Judicial Center, 1983.

Lloyd, Robert E., "Alternative Dispute Resolution in Federal Contracts: The Irony of Process," Policy Studies Journal, Vol. 16, No. 3, Spring 1988.

MacCrate, Robert, "The Legal Community's Responsibilities for Dispute Resolution," The Arbitration Journal, Vol. 43, No. 3, Sep 1988.

Marcus, Stephen D., "Goals and Objectives for Alternative Dispute Resolution," Journal of Performance of Constructed Facilities, Vol. 2, No. 1, Feb. 1988.

Martin Esq., H. Fielder, "Alternative Dispute Resolution For Architects and Engineers," Presentation 28th Annual Meeting of Invited Attorneys, Baltimore, Maryland, June 28, 1989.

McEwen, and Maiman, "Small Claims Mediation in Maine: A Empirical Assessment," 33 Maine LAw Review, 237, 246-248, 1981.

McGillis, Daniel, Community Dispute Resolution Programs and Public Policy, U.S. Department of Justice, National Institute of Justice, Office of Communications and Research Utilization, December 1986.

McKay, Robert B, "The Many Uses of Alternative Dispute Resolution," The Arbitration Journal, Vol. 40, No. 3, Sep 1985.

McMurray, Kay, Statement of, "Testimony Before the Senate Judiciary Committee on the Administrative Dispute Resolution Act of 1988," The Arbitration Journal, Vol. 43, No. 3, September 1988.

Meyerowitz, Steven A., "Keeping Conflict Out of Court," Business Marketing, Vol. 74, No. 2, Feb 1989.

Millhauser, Marguerite, "The Unspoken Resistance to Alternative Dispute Resolution," Negotiation Journal, Jan 1987.

Mittenthal, R., "Making Arbitration Work: Alternatives in Designing the Machinery," The Arbitration Journal, Vol. 36, No. 3, Sep 1981.

Morris, N.D., "Resolving Conflict Through Negotiating," Journal of Property Management, Vol. 47, March/April 1982.

Morton, Douglas, G., "Alternative Dispute Resolution in the Construction Process: A Course of Study for Construction Managers," Master Thesis, Georgia Institute of Technology, 1988.

Nakamura, Robert T., Church Jr, Thomas W., and Cooper, Phillip J., "Environmental Dispute Resolution and Hazardous Waste Cleanups: A Cautionary Tale of Policy Implementation," Journal of Policy Analysis and Management, Vol. 10, No. 2, 1991.

National Institute for Dispute Resolution, "Paths to Justice: Major Public Policy Issues of Dispute Resolution," Report of the Ad Hoc Panel on Dispute Resolution and Public Policy, Oct. 1983.

NCMA Educational Products Department, "Avoiding Litigation: Alternative Methods of Resolving Contract Disputes," Topical Issues In Procurement Series, National Contract Management Association, Vol. 1, No. 4, January 1990.

Nelson, Sandra L., "ADR - A Different Ritual: An Insurer's Perspective," Journal of Performance of Constructed Facilities, Vol. 1, No. 4, Nov. 1987.

Neslund, Nancy, "Dispute Resolution: A Matrix of Mechanisms," Journal of Dispute Resolution, Vol. 1990, No. 2, 1990.

Noam, Eli M., "A Cost-Benefit Model of Criminal Courts," Research in Law and Economics, Vol. 3, 1981.

Ogus, Anthony, Jones-Lee, Michael, Cole, William, and McCarthy, Peter, "Evaluating Alternative Dispute Resolution:

Measuring the Impact of Family Conciliation on Costs," Modern Law Review, Vol. 53, January 1990.

Page, Reba and Lees, Frederick J., "Roles of Participants in Mini-Trial," Public Contract Law Journal.

Parrette, Bernard V., "The Contract Disputes Act and the Administrative Dispute Resolution Act: A Richness of Remedies, Finally Ready for Trial?" Public Contract Law Journal, Vol. 20, No. 3, Spring 1991.

