



# Interagency Alternate Dispute Resolution Civil Enforcement and Regulatory Section Newsletter

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## NEWS FROM CERS

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*(the Civil Enforcement and Regulatory Section  
of the Interagency ADR Working Group)*

CERS will provide, free of charge, a CERS Consultation Team to assist you in developing or modifying an enforcement ADR program. If you are interested in bringing a team to your agency, or just want to learn more about the use of ADR in civil enforcement or regulatory conflicts, contact CERS Chair Richard Miles at 202/502-8702 or by E-mail at [richard.miles@ferc.gov](mailto:richard.miles@ferc.gov). When you call, Rick will set up an initial meeting for you to discuss your interests with other Section members from agencies with ADR programs. (See NLRB Consultation Team article below.) If you would like to learn more about the Interagency ADR Working Group (of which CERS is a part), please go to the interagency group's web page, <http://www.adr.gov>.

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## CERS CONSULTATION TEAM ASSISTS NLRB IN CREATING PILOT ADR PROGRAM

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Upon request of the National Labor Relations Board (NLRB), CERS has established a Consultation Team to assist the NLRB in its efforts to create a pilot ADR program. The pilot will include civil enforcement cases alleging unfair labor practices by employers and unions.



The cases are before the Board Members on appeal from decisions issued by administrative law judges.

The NLRB learned of the Consultation Team program through an article in the December 2004 CERS Newsletter, and contacted CERS Chair Richard Miles for assistance. Rick invited the NLRB Chief Counsel to attend a CERS meeting to explain (1) background on the NLRB's civil enforcement case processing system, (2) the needs the pilot program should address, and (3) the kind of assistance that NLRB would like CERS to offer. The NLRB was particularly interested in drawing upon the wealth of experience that CERS members have in establishing and operating civil enforcement ADR programs.

After creating a Consultation Team, members shared with NLRB staff their agencies' experiences in creating and operating civil enforcement ADR programs. NLRB was especially interested in learning about

- criteria for selecting cases for the pilot,
- mandatory versus voluntary participation in an ADR program,
- when and how public input should be sought in creating the program,
- the selection and training of mediators, and
- pilot evaluation systems.

The agenda for the next meeting between the Consultation Team and NLRB officials is currently being planned. Based on advice from the Consultation Team, NLRB has invited outside stakeholders comprised of management and labor representatives from the American Bar Association's NLRB Practices and Procedures Committee.

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## ADR OPTIONS AT THE INTERNAL REVENUE SERVICE

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The mission of IRS Appeals is to resolve tax controversies, without litigation, on a basis that is fair and impartial to both the government and the taxpayer. Further, the process should enhance voluntary compliance and public confidence in the integrity and efficiency of the Service. To meet these goals, IRS Appeals has adopted three ADR options.



- **Fast Track Settlement** is designed to help large and midsize business and small business/self employed taxpayers expeditiously resolve disputes during an audit. A specially trained Appeals Officer facilitates the discussion between the taxpayer and the audit team manager to reach a mutually agreeable settlement within 120-days. For complete information, see Revenue Procedure 2003-40.
- **Fast Track Mediation** is designed to help small business/self employed taxpayers resolve many disputes resulting from audits, offers in compromise and other collection actions. An Appeals or Settlement Officer who has been trained in mediation helps the taxpayer and IRS discuss the

areas of disagreement and options for resolution. The goal is to reach a jointly agreeable solution, consistent with relevant law, within forty days. For complete information, see Revenue Procedure 2003-41.

- **Post Appeals Mediation** is an extension of the Appeals process. The mediator's role is to help resolve the dispute only after good faith negotiations in Appeals have failed. The parties may use an Appeals Officer Mediator at no cost, or pay for non-IRS co-mediators. For complete information, see Revenue Procedure 2002-44.

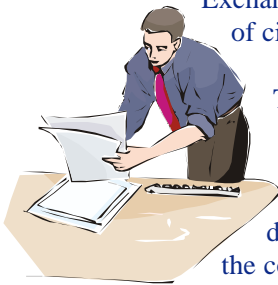
For more details, see the IRS Appeals Internet Web site Tax Information for Appeals on <http://www.irs.gov> or contact Thomas C. Louthan, Director, Alternative Dispute Resolution, IRS Appeals [thomas.c.louthan@irs.gov](mailto:thomas.c.louthan@irs.gov)

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## SEC v AUDITORS

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The Securities and Exchange Commission brought a civil injunctive action in federal district court against three auditors: the engagement partner, the senior manager and the manager, on a failed audit of a nonprofit healthcare organization. The complaint alleged that each of the auditors actively participated in a fraudulent scheme to mask the company's deteriorating financial condition. The Commission sought, among other things, to permanently enjoin the three auditors from violating the Securities Exchange Act of 1934, and the imposition of civil penalties.



The district court judge ordered the parties into mediation with a mutually acceptable mediator. The matter ultimately settled, and the district court entered judgments with the consent of the defendants which:

- permanently enjoined the engagement partner from violating Section 10(b), Rule 10b-5, of the Securities Exchange Act of 1934, which is an anti-fraud provision, and ordered him to pay a \$40,000 civil penalty; and
- for a period of two years, enjoined the senior manager and the manager from appearing or practicing before the Commission, and from participating as a member of the engagement team of any independent auditing firm that issues audit reports in connection with the financial statements of entities not under the jurisdiction of the Commission.

