RESOLVING THE DISPUTE OVER DISPUTE RESOLUTION: ALTERNATIVE DISPUTE RESOLUTION IN FEDERAL AGENCIES

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Abstract

Since 1990, every federal agency in the United States has utilized alternative dispute resolution (ADR) to some degree and with varying levels of effectiveness. Federal agencies have used ADR to resolve a broad variety of disputes in a wide variety of environments. ADR has three primary advantages over traditional dispute resolution: resource effectiveness, flexibility, and better results for conflicting parties through win-win compromises. The purpose of this study is to determine to what extent these advantages exist in the data from the last twenty-seven years of ADR use in federal agencies. This paper will analyze the quantitative questions of the cost and time effectiveness of ADR, as well as two qualitative questions: how effectively does ADR approach the vast diversity of disputes in and between federal agencies, and how effectively does ADR provide win-win results to conflicting parties. With the data gathered from these inquiries, this study attempts to answer the larger research question of whether alternative dispute resolution is effective in US federal agencies? All three categories of measurement indicate that ADR is in fact more effective than traditional dispute resolution in employment disputes.

Introduction

Two mothers, one dead child, one living heir, and no evidence of who the living child belongs to: these are the facts of one of the most notorious legal battles of the ancient world. Two mothers found themselves in a dire dispute. Each nurtured a young child. However, one child died tragically in the night. Out of sorrow, the mother of the dead child claimed that the living child belonged to her (Barrett & Barrett, 2004). How could an ancient justice system possibly discern who was the true mother of the child? The presiding king Solomon stood up from his throne and said, "Cut the living boy in two and give half to one and half to the other" (1 Kings 3:25, Holman Christian Standard Bible). With one decisive phrase, Solomon discovered to whom the child belonged as the mother of the child screamed and begged him to preserve the child. Solomon's solution revealed the true mother—the woman willing to give up motherhood to protect the life of her child. A potential legal nightmare was resolved cleanly and efficiently by a wise king acting as an arbitrator in what modern legal scholars describe as alternative dispute resolution (Barrett & Barrett, 2004).

Alternative dispute resolution (or ADR) is nothing more than the use of methods like arbitration and mediation to resolve disputes instead of lawsuits. In 1990, the United States Congress passed the Administrative Dispute Resolution Act (ADRA) which required each federal agency to adopt a policy on the use of alternative dispute resolution ("About the Interagency," n.d.). In 1996, ADRA was reenacted as the Administrative Dispute Resolution Act of 1996 (ADR Act) ("About the Interagency," n.d.). In 2000, the Equal Employment Opportunity Commission (EEOC) required all federal agencies to establish ADR programs for use in the pre-complaint and formal complaint stages of the equal opportunity employment process (Equal Employment Opportunity Commission, 2007). In 1996, Congress passed an updated version of the ADRA which required contractors in the field of procurement to provide a written explantion whenever they chose not to pursue alternative dispute resolution ("Electronic Guide," n.d.). Recent amendments to the Federal Acquisition Regulation (FAR)—the law that implements the ADRA provisions—encourage federal agencies to "use ADR procedures to the greatest extent practicable" ("Electronic Guide," n.d., para. 2). Several other federal agencies have replicated these statutory changes by pledging their commitment to ADR. This is just some of the evidence of the growing reliance on alternative dispute resolution in federal agencies.

While ADR is not a new invention, its effectiveness was relatively untested and understudied until recently. Either ADR serves justice well or it does not. The pursuit of a fair and effective system of justice in federal agencies demands one central

research question: is alternative dispute resolution effective in United States federal agencies? If ADR techniques are demonstrably effective, federal agencies should opt for ADR instead of litigation in more circumstances. If ADR is ineffective, federal agencies may need to reform their policies towards mediation and arbitration. This study tests the hypothesis: alternative dispute resolution is cost-effective and achieves satisfactory outcomes for both parties in a variety of circumstances and environments.

Literature Review

There are a number of studies that point to the positive benefits of ADR specifically as applied to federal agencies. One particular case study from O'Leary and Raines (2001) used a four-part method to evaluate the effectiveness of ADR as it was used in the Environmental Protection Agency (EPA). The EPA, one of the pioneers of ADR in federal agencies, has used ADR for decades, providing a wealth of data and information about its advantages and disadvantages. In this case study, the researchers looked at in-depth telephone interviews, government statistics, and archived data to analyze the responses of four groups of people: the EPA's ADR specialists, the defendants or responsible parties to EPA suits, mediators and facilitators of EPA disputes, and agency enforcement attorneys who participated in the ADR process. They found that there is a significant increase in positive win-win outcomes with the growth of ADR in the EPA (O'Leary & Raines, 2001).