Pavalon, Eugene I., "ADR: Trial Lawyer's Perspective," Journal of Performance of Constructed Facilities, Vol. 1, No. 4, Nov. 1987.

Penna, Carolyn M., "Facts and Figures on the Caseload," New York Law Journal, May 11, 1990.

Perritt, Henry H., Jr. " 'And the Whole Earth Was of One Language'- A Broad View of Dispute Resolution," Villanova Law Review, Vol 29, 1983-1984.

Phillips, Barbara A. and Piazza, Anthony C., "The Role of Mediation in Public Interest Disputes," Hastings Law Journal, Vol. 34, 1983.

Poirot, James W., "Alternative Dispute Resolution Techniques: Design Professional's Perspective," Journal of Performance of Constructed Facilities, Vol. 1, No. 4, Nov. 1987.

Pollock, Ellen Joan, "Mediation Firms Alter the Legal Landscape," Wall Street Journal, March 22, 1993.

Posner, Richard, "The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations," University of Chicago Law Review, Vol. 53, 1986.

Pou, C, Federal Agency Use of 'ADR': the Experience to Date, Center for Public Resources, 1987.

Rakel Jr., Jerome, P., "Alternative Dispute Resolution for U.S. Navy Construction Contracts," Master Thesis, Georgia Institute of Technology.

Raven, Robert D., "Alternative Dispute Resolution: Expanding Opportunities," The Arbitration Journal, Vol. 43, No. 2, June 1988.

Report of the Acquisition Law Advisory Panel to the United States Congress, "Streamlining Defense Acquisition Laws," January 1993.

Report of the Federal Contract Claims and Remedies Committee on Ways of Expediting Appeals Before the Boards of Contract Appeals, Public Contract Law Journal, Vol. 16, No. 161, 1986.

Rich, Laurie A., and Jacobson, Kenneth, "Alternative Dispute Resolution- Opening Doors to Settlements," Chemical Week, August 14, 1985.

Riggs, Leland S. and Schenk, Robert M., "Arbitration: Survey on User Satisfaction," Journal of Performance of Constructed Facilities, Vol. 4, No. 2, May 1990.

Rudlin, D. Alan and Shebelskie, Michael R., "The Myths and Realities of Alternative Dispute Resolution Techniques," Eastern Mineral Law Institute, Vol. 9, 1988.

Salem, Richard A., "The Alternative Dispute Resolution Movement: An Overview," The Arbitration Journal, Vol. 40, No. 3, Sep. 1985.

Schiffer, Stuart E., Testimony before the Senate Administrative Law and Government Relations Subcommittee, Committee on the Judiciary, June 16, 1988.

Shedd Jr., Joel P., "Disputes and Appeals: The Armed Services Board of Contract Appeals," Law and Contemporary Problems, Vol. 29, 1964.

Siedel, George J., "Present and Future Directions in ADR Research," American Business Law Journal, Vol. 26, No. 3, 1988.

Smith, William, French, "Alternative Means of Dispute Resolution: Practices and Possibilities in the Federal Government," Missouri Journal of Dispute Resolution, Vol. 9, 1984.

Stanley, Preston O., "Cost Determination in Federal Collective Bargaining," Public Personnel Management, Vol. 5, No. 5, Sept./Oct. 1976.

Stipanowich, Thomas J., "Rethinking American Arbitration," Indiana Law Journal, Vol. 63, No. 3, 1987-1988.

Trowbridge, Alexander B, "Arbitration in our Litigious Society," The Arbitration Journal, Vol. 44, No. 3, Sep 1989.

Trubek, D. M. et al, "The Costs of Ordinary Litigation," UCLA Law Review, Vol. 31, No. 72, Oct 1983.

Tyler, Tom R., "The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities," Denver University Law Review, Vol. 66, No. 3, 1989.

U.S. Army Corps of Engineers, "Using ADR in the U.S. Army Corps of Engineers: A Framework for Decision Making," IWR Report, 89-ADR-1.

U. S. Congress, Senate, Report of the Committee on Governmental Affairs and the Committee on the Judiciary, Contract Disputes Act of 1978, S. Rept. 1118, 95th Congress, 2d Session.

