US Army Corps
of Engineers

The Executive Seminar on

Alternative Dispute Resolution (ADR) Procedures

The U.S. Army Corps of Engineers

Christopher Moore, Ph.D.
CDR Associates
and
Jerome Delli Priscoli, Ph.D.
Institute for Water Resources,
Corps of Engineers
Editors

Prepared for and with the
U.S. Army Corps of Engineers

by

CDR Associates
Boulder, Colorado

Program Manager
Creighton and Creighton
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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.

Abraham Lincoln

Our distinct forebears moved slowly from trial by battle and other barbaric means of resolving conflicts and disputes, and we must move away from total reliance on the adversary contest for resolving all disputes. For some disputes, trials by the adversarial contest must, in time, go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people. To rely on the adversarial process as the principal means of resolving conflicting claims is a mistake that must be corrected.

Chief Justice Warren E. Burger, in his Annual Report on the State of the Judiciary at the mid-year meeting of the American Bar Association on February 12, 1984.

Clearly, the Corps' record has established that ADR can be used to resolve disputes arising in Government. Some of the more significant lessons learned from our experience indicate that ADR can bring the resolution of issues closer to factual realities because ADR encourages those closest and most knowledgeable in the technical aspects to work out agreements directly. Moreover, ADR permits the decision makers to make the decisions, rather than have them made by third parties. ADR can decrease the load on the litigation system by insuring that only major precedent-setting claims go the full litigation route. Lastly, ADR can re-establish trust between government and industry. ADR techniques encourage parties to work collaboratively and jointly on solutions.

Obviously, I bring certain biases to bear in favor of alternative dispute resolution. I am biased in support of ADR methods, including mini-trials, in lieu of litigation where appropriate. I am biased in support of decision makers being urged, if not required, to make the decisions they are paid to make, instead of passing them on to third parties, whether the third party be a judge, a lawyer, a disinterested third party, or a so-called neutral expert. I am biased in support of interest-based bargaining in lieu of positional bargaining. I believe to the greatest extent possible, that when the parties leave the negotiating table, whether there be two or ten parties of interest, the result should be a win-win situation rather than a win-lose situation. Rarely, if ever, should there be a lose-lose situation. The latter two types of situations do not last, as they only result in renewed or continued confrontation.

The Federal Government is rapidly recognizing the need to use more innovative approaches in resolving disputes. Relying exclusively upon traditional negotiations and the judicial process is not working in today's litigious environment.

ADR methods such as collaborative problem solving, interest-based negotiations, mini-trial, disputes review panel, and non-binding arbitration hold the promise for the development of a system which can resolve disputes quickly and efficiently. Already, the Corps and several Government agencies have used some of these ADR methods successfully.

If we're serious about making a dent in litigation now and in the future, ADR is available--with ADR the future is now.

Lester Edelman, Chief Counsel, U.S. Army Corps of Engineers in testimony before the Committee on the Judiciary, Subcommittee on Courts and Administrative Practice, United States Senate, May 25, 1988.

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The workbook has been produced by Dr. Christopher W. Moore of CDR Associates, in collaboration with Dr. Delli Priscoli. CDR Partners Susan T. Wildau and Bernard S. Mayer, and CDR Senior Associate Louise E. Smart wrote the chapters on Procedural Assistance and Resources for ADR Assistance, and prepared several of the simulation scenarios. James Creighton co-authored the chapter on Deciding Upon a Dispute Resolution Procedure, and made editorial comments on the draft edition of the manual.

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Reba Page, Division Counsel, and Samuel Mullet, Trial Attorney, of the Huntington District of the Ohio River Division were the legal presenters in the mini-trial video.

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ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

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ABOUT THIS COURSE: RATIONALE AND OBJECTIVES

As senior leaders in the Corps of Engineers, each of you has extensive knowledge and experience in resolving disputes. Why, therefore, invest 2-1/2 days examining alternative dispute resolution (ADR) procedures? What is the rationale for this course and the context surrounding the need for ADR in the Corps? The following section summarizes some of the reasons and history behind the course. It also outlines the course objectives.