Edwards (1986) addressed ADR as if it were a passing fad. He noted that while it may be a fashionable alternative at the moment, ADR methods are understudied and overapplied. Simply put, he believed ADR is effective in narrow instances but has been applied in various areas where it does not belong. It has been misapplied to such a degree as to counteract the some of the purposes for which it is used. However, more recent research counters this characterization. A second study, completed by Maravilla, Block, and Matherne in 2014, studied the effectiveness of ADR in the context of the Federal Aviation Administration. Researchers examined recent usage of ADR in the FAA and found that in almost all cases, all parties come to an agreeable settlement and avoid future litigation. Avoidance of litigation could save the FAA significant expenditures of time and money (Maravilla et al., 2014).

Stipanowich (2004) approached ADR from a balanced perspective. He found from a quantitative perspective that ADR has time and cost benefits where it has been applied thus far. However, he concluded that ADR succeeds or fails based on the structure of the program itself. There is nothing inherent about ADR that makes it work; rather, some ADR programs provide practical benefits due to being structured effectively. Stipanowich argued that to the extent that certain ADR programs are effective, they ought to be emulated by other organizations and agencies.

Nabatchi (2007) studied circumstances where ADR has been less effective in federal agencies. She analyzed the implementation of the Administrative Dispute Resolution Acts of 1990 and 1996 in areas where federal agencies have run into difficulty implementing ADR. If an entire department fails to effectively implement ADR, that is a strong sign that ADR might not be particularly effective in that arena (Nabatchi, 2007).

Data and Methods

Definitions

A dispute is a conflict between two or more parties called disputants (Ware, 2016). A dispute begins when one party, the claimant, makes a claim against the other party, the respondent (Ware, 2016). The claim usually asserts that the respondent has erred in some way, perhaps because the respondent has failed to fulfill some duty or obligation towards the claimant. This study will focus on a common type of such a dispute, one where a federal agency is the claimant. For example, the Environmental Protection Agency might discover a factory is dumping pollutants into a river, violating the EPA regulations on waste disposal. The EPA would lay a claim against the factory in which they assert that the error requires remedial action. That claim could be a cease and desist order and a fine. The factory could cease dumping pollutants, pay the fine, and the dispute would be resolved. However, oftentimes a dispute is not so easily resolved. For example, the factory could claim it is acting within vague EPA regulations that allow a certain amount of pollutants to be disposed of in the river. The factory could even assert a counterclaim alleging the EPA has wrongfully singled out and harmed its business. Traditionally, a legal dispute such as this could only be handled in court. Both parties would hire lawyers, pay extensive legal fees, and spend anywhere from several months to several years in court.

Alternative dispute resolution is a collection of methods dedicated to finding a satisfactory settlement outside of a courtroom. Ironically, there is some dispute over what methods fall within the category of ADR. For the purposes of this study, ADR methods include the two institutionalized forms of negotiation: arbitration and mediation.

Negotiation is a method of dispute resolution where the parties involved in the dispute arrive at some sort of settlement to the dispute themselves. It is the foundational concept upon which arbitration and mediation are based (Ware, 2016). Mediation is negotiation facilitated by a mediator. The mediator is an objective and unbiased party who communicates with all parties to discover their goals and priorities and works with the parties to help discover a satisfactory settlement for

all parties involved (Keith, 1997). The mediator merely serves as an impartial aide; his decisions are not binding. After arriving at the settlement, that settlement is made binding through a settlement agreement (Ware, 2016). Arbitration, on the other hand, is legally binding. All parties to a dispute would voluntarily assent to the decision making of an impartial arbiter (Keith, 1997). The arbiter would create a settlement for the parties, a decision which is binding and enforceable in court (Ware, 2016). Technically, litigation in court is a form of arbitration. However, litigation and arbitration in this sense have two distinct differences. First, parties in court do not voluntarily assent to the decision of a judge before the decision. Both parties will voluntarily agree that the arbiter's decision is binding even before he makes a decision. Second, while judges are impartial and not parties to the dispute, the judge is still part of the government. Arbiters are in the private sector. This distinction is particularly significant when the government is a party to a dispute. A private sector arbiter is more impartial (Ware, 2016).