U. S. Congress, Senate, Report of the Committee on Governmental Affairs. Administrative Dispute Resolution Act, S. Rept. 543, 101st Congress, 2d Session.

U. S. Department of the Interior, A Report on Development and Implementation of a Cost Savings Analysis Model for Processing Discrimination Complaints, June 18, 1990.

U.S. Department of Justice, Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts, August 1992.

Wall Jr., James A. and Lynn, Ann, "Mediation: A Current Review," Journal of Conflict Resolution, Vol. 37, No. 1, March 1993.

Weckstein, Donald T., "The Purposes of Dispute Resolution: Comparative Concepts of Justice," American Business Law Review, Vol. 26, 1988.

Weinstein, J. B., "Warning: Alternative dispute resolution may be dangerous to your health," Litigation, Vol. 12, No. 3, Spring 1986.

Wolf, Michael Allan, "Of Devils and Angels, Lawyers and Communities," a review of Justice without Law by Jerold S. Auerbach, Harvard Law Review, Vol. 97, 1983.

Wittman, Donald, "Dispute Resolution, Bargaining, and the Selection of Cases for Trial: A Study of the Generation of Biased and Unbiased Data," Journal of Legal Studies, Vol. XVII (2), June 1988.

Zeisel, Hans and Callahan, Thomas, "Split Trials and Time Saving: A Statistical Analysis," Harvard Law Review, Vol. 76, 1963.

APPENDIX A ADDITIONAL ADR MATERIALS

Adler, Lovaas and Milner, "The Ideologies of Mediation: The Movement's Own Story," 10 Law and Policy 317, 1988.

Alfini, "Summary Jury Trials in State and Federal Courts: An Introduction," 69 Judicature 252, 1986.

Allison, "Mediation and Legal Problems," 60 Florida Bar Journal 14, 1986.

"American Bar Association Standing Committee on Dispute Resolution Report to the House of Delegates," 12 Seton Hall Legislative Journal 65, 1988.

Awad, "On Behalf of Mandatory Arbitration," 58 Southern California Law Review 1039, 1984.

Bacigal, "An Empirical Case Study of Informal Alternative Dispute Resolution," 4 Ohio State Journal on Dispute Resolution 1, 1988.

Banks, "Alternative Dispute Resolution: A Return to Basics," 61 Australian Legislative Journal 569 , 1987.

Barton, "Common Law and its Substitutes: The Allocation of Social Problems to Alternative Decisional Institutions," 63 North Carolina Law Review 519, 1985.

Becker, "Conflict and Paradox in the New American Mediation Movement: Status Quo and Social Transformation," Journal of Dispute Resolution 109, 1986.

Bedikian, " Overview of Alternative Dispute Resolution Techniques," 56 Michigan Bar Journal 876, 1986.

Bedlin and Nejelski, "Unsettling Issues About Settling Civil Litigation: Examining 'Doomsday Machines,' 'Quick Looks' and Other Proposals," 8 Judicature 8, 1984.

Bernstein, "The Desirability of a Stature for the Enforcement of Mediated Agreements,' 2 Ohio State Journal on Dispute Resolution 117, 1986.

Bianchi, "Alternative Dispute Resolution: Is the Jury Still Out?," 61 Journal of State Government 174, 1988.

Bodily, "When Should You Go to Court?," Harvard Business Review 103, May-June 1981.

Broderick, "Court-Annexed Compulsory Arbitration: It Works," 72 Judicature 217, 1989.

Brown, "Thesis (Preventive Law), Antithesis (Adversarial Process), Synthesis (Settlement, ADR): A Comment on Nyhart and Dauer," Journal of Dispute Resolution 55, 1986.

Brunet, "Questioning the Quality of Alternative Dispute Resolution," 62 Tulane Law Review 1, 1987.

Brunet, "Two Cheers for Litigation: Why Litigation is Superior to its Alternatives," Advocacy 42, Summer 1988.