Currently, many federal agencies are facing the challenge of how to effectively adapt to changing demands in a changing world. Major forces influencing federal agencies include a more litigious public; changing social conditions and values including the extensive requirements for public involvement, along with required detailed analyses of the environmental, social and economic impacts of agency planning and policy making; the changing nature of inter-governmental relationships; and the increasingly political nature of federal agency missions and senior manager roles. The result of these changes has been increased conflict; increased opportunities for higher quality and acceptable agency decisions; and increased utilization of collaborative procedures by federal agencies as a way of effectively managing conflict and decision making.

The Corps has also been impacted by these changes. For instance, contract claims have doubled in the last eight years. Claim procedures frequently take more than three years to complete, while cases qualifying for fast-tracking can take more than one year.

The changing social conditions and values which require a balance of economic, environmental, social and political interests in agency decision making have also produced conflicts within our own public service engineering profession. Diverse studies portray continued public concern for and endorsement of environmental quality. This steady change in values has occurred during both conservative and liberal political administrations in the U.S. and throughout the industrial world (Milbraith, 1984). Public works expenditures in the U.S. must now be justified in terms of impacts on environmental quality and public health, as well as in traditional economic development terms. Indeed, such concerns now top the list of DOD and DOE defense related priorities, and the Corps is the DOD's environmental agency.

The Corps has been struggling with a greater number of complex and controversial issues as well as an expanding collection of conflicting interests. For example, public concerns for water resources have increased from flood control and water transportation to include toxic waste impacts, hazardous wastes, waste water management, water resources management, wetlands protection, and environmental enhancement. These new issues and subsequent disputes within and among agencies, the public, and other interest groups, have become the new domain of water resources engineers and managers. The budget for waste water and hazardous waste is now greater than the combined budgets of the Bureau of Reclamation and the Corps Civil Works program.

Today the word "partnership" characterizes the ideal inter-governmental and intra-organizational relationship. Interdependence, mutual ability to leverage the attitudes and behavior of others, unpredictability of outcome, etc., have resulted in the need for a more collaborative problem-solving process among various levels of government. In order to effectively manage conflict and solve problems, the Corps must now work more explicitly in "partnership" with local sponsors of projects, rather than in the traditional way where the federal government provided direct engineering and construction services. Forming a partnership has also become crucial among Corps managers and construction contractors. Life Cycle Project Management (LCPM) is requiring new partnerships within our own organization.

It has never been a simple matter to separate the political, technical, administrative and legislative mandates and influences associated with our programs. In addition, the administration of laws which are often less than precise, and which significantly impact the distribution of benefits and values across diverse segments of society contribute to the political nature of our work. Consequently, the Corps' mission often looks more and more political to those whom it impacts and serves. While the executive senior manager has always had a political component to his role, the nature, extent and importance of that political piece has shifted. Not only must he be politically sensitive to what is happening inside the Corps, but he also must be effective in the external political arena which extends to the Corps' relationships with other federal agencies, other governmental entities, industry, multiple interest groups who make up "the public", etc. To be successful he must therefore be effective in the expanding political arena as well as exhibiting a high degree of technical competence. Indeed,

one could say that the primary job of the executive senior manager is to manage the gray area between the technical and the political. Changes in the Corps' mission and management responsibilities, which emphasize the political/legislative as well as the technical/administrative, along with the diversity of our programs can foster numerous conflicts among the Corps and those we serve as well as within our agency. It is therefore important for the Corps to recognize the potential for conflict, to identify both internal and external sources of conflict and to design procedures which will help recognize and reconcile the interests of the various stakeholders--other federal agencies, subcontractors, customers, employees, etc.--impacted by Corps policies and decisions. Several illustrations will clarify this point.

- In Civil Works, scarce resources, interdependence and competing interests make conflict inevitable between the Corps and local sponsors as they plan and implement local cost sharing agreements (LCAs). In response to the likelihood of disagreement, both planning and LCA partnerships now contain dispute resolution clauses requiring ADR approaches.

