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**MEDIATION SERVICES: SUCCESSES AND FAILURES OF
SITE-SPECIFIC ALTERNATIVE DISPUTE
RESOLUTION**

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I. INTRODUCTION

Alternative Dispute Resolution (ADR) is a term referring to an array of methods or procedures, or both, short of formal litigation, used to resolve disputes between parties.¹ Some of the more common forms of ADR are facilitation, in which a third party assists in non-substantive areas; fact-finding, in which a third-party acts to develop reliable information; mediation, in which a third party attempts to mediate matters between adversaries; and arbitration, either binding or non-binding, in which a single third-party "neutral" or a team of "neutrals" considers the issues in dispute and renders a legally binding decision. A fifth form of ADR is the mini-trial, which proceeds analogously to a more formal judicial proceeding, but in which rules and procedures are relaxed.

Although use of these techniques is ancient, discussion and treatment of them as a legitimate category of alternative tools

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1. For a discussion of non-environmental Alternative Dispute Resolution, see *Alternative Dispute Resolution*, AM. JUR. 2D *New Topic Service* (1985).

used for dispute resolution has increased in this century. Historically in America, ADR mechanisms developed out of labor-management negotiations. Moreover, ADR has been applied successfully in commercial² and real estate law.³ In the last twenty years, ADR has come into more frequent utilization in disputes involving environmental problems.⁴ ADR procedures continue to gain acceptance as recently exemplified by Congress' enactment of the Administrative Dispute Resolution Act.⁵ The ADR Act amends the Administrative Procedure Act by encouraging federal executive agencies to use ADR.

Advantages to using ADR, as opposed to more traditional forms of dispute resolution such as litigation, include accelerated speed in reaching a resolution concerning problems or disputes; reduction of transaction costs, such as court filing and attorney fees and reduction of the burden on the court system, which is a societal benefit. Perhaps the most important benefit accruing to the parties is having tribunals or panels of experts within the parties' field make decision on problems occurring in that field, which ensures that the resolution will be precisely tailored to promote, in a realistic manner, the desires of all the parties. However, there may be disadvantages to using ADR, such as added costs, delays, overstructured results, and misapplication of techniques to disputes or problems not calling for those methods or techniques.⁶

This Article addresses the development and application of ADR principles in the environmental arena since the enactment of federal environmental legislation. In addition, the Article looks at specific positive and negative results from application of ADR to resolve disputes at various sites.

2. GRAD, *TREATISE ON ENVIRONMENTAL LAW* § 15.04 (1988).

3. Levy, *Arbitration in Real Estate Disputes*, 94 *CASE & COM.* 1, 12-15 (1989).

4. G. BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE* 73 (1984). An exhaustive treatment of dispute resolution in Superfund settlements has been compiled by the Information Network for Superfund Settlements at Morgan, Lewis & Bockius, Washington, D.C., 20036, in its looseleaf manual for INSS members at pp. DR-1-1 to DR-105. A useful bibliography is found at DR-1-14.

5. Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990) (to be codified in scattered sections of 5 U.S.C.). See also *Amendments to Procedure Act Encourage Agencies to Use ADR*, *The National Law Journal*, March 4, 1991, at 22, col. 1.

6. U.S. EPA has issued a guidance document addressing ADR. See UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *GUIDANCE ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES IN ENFORCEMENT ACTIONS* (1987).

II. SUPERFUND OVERVIEW

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund)⁷ was enacted by Congress to address health and welfare problems created by the existence of thousands of abandoned hazardous waste landfills throughout the United States. In 1986, CERCLA was amended by the Superfund Amendments and Reauthorization Act (SARA),⁸ which added new causes of action to CERCLA and reauthorized CERCLA for five additional years.

Pursuant to CERCLA, the United States Environmental Protection Agency (EPA) maintains a list of potential Superfund sites known as CERCLIS.⁹ Sites on the CERCLIS list are scored under the Hazard Ranking System (HRS).¹⁰ Should a potential site attain a score of 28.5 or higher, it is placed on the National Priorities List (NPL).¹¹ The EPA causes sites to be remediated once they have been placed on the NPL. Typically, Potentially Responsible Parties (PRPs), i.e., those parties from whom the EPA may seek to recover response costs for cleanup of a hazardous site or whom the EPA may enjoin to clean up the site, receive information requests issued under section 104(e) of CERCLA¹² and the active phase of the Superfund remediation process begins. The process is fact driven. In some cases, for example, EPA will ask the PRPs to immediately perform a surface removal of drummed wastes.