Bunch and Hardy, "A Re-Examination of Litigation Trends in the United States: Galanter Reconsidered," Journal of Dispute Resolution 87, 1986

Burns, "The Appropriateness of Mediation: A Case Study and Reflection on Fuller and Fiss," 4 Ohio State Journal on Dispute Resolution 129, 1989.

Burns, "The Enforceability of Mediated Agreements: An Essay on Legitimation and Process Integrity," 2 Ohio State Journal on Dispute Resolution 93, 1986.

Bush, "Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principals for Process Choice," Wisconsin Law Review 893, 1984.

Carrington, "Civil Procedure and Alternative Dispute Resolution," 34 Journal of Legal Education 298, 1984.

Cerino and Rainone, "The New Wave: Speedy Arbitration Hearings--But Are They Fair?," 29 Villanova Law Review 1495, 1983-1984.

Charles, "Natural Justice and Alternative Dispute Resolution," 60 Law Institute Journal 1078, 1986.

Chaykin, "The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation," 2 Ohio State Journal on Dispute Resolution 47, 1986.

Chaykin, "Mediator Liability: A New Role for Fiduciary Duties?," 53 University of Cincinnati Law Review 731, 1984.

Christian, "Community Dispute Resolution: First-Class or Second-Class Justice?," 14 Review of Law and Social Change 771, 1986.

Cook, "A Quest for Justice: Effective and Efficient Alternative Dispute Resolution Processes," 4 Det. C. Law Review 1129, 1983.

Cooke, "Introduction, Symposium on Alternatives to Litigation," 48 Alabama Law Review 569, 1984.

Cooke, "Mediation: A Boon or Bust?," 28 New York Law School Law Review 3, 1983.

Cooley, "Puncturing Three Myths About Litigation," A.B.A. Journal 75, December 1984.

Coulson, "The Immediate Future of Alternative Dispute Resolution," 14 Pepperdine Law Review 1, 1985.

Cover, "Dispute Resolution: A Foreword," 88 Yale Law Journal 910, 1979.

"CPR Model Minitrial Procedure," Alternatives to High Cost Litigation 117, July 1989.

Dan-Cohen, "Bureaucratic Organizations and the Theory of Adjudication," 85 Columbia Law Review 1, 1985.

Dauer and Nyhart, "Dispute Resolution and Preventive Law: A Reply to Professor Brown, Journal of Dispute Resolution 59, 1986.

Dauer, "Impediments to ADR," 18 Colorado Law 839, 1989.

Dauer, "Litigation v. Alternative Dispute Resolution--Let's Talk About It," 17 Colorado Law 655, 1988.

Davis and Porter, "Dispute Resolution: The Fourth 'R'," Journal of Dispute Resolution 121, 1985.

Davis and Salem, "Dealing with Power Imbalances in the Mediation of Interpersonal Disputes," Mediation Quarterly 17, December 1984.

Dawson, "The Constitutionality of Mandatory Farmer-Lender Mediation: The Minnesota Plan," Journal of Dispute Resolution 237, 1988.

Daynard, "Redress by a Licensing Authority: Settling Home Improvement Disputes in New York City," Journal of Dispute Resolution 89, 1985.

Delgado, Dunn, Brown, Lee and Hubbert, "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution," Wisconsin Law Review 1359, 1985.

Dilts, "Timeliness of Arbitration Awards: Some Ethical Considerations," Arbitration Journal 62, December 1988.

Dunlop, "The Negotiations Alternative in Dispute Resolution," Villanova Law Review 1421, 1983-1984.

Edelman, "Institutionalizing Dispute Resolution Alternatives," 9 Justice System Journal 134, 1984.

Edwards, "Hopes and Fears for Alternative Dispute Resolution," 21 Wilamettte Law Review 425, 1985.

Eisenberg, "Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking," 89 Harvard Law Review 637, 1976.

Faulkes, "Pursuing the Best Ends by the Best Means," 59 Australian Law Journal 456, 1985.

Fine, "CPR Working Taxonomy of Alternative Legal Process Part III," Alternatives to High Cost of Litigation 5, November 1983.