- Our Section 10 and 404 Regulatory Program, which issues over 20,000 permits per year, has as its centerpiece the balancing of competing interests and the discovery of "public interests" from among the stakeholders.

- Our Operations and Maintenance Program, which has grown to comprise over 50 percent of Civil Works, has become more prominent especially in times of drought or flooding. Management of the impacts of natural disasters will continue to increase visibility of projects, the way they are managed, and the apportionment of resources within the project management.

- In the military construction program, the Corps more actively than ever seeks to discern the interests and needs of its customers. These interests can differ from those of the Corps as well as from those of other customers. As DOD's environmental agent, the Corps explores ways to negotiate apportionment of responsibility in hazardous and toxic waste clean-up at hazardous waste sites. Frequently, potentially responsible parties (PRP) strongly disagree regarding who should bear the burden of and the amount of clean-up costs.

- Pressures from inside and outside the Corps to revise our way of thinking about problems and how we address them can create significant intra-organizational conflict. For example, the introduction of new personnel with diverse skills and new responsibilities has led to the need for collaborative problem solving within our own hierarchical structure in order to address competing mandates, goals, and interests within the organization.

- How we view ourselves may be a source of internal conflict. As Corps professionals, are we engineers who provide a relatively narrow range of solutions to water resources problems, or are we public service engineers who address a wider variety of water and construction related problems, and who create a broader range of possible solutions?

The opportunities for disputes continue to increase much faster than the resources to resolve them. If procedures exist to more effectively manage disputes, then you--senior Corps leaders--need to know and use them because they could significantly reduce the cost of making decisions.

Such procedures do exist and are evolving every day. Private and public organizations throughout society have successfully developed and used procedures which reduce settlement time, avoid costly litigation, build firmer partnerships, and produce viable settlements.

Academics and professionals in explaining and transferring these procedures have called them ADR procedures. Unfortunately, the term ADR can be misleading. You might ask "alternatives to what?" Originally, this meant alternative to litigation. However, professionals have discovered that the phrase may be too limited. To begin with, ADR procedures should not be seen as replacing our legitimate legal processes. Rather, ADR processes are intended to "offload" the legal system and to relieve that system of those disputes which are not precedent setting, which do not turn on points of law and which can be resolved by other means. ADR procedures also endeavor to preserve future relationships and prevent unnecessary and extended disputes through anticipation, upfront collaboration and effective dispute management.

ADR, therefore, is broader than the notion of an alternative and incorporates procedures which anticipate and manage as well as resolve disputes. In this broad sense, ADR procedures include skills such as collaborative problem solving, participatory management, partnering, mediation, facilitation, negotiation, and third party intervention. However, since the acronym, ADR, is recognized, we continue to use it in this course.

The Corps has played a significant role in the development of alternative dispute resolution approaches and procedures, in both its civil and military programs. In the 1970's, the Corps led federal agencies in employing innovative methods of public involvement. The Corps developed several levels of training programs to prepare its personnel to effectively apply and implement the new procedures to a wide variety of difficult public disputes. Hundreds of professionals have been trained in these skills and procedures which have been used to enhance the quality of decision making in hundreds of conflicts.

In the early 1980's, the Corps developed a mid-level management course on Negotiating, Bargaining, and Conflict Management. This course was designed for Corps personnel to empower managers to resolve conflicts at the lowest appropriate level within the organization. Over 500 COE personnel have been trained since the course's inception, and they are now in the field using improved communication, data collection, negotiation, and facilitation procedures to resolve COE problems.

Since the mid-1980's, the Corps has been an organizational leader in the application of ADR procedures to tough issues. The Corps has been a successful pioneer in the application of mini-trials, facilitated problem solving, mediation, dispute panels, and technical advisory panels to complex issues. The following are representative examples of the disputes in which the Corps has applied ADR procedures:

- In 1988, a dispute over the interim and long-term operating plan of a mid-western COE flood control dam came to a head. A governor, Congressional delegation, numerous state agencies, and public interest groups all moved to limit the generation capacity of the project, over the objections of the utility companies which were advocating increased hydro-generation. Law suits and legislative battles appeared imminent. Mediation was used to successfully address a range of environmental and operating issues.