CERCLA and SARA provide for strict liability, which is both joint and several (any party found partially liable can be compelled to pay the entire cost of a cleanup), and retroactive (the acts cover hazardous waste related activities which occurred prior to the enactment of the acts).¹³ While these characteristics are

7. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 §§ 101-175, 42 U.S.C. §§ 9601-9675 (1988) [hereinafter CERCLA].

8. Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified in scattered sections of 42 U.S.C. §§ 9601-9675).

9. CERCLIS, the CERCLA Information System, is defined at 40 C.F.R. § 300.5. CERCLIS is a comprehensive EPA database that inventories and tracks releases addressed or which need to be addressed by the Superfund program. *Id.*

10. Uncontrolled Hazardous Waste Site Ranking System; A Users Manual, 40 C.F.R. 300 App. A (1990).

11. National Priorities List, 40 C.F.R. 300 App. B (1990).

12. 42 U.S.C. § 9604(e).

13. *See, e.g.,* O'Neil v. Picillo, 883 F.2d 176, 178-80 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 1115 (1990); Comment, *Apportioning Liability for the Cleanup of Hazardous Waste Sites Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)*, 1 VILL. ENVTL. L.J. 537, 542 n.27 (1990).

perceived by many to be unfair, they remain a fact of life for the PRPs. This liability scheme is a locomotive for an enlightened PRP to attempt to fix its liability at a site both individually and with respect to all other PRPs. A PRP should act expeditiously in resolving liability issues because should it procrastinate, the likelihood that it will be brought into court increases, thus putting the PRP at risk of being liable for the entire cleanup of the site.

At a great many sites, groups of PRPs band together in generator committees or steering committees to discuss and resolve problems they are facing. A steering committee is simply a group of PRPs who voluntarily band together to deal with and resolve issues of common concern arising out of the site. Over the lifetime of a Superfund proceeding, a steering committee will undertake many tasks, some of which may include the following: identification and notification of additional PRPs; establishing an agreement on how the steering committee should be run (Participating Companies Agreement); negotiating partial or full consent decrees or administrative orders with the government; performance or supervision of a surface removal; performance or supervision (when permitted) of the Remedial Investigation (RI) or Feasibility Study (FS) or both; performance or supervision of other aspects of the remedy, such as cleanup or collection of contaminated groundwater; and allocation of share of responsibility at the site for steering committee members.

III. ADR AT SUPERFUND SITES

Allocation of liability for individual PRPs is a paramount issue for these committees. It is in this allocation process that ADR has the greatest potential. Some observers have suggested that the steering committee process is itself a form of ADR. In the broad sense this can be said to be a valid assessment since the steering committee uses a negotiation-type mechanism that, as a practical matter, minimizes courtroom time in the cases culminating in consent decrees. A steering committee can also effect useful results in cases brought under section 106 of CERCLA,¹⁴ where Administrative Orders (AOs) can be negotiated to result in Administrative Orders by Consents (AOCs).¹⁵ Although achieving some success themselves, these innovative committees can utilize additional ADR techniques such as use of an allocation specialist, employment of a third party neutral to perform non-

14. 42 U.S.C. § 9606.

15. CERCLA § 122, 42 U.S.C. § 9622.

binding or binding arbitration to resolve allocation issues, and resolve other problems confronting the committee.

ADR methods can be useful and effective provided they are not overused or misapplied. Experience indicates that careful application of appropriate ADR techniques can be done most effectively on a case-by-case basis, since fact situations differ from site to site and numerous pathways are likely to exist for problem-solving within a particular site steering committee. In other words, a given ADR mechanism, such as designation of a third-party neutral to allocate shares of responsibility, whose strength lies in its ability to be flexible and adaptable to an individual site's needs and expectations, is, if statutorily implemented, likely to be too rigid and formalized to be practically applied to the highly varied fact scenarios prevailing at different Superfund sites.

