

**THE SOUNDS OF SILENCE: PROMOTING ALTERNATIVE DISPUTE
RESOLUTION IN AIR FORCE PROCUREMENT BY PUTTING CONFIDENCE
INTO CONFIDENTIALITY**

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*Santino, come here. What's the matter with you? I think your brain is going soft. . . . Never tell anybody outside the family what you're thinking again.*¹

I. Introduction

Litigation can be expensive, inefficient, acrimonious, and there is always the chance you will lose; on the other hand, alternative dispute resolution (ADR) can be inexpensive, efficient, and there is always the chance you could end up worse off than if you'd chosen to litigate.² Remarkably, both litigation and ADR, its fashionable alternative,³ are risky, but they are risky for entirely different reasons. The ultimate risk in litigation is the risk of losing. In ADR, the ultimate risk concerns confidentiality—or lack thereof—in negotiations.

¹ THE GODFATHER. (Paramount Pictures 1972). In *The Godfather*, Vito Corleone (the Don) is the patriarch of a large mafia family shortly after World War II. In an early scene in the movie, the Don brings together his closest advisors because he learns he will be offered an opportunity to enter the evolving narcotics business. His eldest son, Santino, is present at the meeting and Santino is impressed with the money that can be made trafficking drugs. The Don listens to his advisors and then summons the narcotics importer, Vergil Sollozzo, to join the meeting. Sollozzo enters the room and begins to discuss a business venture with Don Corleone. No one talks except Sollozzo and the Don; the Don's advisors understand their silent roles in this discussion. Sollozzo asks the Don for political protection and financing and in return Sollozzo promises tremendous profits from narcotics sales. Sollozzo also tells the Don that a rival mafia family will guarantee the security of the Corleone family's investment. Santino suddenly interrupts the negotiations and expresses concern over security being provided by a rival family. The Don cuts off Santino before Santino can say anything further. Shortly thereafter, the Don rejects Sollozzo's offer and dismisses him. Then, the Don admonishes his son for revealing family confidences during negotiations. (See introduction quote *supra*). "Although only implicit [from the scene], the Don realizes that Sollozzo now knows that Sonny would join the narcotics venture, splitting and weakening the unified Corleone family and his empire of control. Sollozzo now believes that the Corleones would cooperate if Vito were to be eliminated." (www.filmsite.org/godfB.html). Shortly thereafter, Sollozzo's associates attempt to kill Don Corleone. The impetuous Santino Corleone failed to understand the grave implications of breaching confidentiality.

² See discussion *infra*.

³ ADR is fashionable but certainly not new. "Settle matters quickly with your adversary who is taking you to court. Do it while you are still with him on the way, or he may hand you over to the Judge and the Judge may hand you over to the officer, and you may be thrown in prison." Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between a Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 717 (1997) (citing *Matthew* 5:25-26).

ADR negotiations can cause parties to reveal case secrets and weaknesses in an effort to achieve resolution; however, the lack of confidentiality protections in ADR negotiations may allow those revelations to be used against the party who made them.⁴ Accordingly, the lack of adequate confidentiality has both the ability to make litigation more attractive and the ability to jeopardize the future of ADR in Air Force procurement; in this regard, loose lips could sink gunships.

ADR comes in many forms. In fact, the Federal Acquisition Regulation (FAR) definition of ADR includes multiple types of ADR:

Alternative Dispute Resolution (ADR) means any type of procedure or combination of procedures voluntarily used to resolve issues in controversy. These procedures may include, but are not limited to, conciliation, facilitation, mediation, fact-finding, minitrials, arbitration, and the use of ombudsmen.⁵

A common thread in many of these forms of ADR in federal procurement is the presence of a third party “who may be used to facilitate resolution of the issue in controversy using the procedures chosen by the parties.”⁶ Generally speaking, the third party should be neutral,

⁴ Confidentiality in Federal Alternative Dispute Resolution Programs, 65 Fed. Reg. 83,085 (Dec. 29, 2000) (Guidance). “Guarantees of confidentiality allow parties to freely engage in candid, informal discussions of their interests in order to reach the best possible settlement of their claims. A promise of confidentiality allows parties to speak openly without fear that statements made during an ADR process will be used against them later. Confidentiality can reduce posturing and destructive dialogue among parties during the settlement process.” *Id.*

⁵ GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 33.214(a) (JUNE 1997) [hereinafter FAR].

⁶ See FAR *supra* note 5, at 33.214(d).

detached, and it is critical that the confidences made to him or her, by the parties, should remain secret.⁷

Confidentiality allows parties to share case strengths, weaknesses, strategies, and fears with a neutral in an effort to reach resolution without fear that an opposing party—or even an outside third person—will discover the confidences and obtain a future competitive advantage.⁸ Confidentiality encourages parties and the neutral to engage in a dialogue and freely exchange ideas and proposals with an eye towards resolving the instant dispute and avoiding an even greater conflict.⁹ Effective confidentiality protections allow parties to drop the finger pointing, drop their guard, and through unpretentious discourse, ultimately drop lawsuits. On the other hand, half-baked confidentiality protections merely allow parties to engage in half-hearted resolution efforts. The success of ADR negotiations is dependent

⁷ Charles Pou, Jr., *No Fear: Confidentiality Day-to-Day in Federal Dispute Resolution*, in FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK 76 (2001).

A neutral third party can enhance parties' negotiations by holding separate meetings with each where they are able to speak candidly about their positions, interests, and alternatives. The neutral, without disclosing confidences, can then use the confidential data to shape the negotiations to reach settlements that meet parties' interests most effectively.

Id. at 77.

⁸ *Id.* at 76.

⁹ Kentra, *supra* note 3, at 722.

Confidentiality lies at the heart of the mediation process. Mediation would not be nearly as effective if the parties were not assured their discussions would remain private. Parties would be hesitant to bare their souls to someone who may be called as a witness against them in subsequent litigation. It is therefore essential to the success of the process that parties freely disclose information relating to the dispute. Confidentiality serves the crucial purpose of allowing the mediator to be seen by the parties as a neutral, unbiased third party.

Id. at 722.

upon effective confidentiality.¹⁰ This paper will examine the limits of confidentiality under federal law and recommend changes to improve its protections and make it more effective in a general effort to further promote the use of ADR in Air Force procurement.

This paper will employ an unconventional literary tool in order to highlight the importance of confidentiality. The literary tool consists of several, fictional cross-examination vignettes. The cross-examination vignettes are brief and elementary and are intended to illustrate the limitations of confidentiality under federal law, introduce particular confidentiality concepts, and demonstrate precisely how painful and ugly it can be if ADR confidentiality is breached. Each cross-examination vignette will be based upon the same basic fact pattern.

The fact pattern for the cross-examination vignettes will be based upon a contract dispute. Imagine if you will, a solicitation to construct a small, unremarkable building on an Air Force installation. The Air Force receives over a dozen proposals, but Dojoro Construction, a reputable builder with decades of experience constructing facilities for the Air Force, is awarded the contract. Shortly thereafter, Dojoro begins performance. A few weeks before the facility is completed, the president of Dojoro Construction calls the contracting officer overseeing the project, Mr. Ko. The president asks Mr. Ko about a possible discrepancy in the blueprints. He tells Mr. Ko that the new facility and the nearby grounds will need a storm drain in the event of a hurricane and none is provided for in the blueprints. Mr. Ko tells the president, "Good catch, I missed that one. Well, if you think it's necessary, I don't see how

¹⁰ See discussion *infra* Part IV.

anyone could begrudge the change.” The president of Dojoro Construction considers the comment an affirmative authorization for a change and performs the work; meanwhile, Mr. Ko completely forgets the conversation.

