



Interagency Alternate Dispute Resolution Civil Enforcement and Regulatory Section Newsletter

Volume 1, Issue 1, October 2003

WELCOME TO CERS

By Richard Miles
Federal Energy Regulatory Commission

Welcome to the first Civil Enforcement and Regulatory Section (CERS) Alternative Dispute Resolution newsletter. CERS, a section of the Presidentially-created Interagency ADR Working Group, provides support on ADR in federal practice. We welcome any agency, department or commission with an enforcement or regulatory practice to join us.

The CERS, currently comprised of 26 member agencies, is committed to working with interested agencies by:

- providing training in ADR,
- publishing a periodic newsletter,
- providing guidance for ADR program development,
- disseminating information about government experiences with ADR,
- providing tools for ADR evaluation,
- addressing barriers to ADR use, and
- offering a Consultation Team, providing personalized assistance to agencies interested in developing and implementing an ADR program.



We encourage readers to contact us to discuss the use of ADR in your civil enforcement and regulatory disputes. Examples of regulatory disputes include construction of new facilities, use of federal lands, licensing, permitting, or unfair or discriminatory business practices.

If you are interested in more information, please contact any of the following individuals: Richard Miles, Federal Energy Regulatory Commission, 202 502-8702, Richard.miles@ferc.gov; David Batson, Environmental Protection Agency, 202 564-5103, batson.david@eps.gov; or Leah Meltzer, Securities and Exchange Commission, 202 942-0048, meltzerd@sec.gov. Finally, if you would like to review past activities of the Civil Enforcement Section and additional helpful information on ADR, please visit www.adr.gov.

EVALUATION OF ADR IN UNITED STATES ATTORNEY CASES

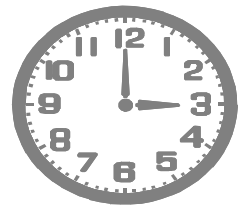
By Jeffrey M. Senger
Office of Dispute Resolution
U.S. Department of Justice

To measure the effectiveness of ADR, the U.S. Department of Justice conducted a study of 828 civil cases over a five-year period, in which Assistant United States Attorneys (AUSAs) used ADR. ADR was successful in settling almost two-thirds of the cases in which it was used. Even when the case did not settle, AUSAs reported the process had other benefits in the majority of cases.

The findings regarding ADR costs and savings are summarized below. For a full report of the study, see www.usdoj.gov/usao/eousa/foia_readingroom/usab4804.pdf

BENEFITS FROM ADR

- Average Litigation Costs Saved
\$10,700
- Average Staff Time Saved
89 hours
- Average Litigation Time Saved
6 months



COSTS OF ADR

- Average fees paid to the mediators
\$867
- Average time spent in preparation
12 hours
- Average time spent in mediation
7 hours



CMS v Nursing Home

By Patrick Chapman
Department of Health and Human Services

Centers for Medicare and Medicaid Services (CMS), an agency of the Department of Health and Human Services

(DHHS), cited a nursing home for deficiencies pertaining to dental and dietary services for various residents. When CMS imposed a civil money penalty, the facility requested a hearing. At hearing, CMS stated that the nursing home failed to (1) provide dental care for residents in a timely manner; and (2) prepare and serve food that conserved flavor and was palatable. The nursing home responded that, with regard to dental care to residents, it should not be penalized because the residents' families failed to follow the necessary procedures. The nursing home further indicated that its practice of early food preparation was common practice in the food industry, necessary to serve meals to residents in a timely manner, and did not impact food flavor.



During mediation conducted by DHHS Departmental Appeals Board ADR Division, CMS learned that the onsite dental provider stopped providing dental services to its residents because of recent changes in the state Medicaid program that no longer reimbursed for routine dental services. Further, the facility was unable to locate any other dentists.



With the assistance of the mediator, the nursing home and CMS discussed ways to enable the nursing home to retain dental coverage, and to improve its procedures. CMS suggested the nursing home modify its early food preparation, and the order in which it served meals to different groups of residents. The nursing home benefited by gaining a better understanding of the enforcement regulations, discovering other resources to help them provide dietary services, and by discussing other deficiencies not included in its hearing request.

The parties obtained a settlement agreement in which CMS reduced the amount of the civil penalty but maintained the scope and severity of the cited deficiencies. The nursing home withdrew its hearing request and agreed to institute new procedures and to pay the civil penalty in a few installments.



Benefits of Mediation in Civil Enforcement and Regulatory Cases

- Saves time
- More efficient use of resources
- Identifies and narrows issues
- Allows focus on substance of dispute
- Streamlines discovery
- Increases effective communication
- Provides opportunity for confidential reality check
- Provides safe way to float ideas to opposing counsel
- Creates understanding

ASK CERS and ANSWERS

Dear CERS,

How do I decide whether my enforcement case is right for ADR?

Confused Advocate

Dear Confused Advocate:

It is helpful to think of ADR as a part of your negotiation strategy. Perhaps this framework will be useful:

- 1) Do you want to try to settle the dispute? Is the dispute negotiable? *E.g.*,
 - a) can you legally negotiate?
 - b) is settlement in the interest of your organization?
 - c) do you have enough information?
 - d) is the matter ripe?
- 2) As a negotiator, are you facing difficulties? *E.g.*,
 - a) difficult personalities?
 - b) unrealistic opponents?
 - c) multiple parties or complex issues?
 - d) communication problems?
 - e) defense counsel unfamiliar with your agency's practice?
- 3) If ADR is the appropriate choice, do you have the ability to support it? *E.g.*,
 - a) sufficient time and funds to pay for it?
 - b) statute of limitations waiver?
 - c) discovery schedule waiver?

If the answer is "yes" to most of these questions, ADR may help your case. By all means, try ADR and let us know what happens.

P.S. Remember to contact your organization's ADR Specialist for support.

If you have any comments about this newsletter, would like to submit an article, or have any questions for "ASK CERS AND ANSWERS", please email Leah Meltzer at meltzerd@sec.gov or Elly Cleaver at elly.cleaver@usda.gov.