- A $55.6 million claim (including interest) involving differing site conditions on the Tennessee Tombigbee Waterway was filed with the Corps of Engineers Board of Contract Appeals by Tenn Tom Constructors, Inc. Both the Corps and the contractor had the prospect of losing a tremendous amount of money and resources as a result of the way that the case was handled. A mini-trial was used to successfully settle the claim.

- In the last few years, the Corps has used regional Section 404 General Permits to facilitate the permitting and regulatory process. In 1987, a district proposed such a permit in a rapidly urbanizing Rocky Mountain county so as to facilitate construction of small fills associated with residential and industrial development. The multiplicity of parties and the number of controversial issues between the Corps, environmentalists, developers, the county and a city resulted in a series of difficult conflicts. The dispute appeared to be unresolvable short of court action. Facilitation was used to enable the parties to resolve their issues.

- Noise generated by maneuvers of battle tanks has outraged many citizens of small towns located adjacent to military bases or practice ranges. This has especially been a problem when maneuvers occur at night or during Sunday church services. Some citizens have argued that changes of use have occurred since the bases were sited, and that the training activities should be stopped. Other citizens have proposed that the noise is "the sound of freedom" and have welcomed the increased activity in their communities. Negotiation and facilitation have been used to address the needs of both the community and the military installation.

- A proposed harbor expansion resulted in local cost-sharing discussions between the Corps and the local sponsor. Differences between Corps regulations and client expectations led to a flurry of calls between the Congressional delegation and the Corps. The elected officials were asking for some flexibility on the Corp's part in evaluating the proposed cost-sharing arrangement. The Corps saw this as bending the rules. Negotiation was used to settle the disagreement.

- The technical staff of the Board of Engineers for Rivers and Harbors raised some very serious concerns about several components of a project that was carefully negotiated by a district/division and a local sponsor. The Board staff suggested that unless changes were made, they would recommend to the Board that the project be delayed or halted. The district and division initiated moves to circumvent the Board staff and put pressure on the Board through the Congressional delegations. Cooperative problem solving was used to manage the differences.

Many of the procedures presented in the next few days should make intuitive and practical sense to you. No doubt, you will have heard about or tried some of these procedures on disputes encountered in your daily work. Indeed, your instructors will be surprised if they do not hear "ah-ha, I've done that." This course will provide a framework and a language by which you, as managers, will be able to identify, analyze and categorize disputes and conflict situations that you have encountered or will encounter. In addition, it will provide a common understanding and repertoire of dispute resolution procedures to help you consciously manage such situations. Finally, the course will provide opportunities to practice procedures in a low-risk environment. The procedures presented are based on experiences both within and outside of the Corps, and have been effective in managing and resolving a variety of disputes.

To sum up, the objectives in this course are to:

1. Expose you to a range of ADR procedures;

2. Demonstrate how these procedures add to your "tool kit" of management techniques;

3. Provide you opportunities to discuss and to practice procedures;

4. Encourage you to encourage your staffs to try such procedures where appropriate; and

5. Put you in contact with the resources to support your use of ADR procedures.

In pursuing these objectives, you will:

- Learn about and be able to identify the basic causes of disputes and conflicts.
- Add conflict management concepts, dispute resolution procedures and skills to your repertoire of general management knowledge and skills.
- Understand the continuum of dispute resolution and conflict management procedures that are available to resolve or manage disputes.
- Learn about how ADR procedures have been successfully used in the Corps to resolve conflicts, and the high level of support the use of these procedures has received.
- Understand which dispute resolution procedures are appropriate for particular problems, and how and when these procedures can be most beneficially utilized in the "life cycle" of a conflict.
- Learn specific skills that will enhance your ability to negotiate internal organizational disputes and to work more effectively with external agencies and the public.
- Identify when third party assistance in dispute resolution is appropriate, and how to obtain it.
- Understand how to plan for or avoid increased litigation costs.
- Identify how ADR can be a benefit to you, your staff, and the Corps.
- Build the knowledge and skills to apply Alternative Dispute Resolution procedures in a current or future Corps dispute.