A few weeks later, the president of Dojoro Construction presents Mr. Ko with a bill for the storm drain change. The bill is startlingly high. Mr. Ko complains he did not authorize any such change to the original contract and he refuses to pay. Understandably, the tenor of the disagreement escalates and litigation looms. The president of Dojoro Construction desires to maintain positive relations with the Air Force; therefore, he asks Mr. Ko if he would agree to try to mediate the matter. Mr. Ko agrees.¹¹

The parties agree upon a mediator, Mr. Secretz, and upon mediation procedures. Mr. Secretz initiates the mediation proceedings by meeting with each party separately (in a caucus) in an effort to learn the nature of the conflict, the interests of the parties, and to foster cooperation. First, Mr. Secretz meets with the president of Dojoro. He assures the president that their discussions are confidential and tries to put the president at ease. The president tells Mr. Secretz about the phone call and after some discussion, the president reveals that in hindsight, he probably should have clarified Mr. Ko’s alleged authorization before he started construction. The next day, Mr. Secretz meets with Mr. Ko. Mr. Ko is ready for the mediation and he has even prepared a report for Mr. Secretz listing all the

¹¹ The fact pattern is purposely rudimentary; it avoids a technical recitation of Air Force ADR procedures for the sake of simplicity. The focus of the fact pattern is on ADR confidentiality rather than the actual ADR process. A detailed discussion of actual Air Force ADR procedures can be found below. See discussion *infra* Parts III.B. & Appendix A. See also Major Patrick E. Tolan, Jr., *Using ADR to Resolve Contract Disputes Between Contractors and the Air Force*, in FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK (2001).

strengths and weaknesses of each party's case. Mr. Secretz patiently assures Mr. Ko that their discussions are confidential while Mr. Ko thoughtlessly flips through the Dojoro Construction ADR report he has in his briefcase. Mr. Secretz then asks Mr. Ko if there was ever any type of communication between the parties wherein Mr. Ko could have possibly authorized the change. Suddenly, Mr. Ko, for the first time remembers the telephone call and is horrified. Mr. Ko slams his briefcase shut, his face turns red, his eyes bulge out, and then he drops his head down into his hands and sighs. Mr. Secretz talks to Mr. Ko for another fifteen to twenty minutes, but all Mr. Ko can do is nod every time Mr. Secretz says, "It sounds like you may have authorized a change." Mr. Ko is unhappy, but he finally collects himself, sits up, and he insists his comments were an observation not an authorization. Mr. Ko maintains that he will not pay for the change, he demands a trial, and then he storms out of his meeting. Mr. Ko is so upset with his past absentmindedness that he runs to his car, puts his briefcase on the roof of his car, unlocks the car door, gets in, and quickly drives away to an early lunch. Mr. Ko's briefcase majestically travels on the roof of his car for about one mile and then it falls off and lands on a nearby Dojoro Construction work site where a Dojoro employee fatefully discovers it.

Imagine a second fictional conflict that arises as a direct result of the storm drain change. Mr. Loser, an unsuccessful offeror from the Air Force building solicitation, learns that Dojoro Construction is seeking payment for constructing the storm drain. Mr. Loser is convinced the storm drain is an out-of-scope project and he believes Dojoro Construction is attempting to avoid competition. Mr. Loser is convinced the president of Dojoro Construction has benefited, over the years, from parochialism. Mr. Loser also believes that

Dojoro has continually escaped termination for default actions on other projects and always seems to have out-of-scope changes authorized. As a result, Mr. Loser files his own suit.

The following fictional cross-examination vignette by government counsel of Mr. Secretz, the mediator, graphically illustrates the absolute need for some degree confidentiality in ADR.

Q: Mr. Secretz, you were a mediator between the two parties, Dojoro Construction and the Air Force?

A: That is correct.

Q: And as I understand it, a mediator serves as a neutral, third party who encourages negotiating parties to come to a mutually beneficial consensus?

A: Generally speaking, yes.

Q: Is it true that a mediator will meet with each party privately in an effort to encourage this consensus?

A: Yes. If the parties decide to do that they can.

Q: And ordinarily these private discussions are confidential, meaning you don't tell anyone what you've heard right?

A: They are intended to be confidential.

Q: I see. During these secret little meetings you have, do parties reveal things to you that they don't want anyone else to know?

A: It's not confessional in nature, but yes, often a party reveals company secrets or agency confidences, but only so I can consider their concerns in a matter.

Q: In this case, did you tell your confidant here (pointing a finger at the president of Dojoro Construction) that he was free to tell you anything he wanted and you would do your best to hide that information from the Air Force?

A: Hide it? No. Protect it, certainly. But of course, you found a way around that protection counselor. The parties...

Q: ...and of course, since this was mediation, if he was open and forthright with you, it would presumably improve his chances of resolving this high dollar matter?

A: Yes, that's logical.

Q: Now, as a mediator, do you remind parties of the rewards and financial incentives for being open, candid, and forthright?

A: I remind them, but I believe the process encourages it as well.

Q: Mr. Secretz, given the financial incentives for being forthright and the encouraging effect both you and the process had, let's talk about what you learned during this secret little meeting?

A: (Turning to the judge.) Your Honor, I'd like to renew my objections to revealing these matters. The parties never expected their admissions to become public; they never intended their documents to be discoverable. My role as a mediator should be sacrosanct.

Judge: Overruled Mr. Secretz. Our lawmakers had a chance, even the parties had a chance, to make these matters confidential, but they declined. Proceed with the cross-examination counselor.

Q: Thank you Your Honor. Mr. Secretz, did you say you had documents, too?

This hypothetical cross-examination demonstrates that the president of Dojoro Construction would have had a financial incentive and an assurance of confidentiality to act and speak candidly to the neutral party. Hence, any revelations are extremely powerful and potentially incriminatory. The use of a party's confidences, in a courtroom could make or break a litigated case. Revelations of this sort could make or break the future of ADR.

It could be said ADR is enjoying something of honeymoon phase¹² at this time. It's still new, it's attractive, and the participants are enjoying each other's presence. It is a welcome

¹² Interview with Major Karen White, Professor, Contract and Fiscal Law Department, The Judge Advocate General's School, in Charlottesville, Va. (Jan. 14, 2002) [hereinafter White Interview].

change to the time, cost, and acrimony associated with litigation.¹³ The current mantra appears to be: ADR good, litigation bad. Simplistic perhaps, but one must still keep in mind that ADR is not the antithesis of litigation, it is merely an alternative to litigation. Litigation won't be leaving the ballpark; it's always on deck.

Contract disputes arise for any number of reasons; common sense dictates, that in some regard, money is at the core of most of the disputes. When a contract dispute arises, both the government and industry desire a solution which satisfies their interests. If ADR will not help them obtain a good deal, they will not use it. If ADR can help parties obtain a good deal, then they will use it. As cynical—or as practical—as it sounds, if ADR can help parties obtain an even better deal they may also abuse it. ADR bears noble intentions, but FOIA¹⁴ did as well, and a few prospective bidders have been known to try to use FOIA for a competitive advantage.¹⁵

The above cross-examination could occur in any number of different scenarios. It could involve a mediation that broke down whereupon one party sought to discover

¹³ Aaron J. Lodge, *Comment: Legislation Protecting Confidentiality in Mediation: Armor of Steel or Eggshells?*, 41 SANTA CLARA L. REV. 1093, 1094 (2001).