In a follow-on administrative proceeding based on the injunction entered against the engagement partner, the Commission suspended him from appearing or practicing before the Commission as an accountant with the right to apply for reinstatement after a period of years.

This case was well suited to mediation because all parties were interested in settling. The case had the potential to drag on for years, impacting the auditor's lives and morale in the accounting firm, and would occupy many Commission staff working hours. Moreover, there was litigation risk to both sides. Because the mediator was well versed in business and enforcement culture, he grasped the strengths and weaknesses – legally, politically and culturally- very quickly and was able to use that knowledge to help surface ideas, and help the parties to explore options. He ultimately assisted the parties in reaching a mutually acceptable settlement.

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## NEW STUDY

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The Hewlett Foundation and U.S. EPA's Conflict Prevention and Resolution Center are jointly sponsoring a study of the environmental, economic, and social effects of reaching agreements through neutral-assisted collaborative processes. The study will evaluate a set of cases from Oregon state government and US EPA, comparing the effects of collaborative-based agreement to litigation and administrative processes. The members of the study team include Andy Rowe of GHK, International, Bonnie Colby of the University of Arizona, Mike Niemeyer of the Oregon Department of Justice, and William Hall from EPA.



The study team has recently concluded data collection and has begun analyzing the Oregon cases, which involve fish passage and water quality issues. They expect to produce a report on these cases sometime during spring 2005. Data collection has begun on the EPA cases, which involve water quality issues in policy making, permitting, and enforcement contexts. The team anticipates finalizing the report on the EPA cases during the later part of 2005. For more information, please contact William Hall at 202.564.0214 or [hall.william@epa.gov](mailto:hall.william@epa.gov).

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## BOOK REVIEW

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**Bernard S. Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution*, John Wiley & Sons, 2004, Jossey-Bass, San Francisco, CA.**

Bernard S. Mayer, Ph.D, a 25-year veteran of the field of conflict resolution believes that the professional role of mediators or arbitrators is much broader than as simply resolvers, or third-party



must, in his view, focus on conflict neutrals. They conflict engagement, assisting at all stages of conflict in order to engage conflict constructively, and when necessary, to reveal the underlying causes of the surface conflict, while maintaining open and amicable dialogue.

His thesis is: (1) this field is changing and must change; it must include the needs of the people it serves, the parties, and the advocates. (2) The concept of conflict resolution must be expanded to include the various aspects of the conflict continuum to include “conflict engagement.” Examples are coaching, systems design, and even advocacy, and other skills.

The idea that the field is bigger than just one or two approaches to conflict is recognized. Indeed, there have been a number of articles mentioning these new training and preventive roles allowing the mediator or conflict expert to get involved sooner. Also, the “systems designer” can look at how to improve the mechanism. The problem has been that many parties still see mediators, and arbitrators in their institutional and instrumental roles rather than as consultants to the problem. Getting involved earlier is a challenge since the parties see the conflict specialists in a more narrow way.

Dr. Mayer’s book will help shape this thinking as well. While it is somewhat repetitive, its strengths include the examples from his practice, the dilemmas he has met and the ideas he has tested. It is refreshing that this book does not contain indecipherable footnotes; instead he includes a generous bibliography and index, and his foreword reads like a who’s who in this field. In summary, Dr. Mayer’s book is provocative and just what the field needs to discuss!

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## ASK CERS AND ANSWERS

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Dear CERS,

I am preparing my negotiation strategy for an upcoming mediation, but I am uncertain how to accommodate and maximize the potential benefits of having a neutral. Can you help?

**Curious Counsel**

Dear Curious Counsel,

Since the neutral will be having confidential talks with your opponent, the neutral will have unique insights into the negotiation that you should draw upon in designing your strategy. The neutral provides you options for dealing with negotiation difficulties that you as an advocate do not typically have. For example, consider using the neutral to

- serve as a safe, confidential and knowledgeable sounding board for potential offers or negotiation tactics;
- communicate sensitive information to your opponent that you want to ensure does not get disclosed outside of the negotiation;
- float ideas or proposals to your opponent without getting locked in. As part of the typical exploring of options with both sides, the neutral can float your ideas without attribution to gauge your opponent’s reactions;
- help you deal with a “difficult” opponent (personality, lack of experience, etc.) by structuring the most effective type of interaction between you and your opponent and ensuring that your points are understood and appreciated.

Through including a strategy for effectively using the unique abilities of a neutral, you can greatly increase your negotiation effectiveness!

**Sincerely,  
CERS**

If you have any comments about this newsletter, would like to submit an article, or have any questions for “ASK CERS AND ANSWERS”, please email Leah Meltzer at [meltzerd@sec.gov](mailto:meltzerd@sec.gov) or Robert Manley at [robert.manley@navy.mil](mailto:robert.manley@navy.mil) The editors would like to thank the following people for their contribution to this issue: David Batson, Will Hall, Eileen Hoffman, Tom Louthan, Rick Miles and Gary Shinnars.