Variables

This study evaluates the interaction between the alternative dispute resolution methods and effective dispute resolution outcomes. The dependent variable is effective dispute resolution outcomes in federal agencies. The independent variable is alternative dispute resolution, specifically the techniques of mediation and arbitration. The central question therefore being, does alternative dispute resolutions correlate with effective dispute resolution in federal agencies?

It is important to control for a few possible intervening variables. Notably, the type of agency dispute may skew the perceived effectiveness of the type of dispute resolution in a given case. It is possible that some types of disputes are more likely to be settled or resolved than others. Unfortunately, there is little available data outside the realm of employment dispute resolution. To mitigate this variable, case studies of specific agencies that utilize ADR outside of employment disputes will be included and analyzed. While these case studies do not completely mitigate the possibility of dispute type becoming an intervening variable, they hint as to whether or not the findings could be generalized outside of employment disputes with further research. A second possible intervening variable could be the agency itself. It is possible due to the very nature of an agency's jurisdiction that disputes could be more or less severe or differ significantly in basis. In order to control for this intervening variable, the data from several major agencies will be compared and contrasted. If ADR has a consistent, measurable correlation with effective outcomes in multiple agencies and multiple categories of disputes, then these variables are likely marginal. If the data is somewhat inconsistent contrasted across agencies and categories of disputes, it is likely these intervening variables are significantly skewing the results.

Operationalization

The nature of this study is both quantitative and qualitative. This study will use two quantitative measures of ADR's effectiveness: first, the number of cases that utilize ADR without further litigation; and second, data regarding how much money is saved by agencies when using ADR.

First, if a legal dispute goes through arbitration or mediation and continues through traditional litigation, then alternative dispute resolution methods were insufficient to resolve the dispute between all parties. On the other hand, if a large number of disputes are settled through alternative dispute resolution without continuing litigation, then all parties were sufficiently satisfied with the resolution to cease further litigation. While the quantitative portion of the study alone does not prove that ADR's results are always satisfactory, it at least means that the parties involved would not have enough to gain from litigation to justify the costs. Quantitative research will be considered alongside the qualitative study of satisfaction in parties to ADR to approximate a more reliable result. If qualitative and quantitative measures both point to parties in ADR being satisfied with the result, that would qualify as significant evidence towards ADR's effectiveness.

The second quantitative measure is a cost comparison between ADR and traditional litigation. Litigation can take many forms, making it difficult to strictly compare the costs of ADR with the costs of a standard lawsuit. However, there is a significant amount of research that provides data on the general comparative costs of ADR and litigation in different areas of federal agencies. If ADR is demonstrably cheaper for federal agencies than litigation, then cost-effectiveness can be weighed as a factor. If ADR is not cost-effective in comparison to litigation, there is little reason to prefer ADR.

These quantitative measures are more meaningful when compared with the diverse qualitative studies on ADR. Specifically, case studies of how ADR has been used in specific agencies will be informative. In-depth case studies have already been completed by the Environmental Protection Agency as well as the Federal Aviation Administration. Case studies in specific types of disputes across multiple federal agencies will also be informative. For example, ADR has been heavily used in employment disputes. Comparing different areas where ADR is used will also aid in determining if ADR's effectiveness is limited to certain categories of disputes, controlling for the possibility of different areas of application becoming an intervening variable.

Data

The statistical and qualitative data on ADR in federal agencies is somewhat limited. There is not enough broad data across all agencies to compile comprehensive

statistics measuring resolution rates, costs, or satisfaction in all agencies and all types of disputes. Not all agencies have ADR available for all types of disputes. However, all equal employment opportunity (EEO) disputes must statutorily have an ADR option, regardless of the which agency the dispute occurs in. In fact, "in the federal government, parties use ADR in workplace cases more than in any other form of dispute resolution" (Ribeiro, 2005, p. 19). Comparing a specific type of dispute across all agencies accounts for any intervening variables due to varying procedures in different agencies. Thus, EEO disputes will constitute the primary data set for statistical analysis. Case studies of specific agencies can be used to supplement the EEO data and extrapolate its results to ensure any trends in EEO disputes are also reflected in other types of disputes as well. Comparing different areas where ADR is used will also aid in determining if ADR's effectiveness is limited to certain categories of disputes, controlling for the possibility of different areas of application becoming an intervening variable.