¹⁴ 5 U.S.C. § 552 (2000).

¹⁵ Nat'l Parks & Conservation Assoc. v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (a contractor sought to use FOIA to discover financial information about a competing concessionaire). In addition, Congress has specifically had to prevent FOIA from being used to discover communications generated in federal ADR proceedings. In 1990, Congress passed the Administrative Dispute Resolution Act (ADRA), which became the basis for federal ADR; unfortunately, Congress "left a substantial gap in this area. While dispute resolution communications were generally treated as confidential, the ADRA did not include an exemption from the disclosure requirements of the Freedom of Information Act ('FOIA')." Jeffrey M. Senger, *Turning the Ship of State*, 2000 J. DISP. RESOL. 79, 81 (2000) (citing Administrative Dispute Resolution Act of 1996, 5 U.S.C. §§ 571-584 (1994 & Supp. IV 1998)). Congress soon discovered how FOIA could be used to breach confidential communications and corrected the problem. See discussion *infra* Part II.

privileged matters for a tactical advantage at trial. It could involve an action wherein one party contests an ADR settlement alleging the other party engaged in fraud and purposefully fabricated facts in an effort to encourage a mediated settlement. The scenario could take place in a criminal trial wherein a party reveals criminal misconduct to the neutral. The scenario could also include a party outside of the settlement (e.g. an unsuccessful offeror) who seeks to learn corporate secrets. The number and variety of disclosure scenarios are ample and problematic; their quantity and troublesomeness arise because confidentiality is so critically important.¹⁶ The parties to ADR depend on confidentiality; the problem is, few agree on its parameters. It is understandably difficult to protect information which you don't know or don't believe is confidential.

Congress understood that parties needed confidentiality during ADR.¹⁷ A party may reveal matters during ADR fully expecting them to be confidential and later learn they are not protected at all. One hates to even imagine the hand-wringing, hair-pulling, and overall frustration that would occur if a party reveals private matters only to find out their confidences are entirely discoverable because they misunderstood the parameters of confidentiality. It's doubtful they would ever be fully comfortable with ADR again.

¹⁶ Confidentiality in Federal Alternative Dispute Resolution Programs, 65 Fed. Reg. 83,085 (Dec. 19, 2000) (Guidance).

¹⁷ Pou, *supra* note 7, at 76. Congress, “[R]ecognized that parties would be less forthcoming if they knew disclosure to be a significant possibility, and that even one or two cases where expectations of confidentiality are undermined could precipitate a damaging loss of trust in the confidentiality of federal ADR processes as a whole.” *Id.*

If ADR, as an alternative to litigation, is a blessing, then its confidentiality rules may be a curse. The rules regarding confidentiality for federal procurement are governed by a hodge-podge collection of statutes, rules, and agreements. Parties can conduct ADR one day under one fact scenario and then conduct ADR the following day under almost the same fact scenario and end up with entirely different results for confidentiality.¹⁸ Parties must be completely engaged in the facts and the law if they hope to maintain confidentiality; moreover, they better ensure the neutral third party is engaged as well.

The lack of uniformity in confidentiality rules is not the result of an accident. Various groups have varying interests and each has tried to implement its own version of confidentiality as the absolute standard.¹⁹ Generally speaking, there are those who believe confidentiality cannot be breached under any circumstances, those who believe confidentiality has an extremely limited privilege, and those who fall somewhere in between.²⁰ This paper does not seek to thrust uniformity onto the entire legal world. Instead, this paper seeks to identify weaknesses in the confidentiality rules in Air Force procurement ADR and propose changes to federal law in an effort to strengthen ADR and establish it as a consistently advantageous alternative over litigation.

¹⁸ Subtle differences in ADR scenarios can result in drastically different results. A head nod, an overheard telephone call, or an innocuous discussion between parties can each result in breached confidentiality. Minor actions, which may seem harmless, may eliminate confidentiality in its entirety. The differences between a conversation protected by confidentiality and a conversation not protected by confidentiality can be insignificant, but the results can be disturbingly significant. *See infra* discussion Parts V.-VII.

¹⁹ *See generally*, Kentra, *supra* note 3, at 724-25.

²⁰ *Id.*

II. The Legal Basis for Federal ADR

The Administrative Dispute Resolution Act (ADRA),²¹ the legal basis for ADR in the federal government, with all its implemented protections and encouragements, has been in operation for a relatively short period of time. Its purpose is to authorize and govern the use of ADR in federal agencies.”²² One particular area the ADRA governs closely is confidentiality and the disclosure of protected communications.²³ The ADRA has evolved over time and it has had the benefit of legislative reflection and amendment. The ADRA was originally enacted in 1990 to encourage federal agencies to use ADR.²⁴ Congress wanted to offer an expeditious and inexpensive means to resolve disputes rather than restrict itself to formal, federal administrative forums.²⁵ The Act had a sunset provision wherein it would expire after five years.

The 1990 Act had some problems that created challenges for ADR advocates. One of the most significant challenges concerned confidentiality. Congress had failed to carve out a Freedom of Information Act (FOIA) exemption to the ADRA.²⁶ “Therefore any citizen could request copies of any federal records of confidential dispute resolution

²¹ 5 U.S.C. §§ 571-583 (2000).

²² Diane R. Liff, *Administrative Dispute Resolution Act of 1996*, in *FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK* 35 (2001).

²³ 5 U.S.C. § 574.

²⁴ Senger, *supra* note 15, at 81.

²⁵ Tolan, *supra* note 11, at 286-99.

²⁶ Senger, *supra* note 15, at 81.

communications merely by filing a FOIA claim with the agency.”²⁷ Another challenge concerned the definition of ADR. The language of the Act included “settlement negotiations” as a type of ADR procedure.²⁸ As a result, practitioners in Air Force procurement litigation who were merely negotiating settlements believed they were successfully engaging in ADR; the result was the “slowed implementation of third-party assisted ADR.”²⁹

The problems were resolved in the Act’s reauthorization.³⁰ “In the new Act, confidential communications between the parties and the neutral are explicitly exempted from FOIA.”³¹ This change “permit[s] agencies to communicate their settlement positions more freely.”³² Additionally, settlement negotiations were eliminated as an example of ADR.³³ Since that time, it has become a welcome piece of legislation³⁴ and, “it has become imbedded as a tool used by the Air Force to resolve disputes.”³⁵

²⁷ *Id.* at 80.

²⁸ Tolan, *supra* note 11, at 290 (citing 5 U.S.C. § 571).

²⁹ *Id.* at 291.

³⁰ Senger, *supra* note 15, at 81.

³¹ *Id.* at 81 (citing 5 U.S.C. § 574(j)). Jonathon D. Mester, *The Administrative Dispute Resolution Act of 1996: Will the New Era of ADR in Federal Administrative Agencies Occur at the Expense of Public Accountability?*, 13 OHIO ST. J. ON DISP. RESOL. 167, 168 (1997).

³² Peter R. Steenland, Jr. & Peter A. Appel, *The Ongoing Role of Alternative Dispute Resolution in Federal Government Litigation*, 27 U. TOL. L. REV. 805, 819 (1996).

³³ Tolan, *supra* note 11, at 291.

³⁴ Mester, *supra* note 31, at 168.