In addition to steering committees, there are numerous persons and entities that are capable of supplying ADR techniques and services. Many of these ADR services are not-for-profit.¹⁶ Some advantages to ADR service entities are that they are experienced in using ADR techniques, thereby reducing the amount of time inexperienced parties would typically spend becoming familiar with the techniques; they usually enjoy the trust and respect of the parties because they are perceived as somewhat neutral and skilled; and they have developed several useful ADR frameworks applicable to varied fact scenarios so that a successful conclusion to the dispute may be reached even with strong factual differences from site to site. Perhaps most importantly, an ADR service is not policy-restricted or constrained by traditional adjudicative processes and parameters and therefore it is highly flexible and capable of addressing a wide range of potential disputes.

From a positive standpoint, ADR can reduce transaction costs, identify all responsible parties at a site, provide relatively equitable allocation, reduce friction among the parties, enhance credibility of the steering committee and expedite remediation. However, inappropriate or ill-applied ADR techniques can add to costs, chill development of trust among the parties or between categories of parties, and cause protracted and acrimonious controversy, thereby delaying remediation at the site and reducing

16. Perhaps the best known is the American Arbitration Association, which is headquartered in New York City, and has offices in major cities. The Center for Public Resources is also involved in ADR and is located in New York City. Clean Sites provides allocation and some fact-finding services and operates out of Alexandria, Virginia. In addition, numerous attorneys and technical consultants offer services, including ADR methods, on a private, for-profit basis.

credibility of the steering committee. For these reasons, ADR techniques need to be applied carefully and selectively to optimize beneficial outcomes and minimize negatives.

IV. EXAMPLES OF POSITIVE ADR EXPERIENCES AT SITES

Some firsthand examples of useful ADR applications demonstrate the beneficial effect of carefully selected and applied techniques.

At a Midwestern site, a third party was employed by the steering committee to develop a transaction database with a number of fields identifying date of shipment, date of receipt, truck number, trailer number, type of waste, and additional information. When compiled, this information provided a volumetric allocation, i.e., an allocation of liability based upon the percentage of the total volume contributed by a particular violator. In analyzing the data, the third party applied a number of principles or assumptions provided by the steering committee. (For example, each tanker truckload was assumed to be 5,000 gallons and records showing different pickup and delivery dates for a given shipment were assumed to have meant that the truck made an overnight stop at an intermediate point.) These assumptions were developed through lengthy negotiation and operated as guidelines on the handling of certain data in the volumetric allocation process. This relatively impartial application of a set of assumptions to a large body of data sped up the allocation process for the steering committee, and yielded results generally believed to be equitable by the majority of steering committee members.

In another instance, the services of a third party organization were retained to examine all site records and other evidence, including narrative and anecdotal evidence. The service entity successfully developed an allocation based partly on "qualitative" factors rather than a simple volumetric allocation of liability. This qualitative allocation is highly useful at sites where large quantities of records are missing. Interestingly and importantly, the steering committee had selected the third-party entity based upon its high level of confidence in the organization's ability to exercise its expertise in Superfund matters and to reach an equitable allocation based upon all relevant factors.

At a third site, an allocation subcommittee comprised of steering committee members effected a volumetric allocation. Members of the steering committee then had the option of chal-

lenging the allocation in writing by presenting their challenges to a third party neutral. The neutral considered the challenges which were quite varied in format and rendered decisions which could be appealed within certain parameters. The same site later utilized a more formal binding arbitration process to resolve certain legal questions regarding allocation, such as whether a given category of waste would be subject to the petroleum exemption of CERCLA. Parties not wishing to use binding arbitration were given other options, such as cashing out. The choices made at this site on application of ADR methods reflect a highly intelligent use of the ADR process—employment of neutrals to arrive at decisions requiring impartiality and of alternatives to arbitration to accommodate parties who believed arbitration was inappropriate in their particular situation.