Fiss, "Against Settlement," 93 Yale Law Journal 1073, 1984.

Fiss, "Out of Eden," 94 Yale Law Journal 1669, 1985.

Fitzgerald and Dickens, "Disputing in Legal and Nonlegal Contexts: Some Question for Sociologists of Law," 15 Law and Society Review 681, 1980-1981.

Fleming, "Reflections on the ADR Movement," 34 Cleveland State Law Review 519, 1986.

Freedman and Prigoff, "Confidentiality in Mediation: The Need for Protection," 2 Ohio State Journal on Dispute Resolution 31, 1986.

Fuller, "The Forms and Limits of Adjudication," 92 Harvard Law Review 353, 1978.

Gadacz, "Power and Justice: An Hypothesis in the Anthropology of Law," 24 Alberta Law Review 296, 1986.

Garth, "ADR and Civil Procedure: A Chapter or an Organizing Theme?," 31 Journal of Legal Education 34, 1987.

Gilkey, "Alternative Dispute Resolution: Hazardous of Helpful?," 36 Emory Law Journal 575, 1987.

Girgan, "Problem Solving in the 1980's: A Qualitative Analysis of Alternative Means of Minor Dispute Resolution," 14 Seton Hall Law Review 986, 1984.

Goldberg, Green and Sander, "ADR Problems and Prospects: Looking to the Future," 69 Adjudicature 291, 1986.

Green, "A Comprehensive Approach to the Theory and Practice of Dispute Resolution," 34 Journal of Legal Education 245, 1984.

Green, "Corporate Alternative Dispute Resolution," 1 Ohio State Journal on Dispute Resolution 203, 1986.

Green "A Heretical View of the Mediation Privilege," 2 Ohio State Journal on Dispute Resolution 1, 1986.

Harrington and Merry, "Ideological Production: The Making of Community Mediation," 22 Law and Society Review 709, 1988.

Hatch, "Alternative Dispute Resolution in the Federal Government: A View from Congress," 4 Touro Law Review 1, 1987.

Hay, Carnevale and Sinicropi, "Professionalization: Selected Ethical Issues in the Dispute Resolution," 9 Justice Systems Journal 228, 1984.

Hazard and Scott, "The Public Nature of Private Adjudication," 6 Yale Law and Policy Review 42, 1988.

Henry, "Alternative Dispute Resolution: Meeting the Legal Needs of the 1980s," 1 Ohio State Journal on Dispute Resolution 113, 1985.

Hensler, "What We Know and Don't Know About Court-Administered Arbitration," 69 Judicature 270, 1986.

Honeyman, "Patters of Bias in Mediation," Journal of Dispute Resolutions 141, 1985.

Hufstedler, "The Future of Civil Litigation," Utah Law Review 753, 1980.

Hurst, "The Functions of Courts in the United States, 1950-1980," 15 Law and Society Review 401, 1980-1981.

Hyman, "The Model Mediator Confidentiality Rule: A Commentary," 12 Seton Hall Legislative Journal 17, 1988.

Izbiky and Savage, "ADR: Explanations, Examples and Effective Use," 18 Colorado Law 843, 1989.

Jones, "Arbitration from the Viewpoint of the Practicing Attorney: An Analysis of Arbitration Cases Decided by the New York State Court of Appeals from January, 1973 to September, 1985," 14 Fordham Urban Law Journal 523, 1986.

Judicial Conference, "How Lawyers and Judges Can Use Alternatives to Litigation," 101 F.R.D. 220, 1983.

Judicial Conference, "Recent Developments in Alternative Forms of Dispute Resolutions," 100 F.R.D. 512, 1983.

Kahn, "The Outlook for Dispute Resolution in the United States," 14 Pepperdine Law Review 791, 1987.

Kanner, "The Dynamics of the Arbitration Process," Arbitration Journal 57, June 1984.

Kanowitz, "Alternative Dispute Resolution and the Public Interest: The Arbitration Experience," 38 Hastings Law Journal 239, 1986-1987.