³⁵ Tolan, *supra* note 11, at 286.

III. Air Force Acquisitions and the Use of ADR

A. The Growth of ADR in Air Force Procurement

The term alternative dispute resolution has all but become a misnomer in the Air Force; ADR is no longer just an alternative. There has been a conscious and consistent effort to take the “A” out of ADR³⁶ and utilize it to the maximum extent practicable.³⁷ The effort to maximize ADR in the Air Force does not appear to be a passing fancy either. ADR is being promoted, in fact directed, by the upper echelons of the United States government. Department of Defense (DoD) policy is that, “[a]ll DoD Components shall use ADR techniques as an alternative to litigation or formal administrative proceedings whenever appropriate. Every dispute, regardless of subject matter, is a potential candidate for ADR.”³⁸ In 1999, F. Whitten Peters, the Acting Secretary of the Air Force, stated that, “[t]he Air Force remains fully committed to fostering the use of ADR.”³⁹ As a result, Air Force policy is, “to use ADR to the maximum extent practicable and appropriate to resolve disputes at the

³⁶ Darleen Druyun, A Quiet Revolution in Managing Contract Controversies, Address Before the ABA Public Contract Law Section (Apr. 26, 1999) [hereinafter ADR First Speech], *available at* <http://www.adr.af.mil/afadr/druyunspeech.htm>.

³⁷ *Id.* (citing Policy Letter, F. Whitten Peters, subject: Implementation of the Administrative Dispute Resolution Act of 1996 (21 Apr. 1996) [hereinafter AF ADR Policy Letter]).

³⁸ U.S. DEP’T OF DEFENSE, DIR. 5145.5, ALTERNATIVE DISPUTE RESOLUTION para. A (22 Apr. 1996).

³⁹ AF ADR Policy Letter, *supra* note 37.

earliest state feasible, by the fastest and least expensive method possible, and at the lowest possible organizational level.”⁴⁰

The Air Force originally made ADR a realistic and favored alternative to litigation by focusing on key Air Force officials and educating them on ADR and its successes in the civilian sector.⁴¹ The key Air Force officials and their staffs have in turn promoted and championed the importance of ADR as a realistic alternative to litigation to the rest of the Air Force.⁴² Ms. Darleen Druyun, Principal Deputy Assistant Secretary of the Air Force for Acquisition and Management, has stated, “ADR will increasingly eclipse lengthy and costly litigation as a method of choice for resolving contract disputes.”⁴³ Mr. Joseph McDade, Deputy Dispute Resolution Specialist at the Air Force General Counsel’s Office, voiced his support by noting ADR is, “always cheaper and faster.”⁴⁴ Moreover, Brigadier General Jerald D. Stubbs, the staff judge advocate at the Air Force Material Command (AFMC) and

⁴⁰ U.S. DEP’T OF AIR FORCE POLICY DIR. 51-12, ALTERNATIVE DISPUTE RESOLUTION (1 Apr. 1999).

⁴¹ Memorandum from Sheila Cheston, Air Force General Counsel, to Hon. Sheila Widnall, Sec’y of the Air Force (31 Oct. 1996), *available* at <http://www.adr.af.mil/afadr/library/docs/secrep2.html>.

⁴² *Id.* See also Colonel Cheryl Nilsson and Joseph M. McDade, *The Air Force Takes the A Out of ADR*, CONTRACT MANAGEMENT, Oct. 2000, at 28.

To support the Air Force’s ADR policy, the Air Force trial team (formerly the Directorate of Contract Appeals, now the Directorate of Contract Dispute Resolution) at Wright-Patterson Air Force Base was reorganized. Its mission was expanded and the AFMC staff judge advocate, Brigadier General Jerald Stubbs, directed that ADR be offered in cases that are presently on the litigation track. The trial team’s three geographic divisions were replaced with two geographic divisions (East and West, divided by the Mississippi river) and an ADR division (responsible for Program Executive Office/Designated Acquisition Commander Programs and other high-dollar or high-interest cases).

Id. at 28-29.

⁴³ ADR First Speech, *supra* note 36.

⁴⁴ *USAF Sees Promise in Dispute Resolution Through Alternative Means*, INSIDE WASH, Sep. 14, 2001 [hereinafter *USAF Sees Promise*].

Mr. Tony Perfilio, director of the AFMC law office, chose to offer ADR as a matter of course in the majority of cases which the Air Force had pending before the Armed Services Board of Contract Appeals.⁴⁵ Finally, the former Secretary of Defense, William Cohen, co-sponsored the re-authorization of the Administrative Dispute Resolution Act (ADRA) when he was a Senator for Maine in 1996.⁴⁶

The top-down endorsement for an ADR program was the key to garnering acceptance and results for the Air Force. The Air Force leadership appears to have transformed the “litigation” paradigm into one of “resolution.” According to Mr. McDade, “[i]t involves a mindset change. We want these talented people⁴⁷ to get involved much earlier to achieve a win-win business deal that is more beneficial to all concerned.”⁴⁸ The guidance and support from Air Force senior leadership ensures both acceptance and results for ADR.

Air Force policy requires the use of ADR, Air Force senior leadership encourages the use of ADR, and the results unquestionably compel the use of ADR. In October of 2000, the *Federal Contracts Report* wrote that the Air Force estimates the total value of all contract disputes resolved by ADR at about \$1 billion.⁴⁹ The same year, the Air Force reported that

⁴⁵ Martha Mathews, *Air Force Launches Joint ADR Training Effort, Cites Resolution of \$1B in Contract Disputes*, 74 FED. CONT. REP 350, 350-52 (Oct. 17, 2000).

⁴⁶ ADR First Speech, *supra* note 36.

⁴⁷ McDade’s comments implicitly refer to the government officials, contracting managers, and attorneys who attended an Air Force ADR Conference to learn about the Air Force’s expanding ADR program. *See* Tanya N. Ballard, *Air Force Steps up Alternative Dispute Resolution Efforts*, GOV’T EXECUTIVE MAG., Apr. 19, 2001, available at <http://www.govexec.com/dailyfed/0401/041901t1.htm>.

⁴⁸ *Id.*

⁴⁹ Mathews, *supra* note 45, at 350-52.

it had attempted ADR in a total of ninety-four contract appeals and that there was a ninety-three percent resolution rate.⁵⁰ In 2001, fifty to seventy percent of the cases proceeding toward litigation at the board of contract appeals were re-directed to ADR.⁵¹ In 2001, Air Force ADR cases were resolved within 121 days while a case proceeding to the appeals board took twelve to eighteen months before the board ever rendered a final decision.⁵²

Speedy resolution also saves money in interest. "Since the Air Force is also required to pay Contract Disputes Act interest on claims from the date of the contracting officer's final decision until payment is made, quicker resolution significantly reduces the Air Force's interest expenses."⁵³ As a result, the Air Force has saved millions in interest payments.⁵⁴ The amount of time saved simply by trying to resolve conflicts before they are litigated is staggering. The goodwill and efficiency produced by ADR is equally impressive.

The B-1 bomber case provides an excellent example of Air Force ADR being used to maintain goodwill and resolve a noteworthy disagreement. The dispute arose after the B-1 bomber's Conventional Mission Upgrade Program ran into obsolescence issues with its parts and technology during the engineering and manufacturing development phase.