At another location, a steering committee made substantially greater progress toward remediation of the site and resolution of member problems by hiring common counsel. Each PRP contributed to counsel's collection of facts. The counsel played a traditional role in inaugurating contribution actions against recalcitrants, but in an internal capacity the counsel acted as mediator, reducing tensions among members of the steering committee and facilitating the decision-making process.

The use of a law firm as facilitator has occurred in a large number of steering committee situations. It is not uncommon for a large corporate PRP to hire outside counsel and for that law firm to act as host organization for PRP meetings or as secretariat for the group, or both, and sometimes to undertake tasks which may benefit the entire group but for which costs are borne by the corporate client PRP. In these instances, the law firm represents a single PRP, often a very large-volume generator at the site, and that PRP in effect subsidizes the costs of certain tasks which actually benefit the entire steering committee.

At a site in the far West, a steering committee hired an organization whose sole purpose was facilitation of activities of the steering committee. The same site also employed joint counsel. Therefore, the steering committee at this site consciously divided roles which are concomitant at other sites. The facilitator handled mailings, arranged meetings and administrated the steering committee. The joint counsel took part in negotiations and instituted certain legal proceedings. This example illustrates the effective use of specific ADR entities to maximize the efficiency of the dispute resolution process.

At a Midwestern site, a facilitator was brought in to identify PRPs, organize the steering committee, and frame the issues. This program had good results at a site where there were few high volume PRPs to take the lead. Inexperienced PRPs were thus provided with an orientation to the Superfund process which, at most sites, would have been performed by Superfund veterans.

V. EXAMPLES OF NEGATIVE ADR EXPERIENCES AT SITES

Not all ADR situations are felicitous. At a site in the North Central states, some of the PRPs proposed a scheme involving fact-finding by a third party neutral. The neutral indicated a rate comparable to very expensive outside counsel. A calculation of the material to be reviewed and estimated time to review that material, when multiplied by the neutral's hourly rate, resulted in an extraordinarily large potential expenditure. The parties reconsidered the proposal and declined to engage the neutral. The rejection of a high-cost alternative led to a reconsideration of the group's needs. The mixed result was that some of the difficulties were hammered out in direct negotiation and others were mediated by joint counsel. However, other problems remain and have been tabled pending some remedial steps and the outcome of certain contribution actions against recalcitrant parties. The situation at this site demonstrates that the rejection of one ADR technique without substituting an adequate comparable technique can result in delayed and unsatisfying results for the PRPs.

In a proceeding involving an EPA Region V site, the parties hired a third party neutral to review certain data and materials. The neutral reviewed and catalogued the materials in question, then continued to perform an unrequested—and unwelcome—analysis of the materials. The parties felt obligated to turn the analysis over to the agency but were unhappy with what they perceived to be overzealous behavior on the part of the neutral. This underscores the proposition that instructions concerning the tasks to be performed in any ADR technique by a third party should be precisely and specifically delineated. In like manner, the quality of the neutral needs to be carefully considered because a weak neutral or one not enjoying high levels of trust on the part of the PRPs will be unable to successfully conclude a dispute or, alternatively, will facilitate an agreement that proves to be impractical or deleterious.

At an East Coast site, project design was neglected and progress at the site suffered because the parties did not reach agreement on goals, objectives, and methods before hiring the neutral. The result was near chaos and an almost total breakdown in progress at the site resulting in escalated costs and protracted delays. These could have been avoided by some careful preparation and consideration of what it was the parties hoped to achieve by use of ADR. Perhaps the lesson to be learned from this site is that the parties need to develop an environment to foster cooperation and successfully identify desired outcomes prior to beginning a hastily-considered process.

VI. CONCLUSION

ADR describes an array of techniques for problem-solving which tend to avoid formal litigation in adversarial disputes. As public awareness of ADR continues to grow, and need for effective and rapid resolution of problems at Superfund sites grows, ADR can play an increasingly important role. When properly utilized, a number of ADR techniques provide good results at sites, including equitable allocations of liability, competent development of facts, facilitation and mediation services, and savings of time and transaction costs. Negatives can be high expenses, protracted delays, work product of questionable quality and failure to accomplish outcomes intended by the steering committee. A careful weighing of the steering committee's needs can result in the selection of ADR techniques which can foster strong economies and more effective remediation at sites.