Katz, "Enforcing an ADR Clause--Are Good Intentions All You Have?," 26 American Business Law Journal 575, 1988.

Keegan, "The Peacemakers: Biblical Conflict Resolution and Reconciliation as a Model Alternative to Litigation," Journal of Dispute Resolution 11, 1987.

Kirst, "Will the Seventh Amendment Survive ADR?," Journal of Dispute Resolution 45, 1985.

Lambros, "The Alternatives Movement: Rekindling America's Creative Spirit," 1 Ohio State Journal on Dispute Resolution 3, 1985.

Lanham, "Delegation of Governmental Power to Private Parties," 6 Otago Law Review 50, 1985.

Lawrence, "Private Exercise of Governmental Power," 61 Indiana Law Journal 647, 1985-1986.

Levin and Golash, "Alternative Dispute Resolution in Federal District Courts," 37 University of Florida Law Review 9, 1985.

Liepmann, "Confidentiality in Environmental Mediation: Should Third Parties Have Access to the Process?," 14 Boston College Environmental Law Review 93, 1986.

Lowry, "Essays on the Future of Alternative Dispute Resolution," 14 Pepperdine Law Review 771, 1987.

Lubet, "Some Early Observations on an Experiment with Mandatory Mediation," 4 Ohio State Journal on Dispute Resolution 235, 1989.

Lundquist, "Alternative Dispute Resolution as a Settlement Strategy in the Wake of Perdue v. Crocker National Bank," 43 Business Law 1095, 1988.

Maatman, "The Future of Summary Jury Trials in Federal Courts: Strandell v. Jackson County," 21 J. Marshall Law Review 455, 1988.

Maida, "Engagement of Lawyer-Mediators in Client Conflict," 4 Ohio State Journal on Dispute Resolution 47, 1988.

Mann, "Private Arbitration and Public Policy," 4 Civil Justice Quarterly, 257, 1985.

McDermott, "Arbitration and the Courts," 11 Justice System Journal 248, 1986.

McEwen and Maiman, "The Relative Significance of Disputing Forum and Dispute Characteristics for Outcome and Compliance," 20 Law and Society Review 439, 1986.

McKay, "Civil Litigation and the Public Interest," 32 University of Kansas Law Review 355, 1983.

McKay, "Developments in 'Alternative' Dispute Resolution: An Overview," 115 F.D.R. 361, 1986.

McThen.. and Shaffer, "For Reconciliation," 94 Yale Law Journal 1660, 1985.

Menkel-Meadow, "The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us," Journal of Dispute Resolution 25, 1985.

Merry, "Anthropology and the Study of Alternative Dispute Resolution," 34 Journal of Legal Education 277, 1984.

Merry and Silbey, "What Do Plaintiffs Want? Reexamining the Concept of Dispute," 9 Justice Systems Journal 151, 1984.

Minow, "Some Thoughts on Dispute Resolution and Civil Procedure," 34 Journal of Legal Education 284, 1984.

Moore, "Constitutional Standards of Review for Medical Malpractice Mediation Panels," 1 Ohio State Journal on Dispute Resolution 183. 1985.

Motomura, "Arbitration and Collateral Estoppel: Using Preclusion to Shape Procedural Choices," 63 Tulane Law Review 20, 1988.

Murray, "Lawyers and Alternative Dispute Resolution Success," 14 Pepperdine Law Review 77, 1987.

Murray, "Third-Party Intervention: Successful Entry for the Uninvited," 48 Alabama Law Review 573, 1984.

Nader, "Disputing With the Force of Law," 88 Yale Law Journal 998, 1979.

Nader, "A User Theory of Law," 38 Sw. Law Journal 951, 1984.

Nelson, "Alternative Dispute Resolution: A Supermart for Law Reform," 14 New Mexico Law Review 467, 1984.

Nelson, "The Immediate Future of Alternative Dispute Resolution," 14 Pepperdine Law Review 777, 1987.

Nejelski, "Supplements to Trial: A Court Administrator's View," 29 Villanova Law Review 1339, 1983-1984.