⁵⁰ *Id.*

⁵¹ Captain Kim D'Ippolito, *Air Force Material Command Leading the Way in "ADR First Policy"* LEADING EDGE, Aug. 2001, available at <http://www.adr.af.mil/afadr/afmcdfirst.htm>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

“Boeing, submitted a request for [an] equitable adjustment on 29 September 2000,” asking for a \$13.7 million increase in the contract’s ceiling price, “and a corresponding \$1,759,000 increase in the award fee pool,” according to the Air Force “This type of case would normally take over 5 years to litigate; instead, it was resolved in less than 6 months.”⁵⁵

Mr. McDade later commented, “Those events [in the B-1 program dispute] led to a sea change at the Air Force.”⁵⁶ The President and Chief Operating Officer of The Boeing Company, Mr. Harry Stonecipher, stated,

I am very proud of the excellent work that our contracting officers at Boeing and their counterparts in the Air Force have done in making use of the Alternative Dispute Process. Working together, they have disposed of some long-running disputes . . . in such programs as AC-130U Gunship and B-1B . . . and they have done so to the satisfaction of both sides.⁵⁷

Mr. Stonecipher also commented that, “No one (except a lawyer) builds a business on lawsuits. And litigation is not how you build an army or an air force, either.”⁵⁸ The importance of ADR in Air Force procurement is significant and it increases every year.

⁵⁵ *USAF Sees Promise*, *supra* note 44 (citations omitted). Boeing was the prime contractor for the B-1 bomber upgrade program. Boeing determined that its computer design suffered parts obsolescence issues and technology turnover problems. Boeing notified the Air Force that the obsolescence issues and technology turnover problems were significant and that an extensive engineering effort was needed to resolve the matter. Boeing also requested a substantial increase in the contract’s ceiling price and to the award fee pool. The Air Force needed a quick resolution and they did not want to sour relations with the Boeing. Ultimately, the parties agreed the Air Force would pay the increase in the contract’s ceiling price but not the revised profit sought by Boeing. *Id.*

⁵⁶ Dan Davidson, *AF and Contractors Expand Use of Alternative Dispute Resolution*, *FED. TIMES*, Aug. 13, 2001, available at <http://www.adr.af.mil/afadr/adrprominence.htm>.

⁵⁷ Harry C. Stonecipher, Speech to the U.S. Air Force Alternative Dispute Resolution Conference (Apr. 17, 2001), available at http://www.boeing.com/news/speeches/current/stonecipher_010417.html.

⁵⁸ *Id.*

Air Force ADR is quickly out-muscling litigation. Air Force policy, directives by Air Force leadership, and ADR results, all demonstrate that ADR is quickly gaining greater acceptance within the Air Force and within the contractor community. The efforts to implement ADR and its subsequent successes are impressive and encouraging. Alternative dispute resolution in Air Force procurement has tremendous promise and potential; therefore, it's weaknesses and pitfalls should be corrected before they negatively affect a rewarding and remarkable program.

B. The Air Force Alternative Dispute Resolution Model

The Air Force ADR model for contract controversies has been designed to encourage ADR before an appeal of a contracting officer's final decision.⁵⁹ The first element of the model addresses resolution through simple negotiation.⁶⁰ If the Air Force and a contractor determine that ADR is in their best interests, the parties will then, to some degree, need to agree upon a number of negotiation issues. The ADR process must be agreed upon, timelines and methods must be established, an ADR agreement must be drafted, and an

⁵⁹ Martha Mathews, *Air Force Makes Good on Promise to Rely on ADR in Contract Disputes* 73 FED. CONT. REP. 152, 152-54 (8 Feb. 2000).

⁶⁰ AF ADR PROGRAM OFFICE, REPORT TO THE PRESIDENT OF THE UNITED STATES AND THE SECRETARY OF THE AIR FORCE FOR FISCAL YEAR 1999 (1999) [hereinafter REPORT TO THE PRESIDENT ON AF ADR] ("If negotiations do not result in a timely settlement (unresolved for more than 12 months) or if the estimated value of the issue is significant (more than \$10 million when received), the Contracting Officer will refer the matter to [an] Air Force Advisory Team for advice on the use of ADR.").

appropriate third-party neutral needs to be identified.⁶¹ A flowchart of the Air Force ADR model for contract controversies is displayed in Appendix A.⁶²

Air Force procurement officials have further tailored the ADR model, in a number of cases, by establishing standing corporate level ADR agreements with the Air Force's top contractors.⁶³ The agreements establish "tailored rules of engagement" in the event of a future contract dispute.⁶⁴ They help structure a particular ADR model between the Air Force and the contractor, in advance, in the event a contract conflict arises. These agreements are individually drafted and do not apply across the board (to all contractors) like a FAR clause would; however, they do promote the use of ADR between the Air Force and the top suppliers to the Air Force.⁶⁵

The Air Force has made a concerted effort to ensure "[t]hese agreements—which can either be a memoranda of understanding between the Air Force program offices and their industry partners or special contract requirement contained in the contract—will cover the Air Force's forty largest programs and their prime contractors, or between sixty-five percent and seventy percent of Air Force contract dollars."⁶⁶ The goal of these program-level

⁶¹ Five Year Plan, SAF/IQ, subject: Air Force Alternative Dispute Resolution (ADR) Plan for Contract Controversies (9 Jul. 1999) [hereinafter 5 Year Plan]; Mathews, *supra* note 59, at 152-54.

⁶² See *infra* Appendix A.

⁶³ Mathews, *supra* note 59, at 152-54.

⁶⁴ 5 Year Plan, *supra* note 61.

⁶⁵ REPORT TO THE PRESIDENT ON AF ADR, *supra* note 60.

⁶⁶ Martha Mathews, *Air Force Launches New Push for ADR Use; Drafts Legislation to Fund ADR Settlements*, 71 FED. CONT. REP. 608-09 (3 May 1999).

agreements is to commit Air Force “program managers, contracting officers and their industry partners to using ADR first—promoting constructive long-term business relationships and reducing the time and cost associated with resolving contract controversies.⁶⁷ There is an amusing, but heartening, irony to the fact that the Air Force is so thoroughly committed to ADR that it will negotiate a standing agreement on how it intends to negotiate if negotiations are ever required.

IV. The Importance of Confidentiality

As discussed above, ADR has become increasingly prominent in the U.S. government’s approach to resolving contract disputes.⁶⁸ The Herculean efforts by Air Force leadership, procurement personnel, and contractors in promoting and using ADR are all reliant upon a consistent understanding and effective application of the law regarding confidentiality. “It is generally thought that an expectation of confidentiality on the part of participants is critical to a successful [ADR] process.”⁶⁹ Unfortunately, the law regarding confidentiality is neither

⁶⁷ Memorandum from Darleen A. Druyun, Principal Deputy Assistant Secretary (Acquisition & Management), to Air Force Acquisition Personnel, subject: Lightning Bolt (LB) 99-04, Alternative Dispute Resolution (18 Aug. 1999), available at <http://www.safaq.hq.af.mil/contracting/toolkit/adr/adr-druyunmemo-18aug99.pdf>.

⁶⁸ Marshall J. Breger & Gerald S. Schatz, *Federal Administrative Dispute Resolution: An Overview*, in FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK 76 (2001).