Hypothesis

This study is based upon a simple hypothesis: alternative dispute resolution is correlated with effective outcomes in dispute resolutions in United States federal agencies. Three facts must be demonstrated to confirm this hypothesis. There must be consistent, demonstrable cost savings, qualitative evidence of satisfaction in resolutions, and a significant reduction in cases that continue through traditional litigation. These three factors must be demonstrated consistently in multiple categories of disputes across multiple federal agencies to control for and isolate the possible intervening variables. To disconfirm the hypothesis, any one of these three facts could be negated. The third possible outcome is that the hypothesis may be confirmed with limited generalizability. If these three factors are demonstrated to be true but inconsistent across categories of disputes and different agencies, it is possible the hypothesis is only true in the context of those categories and agencies.

Research and Analysis

Resolution Rate

The Equal Employment Opportunity Commission (EEOC) commissioned a study that gathered data regarding the usage of ADR in all federal agencies in 2006. The data gathered analyzes ADR as a whole in every federal agency but also compares the performance of agencies against each other. This data can be used to determine if there are time savings, cost savings, and the percentage of cases that undergo further litigation. This data only covers ADR when used in the equal employment opportunity (EEO) process. That means this data specifically applies primarily to employment disputes. This data is significant because ADR is used in EEO disputes

more than any other type of dispute. This is the result of an EEOC requirement established in 2000 that all federal agencies must establish or make ADR available during the pre-complaint and formal complaint stage of EEO disputes (Equal Employment Opportunity Commission, 2007). The Alternative Dispute Resolution Act of 1996 encourages agencies to use ADR where possible ("Electronic Guide," n.d.), but in no other area is ADR required for federal agencies than EEO disputes (Equal Employment Opportunity Commission, 2007). Because EEO disputes are the only category of dispute where ADR must be an option, EEO disputes will provide the greatest quantity and broadest diversity in quantitative data.

Figure 1 provides the number of total cases in EEO disputes that went through ADR during the pre-complaint stage. The data shows that approximately 50% of all EEO disputes in the pre-complaint stage are resolved by the time the ADR process ends (Equal Employment Opportunity Commission, 2007). The pre-complaint stage begins the moment an aggrieved person brings a problem to an EEOC counselor in a federal agency. An aggrieved person is legally required to bring any EEO matters to a counselor within 45 days of the supposed offense. A person may be offered the opportunity to go through some form of mediation before bringing any type of complaint forward (Equal Employment Opportunity Commission, 2007). To break down this data further, half of the complainants that come forward in EEO disputes and accept ADR do not continue to press any form of complaint after meeting with an EEOC counselor.

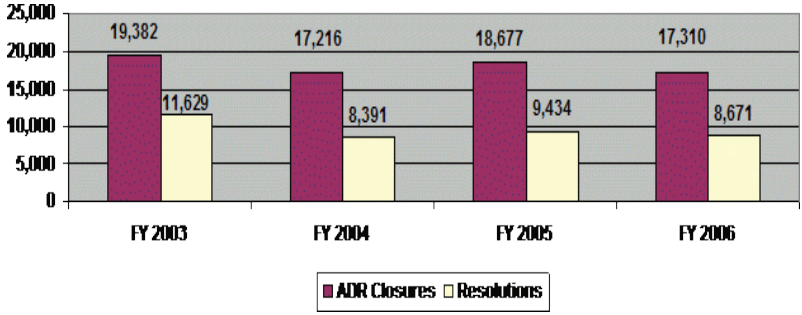

Figure 1. Number of EEO dispute resolutions in ADR during the pre-complaint stage in all agencies (Equal Employment Opportunity Commission, 2007).

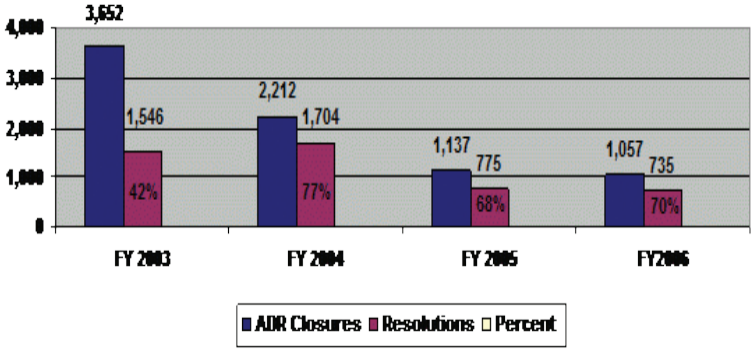

Figure 2. Number of EEO dispute resolutions in ADR during the formal complaint stage in all agencies (Equal Employment Opportunity Commission, 2007).