Nyhart and Dauer, "A Preliminary Analysis of the Uses of Scientific Models in Dispute Prevention, Management and Resolution," Journal of Dispute Resolution 29, 1986.

Patterson, "Dispute Resolution in a World of Alternatives," 37 Catholic University Law Review 591, 1988.

Payne, "Enforceability of Mediated Agreements," 1 Ohio State Journal on Dispute Resolution 385, 1986.

Pearson, " An Evaluation of Alternatives to Court Adjudication," 7 Justice Systems Journal 420, 1982.

Perritt, "Administrative Alternative Dispute Resolution: The Developments of Negotiated Rulemaking and Other Processes," 14 Pepperdine Law Review 863, 1987.

Petillon, "Recent Developments in Alternative Dispute Resolution," 14 Pepperdine Law Review 929, 1987.

Piche, "Guest Editorial: Conflict Management--Litigation in Perspective," 17 Colorado Law 11, 1988.

Pipkin and Rifkin, "The Social Organization of Alternative Dispute Resolution: Implications for Professionalization of Mediation," 9 Justice Systems Journal 204, 1984.

Pou, "Governmental Uses of Alternative Dispute Resolution," 14 Current Municipal Problems, 408, 1987-1988.

Prigoff, "Toward Candor or Chaos: The Case of Confidentiality in Mediation," 12 Seton Hall Legislative Journal 1, 1988.

Reich, "Regulation by Confrontation or Negotiation?," Harvard Business Review 82, May-June 1988.

Resnik, "Due Process: A Public Dimension," 39 University of Florida Law Review 405, 1987.

Riskin, "The Special Place of Mediation in Alternative Dispute Processing," 37 University of Florida Law Review 19, 1985.

Ritter, "ADR: What About Confidentiality?," Texas Bar Journal 26, January 1988.

Rodenberg, "To Arbitrate or Not to Arbitrate? The Protection of Rights Under the Age Discrimination in Employment Act," Journal of Dispute Resolution 199, 1988.

Sachs, "An Alternative to the Traditional Rulemaking Process: A Case Study of Negotiation in the Development of Regulations," 29 Villanova Law Review 1505, 1983-1984.

Sacks, "The Alternative Dispute Resolution Movement: Wave of the Future or Flash in the Pan?," 25 Alberta Law Review 233, 1988.

Sander, "Alternative Methods of Dispute Resolution: An Overview," 37 University of Florida Law Review 1, 1985.

Sander, "Varieties of Dispute Processing," 70 F.R.D. 111, 1976.

Sarat, "The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions," 37 Rutgers Law Review 319, 1985.

Sarat, "The 'New Formalism' in Disputing and Dispute Processing," 21 Law and Society Review 695, 1988.

Schneider, "Rethinking the Teaching of Civil Procedure," 37 Journal of Legal Education 41, 1987.

Sekus, "Dispute Resolution Among the Old Order Amish," 4 Ohio State Journal on Dispute Resolution 315, 1989.

Sato, "The Mediator-Lawyer: Implications for the Practice of Law and One Argument for Professional Responsibility Guidance--A Proposal for Some Ethical Considerations," 34 UCLA Law Review 507, 1986.

Shaffer, "Divorce Mediation: A Feminist Perspective," 46 University of Toronto Faculty Law Review 162, 1988.

Shaw, "Mediator Qualifications: Report of a Symposium on Critical Issues in Alternative Dispute Resolution," 12 Seton Hall Legislative Journal 125, 1988.

Shell, "Res Judicata and Collateral Estoppel Effects of Commercial Arbitration," 35 UCLA Law Review 623, 1988.

Shell, "The Role of Public Law in Private Dispute Resolution: Reflections on Shearson/American Express, Inc. v. McMahon," 26 American Business Law Journal 397, 1988.

Siedel, "Intersections of Business and Legal Dispute Resolution: Decision Analytic Modeling of Litigation Investment Decisions," Journal of Dispute Resolution 107, 1988.

Simon, "Legal Informality and Redistributive Politics," 19 Clearinghouse Review 384, 1985.