⁶⁹ Owen W. Gray, *Protecting the Confidentiality of Communications in Mediation*, 36 OSGOODE HALL L.J. 667, 670 (1998) (citing J. FOLBERG & A. TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 264 (1984); L.R. Freedman & M.L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37 (1986); M.L. Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 SETON HALL LEGIS. J. 1 (1988); A. Kirtley, *The Mediation Privilege’s Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, J. DISP. RESOL. 1, 8 (1995); and *Protecting Confidentiality in Mediation*, Note, 98 HARV. L. REV. 441, 444-45 (1984). Gray also cites contrary authority. *Id.* (citing E.D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986); and K. Gibson, *Confidentiality in Mediation: A Moral Reassessment*, J. DISP. RESOL. 25 at 40 (1992)).

completely consistent nor completely effective. The law includes a hodge-podge collection of statutes (the ADRA and the FAR), rules of evidence of civil procedure, and corporate level agreements, and it is these uncertain confidentiality rules which are the *sine qua non* of successful ADR in Air Force procurement. If parties lack confidence in confidentiality they “could well begin to worry that their communications might indeed be used against them later and decide to avoid mediating with the government altogether.”⁷⁰ Therefore, it is necessary to examine the current law on confidentiality, identify weaknesses in it, and propose corrective measures if Air Force ADR participants hope to maintain confidence in confidentiality.

One might argue that changes are unnecessary. The leadership promotes ADR, corporations sign up to engage in ADR, and the results illustrate that ADR is a resounding success even without consistent and effective laws regarding confidentiality. At first glance, one might proffer that if the results are positive then maybe the confidentiality rules aren't a problem. Some proponents of Air Force ADR could suggest that, “If it ain't broke don't fix it.” Nonetheless, the syllogistic logic in such conclusory assessments is flawed in much the same way the following statement is flawed, “Since I haven't been hit by enemy fire, I must be bulletproof.” Air Force ADR is too immature to be able to rely on its past successes, and confidentiality is too important to depend upon banal colloquialisms, naïve logic, and wispy

⁷⁰ Pou, *supra* note 7, at 76.

conclusions. The importance of confidentiality is an axiom of mediation because it protects the present disclosures and future successes of ADR.⁷¹

V. Sources of Confidentiality Protections in Federal ADR

A. The Confidentiality Protections of Federal Rule of Evidence 408

A party who engages in ADR may do so for any number of reasons. A party may have numerous lawsuits pending against them and seek ADR as a means of resolving his or her lesser suits. The party may have a weak case and seek a forum that allows him or her to negotiate liability downward. On the other hand, a party may have a strong case, but he or she may desire a quick, expedient resolution through ADR. A party may even want to mediate case in an effort to maintain cordial relations with the opposing party. There are any number of reasons why a party might seek ADR, but a skillful litigator could make a factfinder focus on only one reason: fault. Imagine the following fictional cross-examination of the president of Dojoro Construction which highlights fault and equates fault with liability.

Q: Sir, you are the President of Dojoro Construction?

⁷¹ Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides With Confidentiality*, 35 U.C. DAVIS L. REV. 33, 35 (2001). In her article, Deason examines the parameters of confidentiality when there is an attempt to enforce a mediated settlement agreement. Deason stresses, “[Confidentiality] is necessary to foster the neutrality of the mediator and essential if parties are to participate fully in the process.” *Id.* See also, Peter Marksteiner, *How Confidential Are Federal Sector Employment-Related Dispute Mediations?* 14 OHIO ST. J. ON DISP. RESOL. 89, 89 & 155 (1998) (citations omitted). In his article, Marksteiner dissects the confidentiality provisions of the ADRA and analyzes the future of mediation in Air Force labor disputes. He acknowledges the importance of confidentiality and later concludes, “Mediation will continue to be an effective way to resolve employment-related disputes in the Air Force as long as the confidentiality of private caucuses between the mediator and the parties is strictly protected.” *Id.*

A: Yes.

Q: And yesterday you told us all about your particular complaints against the Air Force?

A: That's correct.

Q: And you tried to convince this us that it was the big, bad Government's fault?

A: It certainly was.

Q: And you honestly, truly believe you are in the right?

A: Absolutely.

Q: In fact, you believe you were right with such firm, unequivocal conviction, that YOU went to them, and YOU asked them if they would let YOU settle?

A: I asked if they wanted to mediate the issue.

Q: Let me see if I have this right, you honestly thought you'd win at trial but yet you tried to keep this out of court?

A: Yes.

Q: Do you naturally surrender when you have a strong case?

A: No.

Q: So this was a conscious decision for your allegedly strong case?

A: Um ...

The above cross-examination would not occur in the Federal system because Federal Rule of Evidence 408 (Rule 408) ensures that such matters are inadmissible.⁷²

⁷² FED. R. EVID. 408.

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability

Rule 408 prohibits the admissibility of evidence of compromise as well as offers to compromise in order to prove liability.⁷³ It also restricts the use of evidence derived from those compromise efforts.⁷⁴ The rule applies equally to situations where the compromise evidence arises out of the same case and to situations where the compromise evidence arises out of a previous related case between either of the parties.⁷⁵ The intent of the prohibition is “to allow free and open bargaining in which the parties could make concessions for bargaining purposes that they would not later have to explain.”⁷⁶ The prohibitions even apply to nonparties who may attempt to use the compromise evidence in an entirely different case.⁷⁷

The scope of Rule 408 might lead one to believe no other confidentiality protections are necessary under federal law. Rule 408 extends from pretrial negotiations, through trial, and it continues endlessly through post-trial. Rule 408 applies to the immediate parties as well as

for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Id.

⁷³ *Id.*

⁷⁴ *Id.* (“Evidence of conduct or statements made in compromise negotiations is likewise not admissible.”).

⁷⁵ STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 599 (7th ed. 1998) (citing *Fiberglass Insulators, Inc. Dupuy*, 856 F.2d 652 (4th Cir. 1988)).

⁷⁶ *Id.* at 599.

⁷⁷ *Id.* “Thus, the fact that a party settled a litigation with another is not admissible to prove the validity or amount of the claim currently before the Court.” *Id.* at 601.

to third parties. It is also a strict prohibition with a limited number of exceptions. Therefore, it is somewhat surprising to learn that Rule 408 only applies in limited circumstances. In fact, the limited exceptions could virtually swallow the rule and subsequently create a tremendous challenge to complete confidentiality.⁷⁸

Rule 408 has two exceptions that can work together to create a large, exploitable loophole and which make it an insufficient protection for ADR confidentiality. First, Rule 408, “does not require exclusion when the evidence is offered for another purpose, such as *proving bias or prejudice of a witness*, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution (emphasis added).”⁷⁹ Second, the “rule does not require the exclusion of any evidence *otherwise discoverable* merely because it is presented in the course of compromise discussions (emphasis added).”⁸⁰ Hence, Rule 408 appears to allow any party, at any time, to pierce ADR confidentiality in search of bias or prejudice of a witness.

Notwithstanding evidence of bias or prejudice, Rule 408 does offer some degree of protection in the courtroom. Unfortunately, it has little power over discovery. “Rule 408 is a preclusionary rule, not a discovery rule. It is meant to limit the introduction of evidence of

⁷⁸ Wayne Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955 (1988). In his article Brazil comments, “The bottom line of this Article’s analysis will be disheartening to some: despite the policy that inspires rule 408, there are many circumstances in which the things that lawyers and clients say and do during settlement negotiations will not be protected from disclosure or barred from use at trial.” *Id.* at 957.

⁷⁹ See FED. R. EVID 408.