Figure 2 continues the comparison into the formal complaint stage. The formal complaint stage begins with any formal request for relief or formal complaint. In the formal complaint stage, among those disputes that go into ADR, 70% come out with a resolution (Equal Employment Opportunity Commission, 2007). When the two figures are combined, the number of cases that continue on through some form of litigation or traditional dispute resolution can be determined. Assuming that a complainant opts for ADR at all stages, the percentage of disputes that remain unresolved in EEO disputes in federal agencies would be 15%, giving ADR an 85% success rate in these disputes.

To give context, ADR's resolution rate can be compared with the resolution rate of EEO disputes that do not use ADR. Figure 3 demonstrates a trend from 2000 to 2008 that ADR cases have a higher percentage of being resolved than traditional EEO disputes. In fact, in no year does the traditional dispute resolution processing outperform ADR.

	2000	2001	2002	2003	2004	2005	2006	2007	2008
Traditional EEO Cases	28%	27%	30%	35%	24%		24%		
ADR Cases	62%	64%	59%	42%	77%	68%	70%	66%	62%

Figure 3. Resolution rate by year in the formal complaint stage of agency EEO disputes (Nabatchi & Stanger, 2012).

Cost and Time Savings

The second critical measure of effectiveness is efficiency with time and money. Two researchers studied the efficiency of ADR against traditional equal opportunity employment disputes across federal agencies using the numbers released by the EEOC (Nabatchi & Stanger, 2012). One of several measures they used was average processing time. They averaged the time it took for a case to arrive at some sort of settlement or closure (Nabatchi & Stanger, 2012). Average processing time was measured specifically by the number of days it takes to reach a settlement. Figure 4 compares average processing time between traditional EEO cases and EEO disputes which used ADR.

	2002	2003	2004	2005	2006
Traditional EEO Cases	418	541	469	411	367
ADR Cases	82	62	127	66	50

Figure 4. Average processing time in days (APD) for agency EEO disputes (Nabatchi & Stanger, 2012).

There are significant differences between the average processing times of each style of dispute resolution. In each year measured, ADR cases were resolved in less than a year. In fact, aside from 2004, every year saw the average ADR dispute conclude in less than 3 months. On the other hand, traditional EEO cases took longer than a year to process on average in every year measured. In every year measured, traditional EEO case resolution lasted on average at least 300 days longer than ADR.

Another quantitative and qualitative study found significant disparities in financial efficiency between ADR and traditional dispute resolution. The typical cost expenditure of processing a basic workplace case is a minimum of $5,000 in administrative expenses (Senger, 2004). More complicated cases that enter formal adjudication can cost as much as $77,000. However, when the government utilizes mediation in an employment case, it only costs an average of $1,077 per case (Senger, 2004). Attorneys at the Justice Department estimated that opting for ADR during disputes saves the government an average of more than $17,000 in litigation costs per case (Senger, 2004). The Air Force provides a particularly compelling example. It estimates that it saves $14,000 and 276 hours of labor per case resolved (Senger, 2004).

Satisfaction

Several studies provide data on party satisfaction during the ADR process. The Federal Aviation Administration has begun to utilize ADR to a greater degree. One study analyzed the results and methods of FAA dispute resolution. It found that in 112 disputes in one year, 109 were satisfactorily resolved or withdrawn, and only two disputes required formal adjudication (Maravilla et al., 2014). The study concluded that:

> Parties are not bound to the zero-sum game results of an adjudicatory proceeding. A party engaged in ADR with the [Office of Dispute Resolution for Acquisition] may propose any "fair" resolution. Through the ADR process the parties can actually develop stronger relationships to the benefit of both the contractor and the agency in future interactions. (Maravilla et al., 2014, para. 16)

With these numbers, it can be calculated that 97% of FAA disputes in ADR resulted in satisfactory settlements. Further, these settlements provided greater satisfaction between both parties because there was no adversarial process that amounts to a zero-sum game.

