

Department of the Public Advocate

Alternative Dispute Resolution (ADR) White Paper

Summary

When disputes between government and the private sector are resolved outside the courtroom, citizens benefit. There is abundant evidence at both the state and federal levels that alternative dispute resolution (ADR), especially mediation, reduces costs and litigation.

The Department of the Public Advocate, through its Office of Dispute Settlement, has provided both ADR services in a broad range of cases and has studied the benefits of ADR techniques.

A-4333, sponsored by Assemblywoman Linda Greenstein, would require state agencies to adopt ADR policies and would promote the voluntary use of ADR techniques to resolve disputes and avoid costly litigation. The Office of Dispute Settlement has closely studied the proposed legislation and supports its passage.

ADR: Resolving Disputes by Bridging Divides

ADR procedures have been used successfully in the private sector for many years and have been more recently institutionalized by the federal government, state agencies around the country and New Jersey courts. Alternative Dispute Resolution (ADR) is a term used to describe various methods of resolving disputes other than traditional litigation. These methods include negotiation, facilitation, mediation and arbitration. Below is a brief description of each:

*Negotiation is a process where the disputants attempt to reach a negotiated resolution of the dispute themselves.

*Facilitation is a non-binding process where a neutral third party helps the disputants identify issues in dispute and assists in the exchange of information. A facilitator does not address the substance of the dispute directly. There is no settlement unless both parties agree.

*Mediation is a non-binding process where a neutral third party assists the disputants in not only identifying issues and exchanging information, but also addressing the substance of the dispute by exploring ways to resolve the conflict. There is no settlement unless both parties agree.

*Arbitration is a binding process where a neutral third party holds a formal hearing and evaluates evidence presented by both sides. The arbitrator then renders a decision.

As administrative proceedings become increasingly formal, costly and lengthy, there is a decreased likelihood that a consensual resolution will be reached. In appropriate circumstances, ADR mechanisms have yielded results that are faster, less expensive, less contentious and more mutually satisfying than traditional litigation. ADR can be tailored to fit a wide variety of administrative programs. Alternative means of dispute resolution not only lead to more creative, efficient and sensible outcomes, but also to greater trust and satisfaction among the parties and ultimately in government.

New Jersey: ADR Trailblazer

New Jersey was an early leader in recognizing and promoting ADR principles in state government.

In 1975, the Office of Dispute Settlement was founded within the former Department of the Public Advocate. The Office is charged with providing mediation and other neutral dispute resolution services, conducting educational programs in dispute resolution and designing dispute resolution programs. (NJSA 52:27EE-22).

During the past 32 years, the Office of Dispute Settlement has helped parties reach mediated agreements in thousands of cases and has resolved thousands more through arbitration and other ADR techniques, such as public policy facilitation.

In addition, the office has also trained thousands of state agency personnel in ADR techniques including the Attorney General's office, State Police, the Department of Environmental Protection, the Department of Human Services, the Board of Public Utilities and the Department of Health and Senior Services. The office has trained more than 100 Superior Court and administrative law judges in mediation techniques.

Through its mediation and arbitration work, the Office of Dispute Settlement has saved the state and private parties millions of dollars by resolving disputes without costly litigation. For example, the Office of Dispute Settlement:

- Mediated a federal class action lawsuit involving the proposed demolition of high-rise public housing in Newark, ensuring the preservation of \$100 million in federal housing funds.
- Helped the parties settle litigation involving the construction of the River Line light rail system. The mediation saved the state and private parties hundreds of thousands of dollars in litigation costs.
- Administers the arbitration of more than 600 cases each year involving new home construction disputes between new home owners and builders as part of

the New Home Warranty program. In each of these cases, homeowners and home builders save thousands of dollars in legal fees.

- Mediates or arbitrates more than 100 cases each year involving disputes between contractors and utilities resulting from underground utility lines being damaged as a result of construction activities.
- Mediates more than 50 disputes each year between citizens and government entities relating to the disclosure of documents pursuant to the NJ Open Public Records Act. By resolving these disputes informally the parties can save thousands of dollars in litigation costs.