Singer, "Nonjudicial Dispute Resolution mechanisms: The Effects on Justice for the Poor," Clearinghouse Review 569, 1979.

Speidel, "Arbitration of Statutory Rights under the Federal Arbitration Act: The Case for Reform," 4 Ohio State Journal on Dispute Resolution 157, 1989.

Speigelman, "Civil Procedure and Alternative Dispute Resolution: The Lawyer's Role and the Opportunity for Change," 37 Journal of Legal Education 26, 1987.

Stulberg, "ADR Paradigms and Intervenor Values and Intervenor Values," Journal of Dispute Resolution 1, 1985.

Stulberg and Montgomery, "Design Requirements for Mediator Development Programs," 15 Hofstra Law Review 499, 1987.

Stulbert, "Negotiation Concepts and Advocacy Skills," 48 Alabama Law Review 719, 1983-1984.

Sundermann, "The Dilemma of Regulating Mediation," 22 House Law Review 841, 1985.

"Symposium Proceedings," 299 Villanova Law Review 1477, 1983-1984.

"Symposium Rule: Confidentiality in Mediation," 12 Seton Hall Legislative Journal 71, 1988.

Taylor, Fine and Moukad, "CPR Working Taxonomy of Alternative Legal Processes Part I," Alternatives to High Cost Litigation 9, May 1983.

Taylor, Fine and Moukad, "CPR Working Taxonomy of Alternative Legal Processes Part II," Alternatives to High Cost Litigation 4, August 1983.

Terrell, "Rights and Wrongs in the Rush to Repose: On the Jurisprudential Dangers of Alternative Dispute Resolution," 36 Emory Legislative Journal 541, 1987.

Thensted, "Litigation and Less: The Negotiation Alternative," Tulane Law Review 76, 1984.

Trubek, "The Construction and Deconstruction of a Disputes-Focused Approach: An Afterword," 15 Law and Society Review 487, 1980-1981.

Trubek, "Studying Courts in Context," 15 Law and Society Review 155, 1987.

Vidmar, "Assessing the Effects of Case Characteristics and Settlement Forum on Dispute Outcomes and Compliance," 21 Law 7 Society Review 155, 1987.

Wahrhaftig, "Nonprofessional Conflict Resolution," 29 Villanova Law Review 1463, 1983-1984.

Wald and Evarts, "Does Alternative Dispute Resolution Work?," Texas Bar Journal 57, 1988.

Weller, "Commentary on 'An Evaluation of Alternatives to Adjudication'," 7 Justice Systems Journal 445, 1982.

White, "Alternative Methods of Dispute Resolution," 65 Michigan Bar Journal 875, 1986.

Wolff & Ostermeyer, "Dispute Resolution Centers: Citizen Access to Justice," Texas Bar Journal 51, 1988.

Wroth, "Pluralism and Uniformity in the Common Law Legal Tradition," 37 University of New Brunswick Law Journal 76, 1988.

Yngvesson, "Re-Examining Continuing Relations and the Law," Wisconsin Law Review 623, 1985.

Zipfel, "The 'Attorney Mediator:' Protection Through Representation," 92 Dickson Law Review 811, 1988.

INITIAL DISTRIBUTION LIST

		No. Copies
1.	Defense Technical Information Center Cameron Station Alexandria VA 22304-6145	2
2.	Library, Code 052 Naval Postgraduate School Monterey CA 93943-5002	2
3.	Director, Training and Education MCCDC, Code C46 1019 Elliot road Quantico VA 22134-5027	1
4.	Dr. David V. Lamm, Code AS/Lt Naval Postgraduate School Monterey, CA 93943-5000	3
5.	Dr. David R. Henderson, Code AS/Ht Naval Postgraduate School Monterey, CA 93943-5000	1
6.	Dr. Nancy C. Roberts, Code AS/Rc Naval Postgraduate School Monterey, CA 93943-5000	1
7.	Capt David S. Eaton 2410 Bell Ave. Dodge City, KS 67801	1