The EPA has been the subject of a number of case studies due to their pioneering in the field of administrative ADR. Raines and O'Leary (2000) published a study that analyzed the satisfaction of attorneys belonging to the EPA and potentially responsible parties (PRPs) in regard to the mediation process.

Attorneys by the nature of their duty to aggressively seek their client's interests are a crucial measure of whether or not a party's interest was satisfied. In no category did mediators in the process receive an average greater than 2 on a Likert scale of 1 to 5 with 1 being the most satisfied and 5 being the least satisfied (Raines & O'Leary, 2000). The study also provides data on attorneys' satisfaction with the results of ADR.

One year after this study was completed, the same researchers conducted a study on party satisfaction with the EPA's ADR process. In this study, however, the researchers analyzed the viewpoints of all parties involved in the process. This study generalized these results beyond attorney satisfaction to the satisfaction of dispute resolution specialists, potentially responsible parties, attorneys, and mediators. The study concluded that "there are generally high levels of satisfaction with the EPA's enforcement ADR program" (O'Leary & Raines, 2001, p. 682).

Mediator's/Neutral's preparedness	1.49
Respect shown by the mediator/neutral	1.28
Mediator's/neutrals knowledge regarding the substance of the dispute	1.79
Mediator's/Neutral's impartiality	1.48
Mediator's/Neutral's skill in opening up new options	1.96
Mediator's/Neutral's skill in aiding resolution	1.81
Mediator's/Neutral's fairness	1.51
Mediator's/Neutral's performance overall	1.60

Figure 5. EPA and PRP attorneys' satisfaction with mediators. 1=very satsified, 5=very dissatisfied (Raines & O'Leary, 2000).

These results are reinforced by another study of the EPA's ADR program (Bourdeaux, O'Leary, & Thornburgh, 2001). Nader's (1995) study of ADR satisfaction expressed a concern that the ADR process in agencies favors the more powerful party by locking them in a position of control before mediation begins. However, Bourdeaux, O'Leary, and Thornburgh (2001) concluded that the weaker party was generally more satisfied with the results of ADR. They concluded that this was case primarily due to relative cost savings that most benefited the party least able to afford litigation.

Control attorney had over outcome	2.19
Speed with which ADR proceeded	2.38
Positive impact ADR will have on parties' relationships	2.17
The enduring resolution of the dispute compared to litigation	2.21
The outcome compared to expectations before ADR	1.85
The outcome overall	1.77

Figure 6. Attorney's satisfication with the outcome of ADR. 1=very satisfied, 5=very dissatisfied (Raines & O'Leary, 2000).

Conclusion

After careful measurement of resolution rates, cost reductions, and party satisfaction, all three measurements provide indications that ADR is an effective form of dispute resolution in federal agencies. However, within the current constraints of available data, there is not enough evidence to generalize that conclusion beyond

employment disputes with a high degree of certainty.

In employment disputes, ADR has a success rate of 85% and has outperformed traditional EEO dispute resolution in every year measured. ADR is a shorter process than traditional dispute resolution by more than 300 days in every year measured. When measuring satisfaction of all party attorneys on a scale of 1 to 5, with 1 being the most satisfied, no average came out higher than 2. That means that the average party attorney in ADR cases was either very satisfied or somewhat satisfied in every category measured. Each of these three measures confirms the hypothesis that ADR is an effective form of dispute resolution.

The question is: how far can the hypothesis be generalized? Because there is no aggregate data about ADR across all agencies in other categories of disputes than employment, this hypothesis cannot be generalized with certainty beyond employment disputes. That said, the case studies regarding the EPA, FAA, and the Air Force do offer significant evidence that ADR may be just as effective beyond the realm of employment disputes. However, a sample of three agencies out of all the existing federal agencies is alone not enough to generalize the hypothesis. Rather, these examples should be taken as an incentive for future researchers to gather broader data on how federal agencies use ADR in other areas outside of employment disputes. If the same benefits of ADR found in employment disputes, the EPA, the FAA, and the Air Force are reflected in other areas of agency disputes, and other agencies, the positive outcome could be enormous. The dispute over the best form of dispute resolution is far from over. However, ADR has proven to be a faster, cost effective, and satisfactory form of dispute resolution in every category where there is enough data to sufficiently measure its outcome in federal agencies.

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