In addition to the Public Advocate's ADR initiatives, many other New Jersey state agencies are utilizing dispute resolution programs to handle internal matters, as well as outside concerns. Examples of these programs include:

- New Jersey Department of Agriculture mediation program involving Right to Farm cases and farmer loan disputes;
- Division on Consumer Affairs voluntary mediation program of consumer complaints;
- Department of Environmental Protection's mediation of disputes involving qualified enforcement actions;
- Department of Transportation's Ombudsman program dealing with internal employee disputes, and
- Division on Civil Rights mediation program.

The Federal ADR Model

Under the Administrative Dispute Resolution Act of 1998, the federal government has saved millions of dollars through the use of ADR techniques. The federal law requires each federal agency to adopt a policy encouraging the use of ADR. In 1998, the President also directed that an Interagency Alternative Dispute Resolution Working Group be created to promote and facilitate ADR on the federal level. The working group consisted of representatives from every federal agency.

The 2007 *Report for the President on the Use and Results of Alternative Dispute Resolution in the Executive Branch of the Federal Government* states that federal agencies are increasing their use of ADR with great success. The report also states that the use of ADR has saved costs and improved outcomes in four main areas:

- Civil enforcement and regulatory
- Claims against the government
- Contracts and procurement
- Workplace conflict.

There are many examples of federal agencies successfully using ADR to resolve a wide range of disputes. (Source: March 17, 2004 report issued by the Office of the Associate Attorney General). For Example:

- At the Federal Energy Regulatory Commission, the use of mediation by its Dispute Resolution Service saves parties, on average, \$100,000 in avoided costs by resolving disputes concerning electricity and natural gas.
- At the Department of Health and Human Services, the Provider Reimbursement Review Board uses ADR to settle about 150 disputes each year involving health care providers. It costs \$11,000 to hear one of those cases, but only \$750 to mediate it, so the cost savings is over \$10,000 per case.
- At the Environmental Protection Agency, the use of ADR to reach agreement for the cleanup of contaminated Superfund sites has saved private corporations and the government millions of dollars in litigation and transaction costs.

ADR also is demonstrating results in resolving agency workplace disputes. Unlike traditional adversarial processes, ADR is reducing costs, improving workforce morale and increasing productivity. For example:

- At the U.S. Air Force, more than 2,700 workplace disputes were mediated in 2003. Seventy-five percent (75%) were successful. The average cost savings was \$14,000 per case. The average time savings was 410 days per case. The number of informal workplace complaints has dropped by 70 percent and formal complaints have dropped by 56 percent.
- The U.S. Postal Service mediates 10,000 workplace disputes every year. Its exit surveys show that 90 percent of both managers and employees are satisfied with the mediation process. There has been a 40 percent decline in the percentage of postal service employees who initiate a new EEO complaint.

Instilling a Culture of ADR: The Next Steps

A proposal pending before the New Jersey Legislature would make significant strides toward promoting the use of ADR by state agencies. Each agency would adopt an ADR policy, appoint an ADR officer and receive training in ADR techniques.

In addition, an interagency ADR working group would be created to promote the use of ADR within state government. This proposal is similar to the requirements instituted at the federal level.

Agencies would have the discretion to decide whether to pursue ADR techniques to resolve disputes and both parties would have to agree to pursue ADR. The dispute resolution officer for each agency would be responsible for ensuring that alternate means of resolving disputes are examined in connection with adjudications, rulemaking, enforcement actions, issuing and revoking licenses or permits, contract administration, litigation and other agency actions.

Under the bill, the Public Advocate's Office of Dispute Settlement would work to encourage, facilitate and coordinate the use of dispute resolution by state agencies. The office would also provide free training to departments.

By instilling a culture within government that seeks alternatives to litigation whenever possible, costly legal expenses are avoided by the state, as well as by individuals and businesses involved in those disputes.

ADR also is likely to result in more efficient and productive resolution of issues than traditional litigation, which pits the adversaries against one another. The 2007 federal report found that using ADR produced cost savings, quicker resolutions and higher citizen satisfaction than traditional litigation.

The bill recognizes the value of ADR in preventing and resolving areas of conflict. Through passage of the bill, state agencies would not only receive the benefit of techniques that have been developed and tested in the private sector, courts and the federal government but they also would ensure New Jersey continues to play a leadership role in further developing and refining such techniques.