⁸⁰ *Id.*

settlement negotiations at trial and is not a broad discovery privilege.”⁸¹ Hence, evidence of compromise, offers to compromise, and evidence of conduct or statements made in compromise discussions can be discoverable under the Federal Rules of Civil Procedure if they will lead to admissible evidence.⁸² Rule 408, generally protects records, statements, and agreements resulting from ADR efforts, in the courtroom, but they are accessible outside of court by discovery rules that are separate and distinct from Rule 408.

Discovery is governed by Fed. R. Civ. Proced. 26 (Rule 26). This Rule is a truly broad rule and it is liberally construed.⁸³ Federal Rule of Civil Procedure 26(b)(1) reads in part, “[i]t is not grounds for objection [to a discovery request] that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”⁸⁴ Additionally, efforts to defend against discovery seeking matters originating in compromise negotiations may be doomed in light of case law which encourages broad discovery, “[o]therwise, parties would be unable to discover compromise offers which could be offered for a relevant purpose.”⁸⁵ One can foresee endless discovery requests for ADR matters alleging that the requestor needs access to such

⁸¹ *Computer Associates International, Inc. v. American Fundware, Inc.*, 831 F. Supp. 1516, 1531 (D. Colo. 1993) (citing *NAACP Legal Defense Fund v. United States Dep’t of Justice*, 612 F. Supp. 1143, 1146 (D.D.C. 1985)).

⁸² *Morse/Diesel Inc. v. Trinity Industries, Inc.*, 142 F.R.D. 80, 85 (S.D.N.Y. 1992); *Manufacturing Systems, Inc. of Milwaukee, v. Computer Technology, Inc.*, 99 F.R.D. 335, 336 (E.D. Wis. 1983).

⁸³ *Trinity*, 142 F.R.D. at 83 (citing J. WEINSTEIN & M. BERGER, *EVIDENCE*, ¶ 408[1], at 408-15 to 408-16 (1986)).

⁸⁴ See FED. R. CIV. P. 26(b)(1).

⁸⁵ *Morse/Diesel Inc. v. Trinity Indus., Inc.*, 122 F.R.D. 447, 449 (S.D.N.Y. 1988) (citing, *NAACP*, 612 F. Supp. at 1143, 1146) *aff’d*, 142 F.R.D. 80.

matters ordinarily covered by Rule 408 in order to determine whether or not the information contained therein could be admissible at trial to prove, for example, the bias or prejudice of a witness.⁸⁶

Imagine the following hypothetical cross-examination of the mediator (Mr. Secretz) wherein Rule 408 is in place but Mr. Loser's (the unsuccessful offeror) counsel nevertheless seeks ADR negotiation information in an effort to prove parochialism between the Air Force and Dojoro Construction.

Q: Mr. Secretz, are you aware why I've asked you to testify at this hearing?

A: I presume it has something to do with the fact that I have mediated several disputes between the Air Force and Dojoro Construction?

Q: Are you aware that the Air Force, for several years now, has awarded numerous high-dollar contracts to Dojoro Construction rather than my client?

A: No.

Q: But you are aware that the Air Force and Dojoro have had numerous disputes regarding the numerous contracts between them?

A: Sure.

⁸⁶ Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591 (2001). Weston raises concerns over ADR being used simply as a discovery tool. She writes,

As the use of compulsory ADR continues to rise, concerns that behind the closed doors of an ADR proceeding participants may engage in abusive conduct, use the process simply as a subterfuge for discovery, or fail to participate in a meaningful matter raise the questions of what can be done to address participant misconduct or abuse in ADR and to ensure basic procedural fairness.

Id. at 595 (citations omitted).

Q: And despite those disputes, the Air Force, for some particular reason, has never terminated any contract with Dojoro Construction?

A: I believe you are correct.

Q: So it seems that Dojoro Construction gets lots of lucrative contracts and no matter what they do wrong, no matter how bad, the Air Force never terminates the procurement?

A: I wouldn't say anyone did anything wrong, but if there's a dispute, mediation is the tool that helps resolve it.

Q: That's your opinion isn't it?

A: Well, yes.

Q: You really don't know, with absolute certainty, if this cozy relationship is the result of successful mediation or simply favoritism?

A: Ah, no.

Q: Would you agree that in order to determine if there was any favoritism or bias in the procurements, we'd want to know the severity of any contract dispute and how much either side was willing to accommodate the other?

A: Well, um, it could help.

Q: Of course it could. Let's turn now to the contract disputes, your mediation discussions, and why the disputes were settled rather than terminated shall we?

Bias is the allegation in the above fictional scenario and bias is both a discovery and an in-court exception to Rule 408; hence, virtually any unsuccessful offeror can get around the protections of Rule 408 and discover confidential matters with Rule 26 and a simple allegation of favoritism. In this regard, the confidentiality protections of Rule 408 are nothing more than a paper tiger.

When an unhappy contractor loses a bid more than one time, to the same competitor, it is only natural for them to consider some degree of parochialism as an explanation for their

losing bid—providing they believe their bid should have won. Contractors suspecting favoritism can illustrate their unease with a bid protest on the grounds of bias. Bias can be the very heart of a bid protest case and it is a clear exception to Rule 408.

Rule 408 does not provide the confidentiality necessary for ADR because it allows various confidential matters to be revealed both through discovery and in the courtroom. Any unsuccessful offeror, with a little effort and a little imagination, can fashion a credible allegation of bias and enjoy a fair chance at running roughshod over Rule 408 protections.⁸⁷ So while Rule 408 does form a fair, first-line defense in protecting confidentiality, it does not provide sufficiently effective confidentiality necessary to instill complete confidence in ADR. Fortunately, the ADRA provides some additional assistance.⁸⁸

⁸⁷ Kentra, *supra* note 3, at 729. “However, Rule 408 is fraught with exceptions, many of which raise serious concerns to whether essential portions of the mediation process would be deemed confidential.” *Id.*

⁸⁸ 5 U.S.C. §§ 571-583 (2000). In his article, *Protecting the Confidentiality of Settlement Agreements*, Brazil reminds his reader that Federal Rule of Evidence 403 (Rule 403) can also provide Rule 408 with some protective assistance. Brazil, *supra* note 78, at 988. Rule 403 holds, “Although relevant, evidence may be excluded if its probative weight is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” FED. R. EVID. 403. Brazil writes, “[I]t is entirely appropriate to invoke Rule 403 to oppose the admission of settlement evidence that rule 408 would not automatically bar.” See Brazil, *supra* note 78, at 988. Brazil’s reliance on Rule 403 is justified if the issue of confidentiality is ever brought before a judge. However, Rule 403 provides no practical guidance to the parties or neutrals who are trying to understand the parameters of ADR’s confidentiality protections on a day-to-day basis. The broad, general nature of Rule 403 can assist confidentiality inside the courtroom, but its amorphous nature makes it virtually useless to those practitioners who desire confidence in confidentiality before they will ever even engage in ADR.

B. The Confidentiality Protections of the ADRA

The protections offered under the ADRA form a second line of defense (after Rule 408's protections) in defending confidentiality.⁸⁹ The confidentiality protections provided under the ADRA are detailed and can be confusing.⁹⁰ They are defined by time, place, and manner limitations. Generally speaking, under the ADRA, confidentiality protections are extended to confidential communications between a neutral and a party and between a party and a neutral,⁹¹ but these protections do not rise to the level of a privilege.⁹² In fact, the ADRA permits disclosure under a number of circumstances and it does specifically restrict the situations in which confidentiality applies. Hence, even under the ADRA confidentiality is limited.