In short, this course is the most recent step in a history of Corps leadership in the ADR field.

2
AGENDA

THE COE EXECUTIVE SEMINAR ON ALTERNATIVE DISPUTE RESOLUTION (ADR) PROCEDURES

DAY I **8:00 A.M. - 5:00 P.M.**

Time	Topic	Approach	Workbook Reference
8:00 - 8:15	Welcome and Introductions		
8:15 - 8:30	Course Overview and Agenda Review	Presentation	Chapter 1
8:30 - 9:00	Types of Disputes Encountered by the Corps	Group Exercise & Discussion	Chapter 1
9:00 - 9:15	ADR Principles for Managers	Presentation	Chapter 3
9:15 - 9:30	Break		
9:30 - 10:45	The Causes of Disputes and Conflict Management	Group Exercise, Presentation, Discussion	Chapter 4
10:45 - 11:00	Stretch Break		
11:00 - 12:00	Dispute Resolution Procedures and Their Applicability to the Corps	Presentation & Discussion	Chapter 5, 6
12:00 - 1:15	Lunch		
1:15 - 2:30	Introduction to Negotiation	Presentation & Discussion	Chapter 5, 7
2:30 - 2:45	Break		
2:45 - 3:30	Negotiation Simulation	Exercise	Chapter 7
3:30 - 3:45	Discussion of the Simulation	Discussion	Chapter 7
3:45 - 5:00	Assisted Problem Solving I: Procedural Assistance: Mediation and Facilitation	Group Exercise and Discussion	Chapter 5, 8

Agenda

DAY II **8:00 A.M. - 5:00 P.M.**

Time	Topic	Approach	Workbook Reference
8:00 - 8:05	Agenda Review		
8:05 - 9:00	Mediation/ Facilitation Demonstration	Presentation & Discussion	Chapter 8
9:00 - 9:15	Break		
9:15 - 11:30	Assisted Problem Solving II: The Mini-Trial and Other Procedures	Simulation & Discussion	Chapter 5, 9
11:30 - 12:00	Assisted Problem Solving III: Non-Binding Arbitration, Settlement Conferences, Dispute Review Boards	Presentation & Discussion	Chapter 5, 9
12:00 - 1:15	Lunch		
1:15 - 1:45	Pass Out and Read Case		
1:45 - 2:15	Selecting and Implementing Appropriate ADR Procedures	Presentation & Discussion	Chapter 10, 11, 12
2:15 - 3:15	Case Study: Managing Disputes and Selecting ADR Procedures	Presentation and Discussion	Chapter 14
3:15 - 3:30	Break		
3:30 - 4:00	Case Study Analysis/Critique	Presentation and Discussion	Chapter 10, 11
4:00 - 4:45	Obstacles and opportunities for using ADR procedures	Group Exercise	Chapter 14
4:45 - 5:00	Wrap up and Evaluation		

3
ADR PRINCIPLES FOR MANAGERS

Dispute resolution *is* management. Look at your own job as a manager and executive. Studies have shown that 30 percent of first line supervisors' time and 25 percent of all management time is spent on resolving disputes. More than 85 percent of those leaving jobs do so because of some perceived conflict. Almost 75 percent of job stress is generated by disputes. Festering disputes are time consuming and can result in alienation, stress, reduced productivity, loss of quality, ruptured relationships, and even violence. One might say that being an executive or senior manager is *dispute management*. Some guidelines for managing disputes and assessing the effectiveness of a specific dispute resolution approach are listed below. These general guidelines provide a framework within which to choose ADR procedures outlined in subsequent chapters.

1. **Strive to keep decisions as close to the hands of the manager, decision-maker and substantive expert as possible.**

   ADR techniques are management tools. The more the management of the disputes and the solutions are in the hands of the managers or those closest to the substance of the problem, the higher the probability that both the letter and spirit of solutions will be implemented. Indeed, it is often possible to obtain more satisfactory and timely decisions when those closest to the problem or those who know something about the situation are involved in the solution. Often, the tendency is to do just the opposite. Frequently managers who encounter a sticky problem are quick to turn over its resolution to lawyers or other outside parties, rather than more directly participate in a problem-solving process where control over the outcome remains with the parties, themselves. This can deprive the decision-making process of the involvement of the people who best know about the problem and who

are best suited to design an elegant solution. Managers should be more careful in delegating this responsibility to less informed parties, and should seek to own the process as well as the solutions to disputes.

2. **Seek not only the rational but the reasonable.**

Frequently engineers and technical people forget that their goal is to seek not only the technically superior solution but also the reasonable and workable alternative. Undue emphasis upon technical elegance and legal purity can become the ingredients of stalemate and intransigence. Seemingly minor issues can become battles to the death in the crusade of technical purity.

It is important to remember that the most technically rational or perfect solution is not always the one which parties find most acceptable or feasible to implement. Obviously the "reasonable" solution should not require a compromise of ethical or legal standards, but the degree of purity a solution contains should be weighed against the desirability of resolving a dispute and the long-term impacts of a stalemate.

There are multiple satisfactory, and genuinely elegant, solutions to most problems. It is important for parties to be open to exploring multiple options to satisfy their interests rather than becoming deadlocked over positions. Managers once again will recognize that attaining this goal involves finding the balance between a variety of competing interests. ADR procedures can often help managers to find such a delicate balance.

3. **Seek to "offload," not replace, the legal system.**

ADR does not seek to replace the legal system or challenge our democratic principles. Alternative dispute resolution techniques are intended to make the legal system--judicial, legislative, and executive--work more efficiently and to help that system adapt to new realities and problems. ADR is also concerned with solving key problems in addition to settling the issues--something critics of the formal judicial process say is missing. However, ADR is not a panacea for the resolution of all social ills. ADR should not be applied in all circumstances or to all disputes. For example, cases where a legal precedent is at stake should go through the traditional judicial process. But remember, it is easy to think that every case fits such criteria. If this trend is continued, the formal system will remain overloaded and it will rapidly reach the point where it cannot perform. When that happens, its very legitimacy will be questioned.

A significant percent of most disputes in America could easily be resolved outside the expensive adversarial process. Indeed, over 80 percent of current cases within the U.S. court system are settled outside of the court. The point is that by offloading the formal legal system, ADR will result in a more effective and efficient judicial system.

4. Anticipate and act to prevent.

Since most cases are settled outside of court, we know there are vast opportunities to anticipate and to prevent highly adversarial disputes. To anticipate means projecting where the dispute is heading and asking if things could be different. Preventing does not mean caving in. To prevent means understanding and satisfying interests before they are hidden and locked behind positional posturing.

If we assume that the situation will become adversarial, we can be sure that's what we will create. Do not advocate the use of procedures which encourage the adversarial relationships we seek to avoid. Do not succumb to a sense of powerlessness over the process. Pull your organization out of unproductive and excessively expensive dispute resolution; anticipate and act to prevent.

The best ADR success is the conflict that has been avoided because interests have been met before destructive confrontation has occurred. In the legal arena, this is often referred to as "preventative" law.

Anticipating and preventing conflicts is a management decision. It is often difficult to prove the benefit of such action because it is hard to document potential negative impacts or benefits should another course of action be selected. Nevertheless, anticipating and addressing interests which could generate conflicts is the most efficient form of ADR.

5. Explicitly assess the alternatives to using ADR and negotiation forums.*

Considering the best alternative to a negotiated agreement or other intervention is a powerful tool for evaluating the viability of, and building commitment to, a process of resolving disputes. Assessing the desirability and probability of a non-negotiated decision is often the first step in determining if negotiation, with or without the assistance of a neutral third party, is a superior procedural option.

How often have negotiators shied away from asking other disputants, "Why are you still at the table?" or "Why do you want a negotiated agreement?" Such questions are often avoided because of the fear that the opposing party will leave the table, and the negotiator will have failed. Requesting all parties to review and

*Roger Fisher and William Ury, *Getting to Yes.* Boston, Massachusetts: Houghton Mifflin Publishing Company, 1981.