1. Disclosure by a Neutral Under the ADRA

The ADRA prohibits a neutral from voluntarily disclosing or being required to disclose, through discovery or compulsory process,⁹³ dispute resolution communications or

⁸⁹ In fact, some argue it provides too much confidentiality at the expense of the public's right to know. *See Mester, supra* note 31, at 185-86.

⁹⁰ Pou, *supra* note 7, at 76. "In creating a confidentiality section that is the most detailed of any federal or state ADR statute, Congress gave parties in federally related ADR proceedings an assurance that their dispute resolution communications would generally be 'immune from discovery,' and defined these protections in detail." *Id.*

⁹¹ Marksteiner, *supra* note 71, at 102.

⁹² In re: Grand Jury Subpoena Dated Dec. 17, 1996, 148 F.3d 487, 492 (5th Cir. 1998) (citing *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1205 (9th Cir. 1975)). "'Confidential' does not necessarily mean 'privileged.'" *Id.*

⁹³ 5 U.S.C. §§ 571(5), 574 (2000). Although Rule 408's protections were limited during discovery, the ADRA's umbrella of protections specifically includes discovery of written and oral confidential communications.

communications provided to them in confidence.⁹⁴ The ADRA defines dispute resolution communications as oral or written communications “prepared for the purposes of a dispute resolution proceeding.”⁹⁵ The dispute resolution proceeding occurs when specified parties participate, a neutral is appointed, and an alternative means of dispute resolution is used.⁹⁶ Dispute resolution communications include the memoranda, notes, and work product of the neutral, parties, and nonparty participants.⁹⁷ Conduct and actions are not included in the definition of dispute resolution communications and written agreements to enter into dispute resolution, final written agreements, and arbitral awards are specifically excluded.⁹⁸ Finally, communications provided in confidence come into existence when they are made, with the express intent that they not be disclosed, or under circumstances that would create a reasonable expectation by the source that they will not be disclosed.⁹⁹ The ADRA grants

⁹⁴ *Id.* U.S.C. § 574(a). “Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral. . . .” *Id.*

⁹⁵ *Id.* § 571(5).

‘[D]ispute resolution communication’ means any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication. . . .

Id.

⁹⁶ *Id.* § 571(6). “[D]ispute resolution proceeding’ means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate. . . .” *Id.*

⁹⁷ *Id.* § 571(5).

⁹⁸ *Id.* (Even though the ADRA does not protect discovery of agreements to enter into ADR or final written agreements, Rule 408 prevents their use at trial.).

⁹⁹ *Id.* § 571(7).

‘[I]n confidence’ means, with respect to information, that the information is provided--
(A) with the expressed intent of the source that it not be disclosed; or

neutrals more confidentiality protection than Rule 408, does but the Act does contain several enumerated exceptions.

A neutral may disclose confidential communications in four circumstances. First, the neutral may disclose confidential communications if all parties (and participating non-parties [e.g. an expert providing testimony]) to the ADR agree to disclosure.¹⁰⁰ Second, the neutral may disclose if the communication has already been made public.¹⁰¹ This exception is broad; it would cover intentional as well as inadvertent disclosures. Third, the neutral may disclose confidential communications if required by law.¹⁰² Fourth, the neutral may disclose confidential communications if a court determines that it is necessary to prevent a manifest injustice, establish a crime; or if it would prevent harm to public health or safety.¹⁰³ The

(B) under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed. . . .

Id.

¹⁰⁰ *Id.* § 574(a)(1).

Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral, unless--

(1) all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing. . . .

Id.

¹⁰¹ *Id.* § 574(a)(2). “[T]he dispute resolution communication has already been made public. . . .” *Id.*

¹⁰² *Id.* § 574(a)(3). “[T]he dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication.” *Id.*

¹⁰³ *Id.* § 574(a)(4).

[A] court determines that such testimony or disclosure is necessary to--
(A) prevent a manifest injustice;

confidentiality protections held by a neutral are not absolute, but they are significantly better than the protections held by the actual disputing parties.

2. *Disclosure by a Party Under the ADRA*

Under the ADRA, a neutral cannot disclose any dispute resolution communication or any communication provided to them in confidence.¹⁰⁴ The statute is significantly different for disclosures to a party; the confidentiality protections are much more narrow. The ADRA prohibits a party from voluntarily disclosing, or being required to disclose, through discovery or compulsory process, “dispute resolution communications.”¹⁰⁵ This protection is far different than the protection covering disclosure by a neutral. When the confidence is held by a neutral, the statutory protection involves “dispute resolution communications” and “communications provided in confidence.”¹⁰⁶ When the confidence is held by a party, the statutory language, “communications provided in confidence” is glaringly absent. The significance of the absent language is compounded by an enumerated exception under the ADRA which actually allows the disclosure of confidences by a party to a party.

(B) help establish a violation of law; or
(C) prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

Id.

¹⁰⁴ *Id.* § 574(a).

¹⁰⁵ *Id.* § 574(b). “A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication. . . .” *Id.*

¹⁰⁶ *Id.* § (a).

There are several enumerated exceptions under subsection (b) (which focuses on disclosures by a party) and they are similar to those found in subsection (a) (which focuses on disclosures by a neutral). First, a party may disclose confidential communications if they are the party who originally prepared the communication.¹⁰⁷ Second, a party may disclose if all parties to the ADR consent in writing.¹⁰⁸ Third, a party may disclose if the communication has already been made public.¹⁰⁹ Again, like the exception pertaining to neutrals (under subsection (a)), this exception is similarly broad and would cover intentional as well as inadvertent disclosures. Fourth, a party may disclose if required by statute.¹¹⁰ The fifth exception concerning neutrals is the same as the exception in subsection (a)(4). A party may disclose confidential communications if a court determines that it is necessary to prevent a manifest injustice; establish a crime; or if it prevents harm to public health or safety.¹¹¹ The sixth exception allows disclosure to serve as parole evidence in the event there is a dispute

¹⁰⁷ *Id.* § 574 (b)(1). “[T]he communication was prepared by the party seeking disclosure. . . .” *Id.*

¹⁰⁸ *Id.* § 574 (b)(2). “[A]ll parties to the dispute resolution proceeding consent in writing. . . .” *Id.*

¹⁰⁹ *Id.* § 574(b)(3). “[T]he dispute resolution communication has already been made public. . . .” *Id.*

¹¹⁰ *Id.* § 574(b)(4). “[T]he dispute resolution communication is required by statute to be made public. . . .” *Id.*

¹¹¹ *Id.* § 574(b)(5).

[A] court determines that such testimony or disclosure is necessary to--

- (A) prevent a manifest injustice;
- (B) help establish a violation of law; or
- (C) prevent harm to the public health and safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential. . . .

Id.

over the meaning of an agreement or an award.¹¹² The last exception is the most striking and the most troubling.¹¹³

Section 574(b)(7) (the last exception regarding disclosures by parties) of the ADRA permits disclosure of any kind of dispute resolution communication if it was provided to or was available to all the parties and the neutral did not generate it.¹¹⁴ In other words, if the communication did not originate with the neutral and instead was made by one party to the other party, it has absolutely no confidentiality. It is no wonder the statutory language, “communications provided in confidence” was deleted from this portion of the statute.¹¹⁵ Accordingly, there is no confidentiality for any communication between parties. Two parties may intend complete confidentiality in their discussions and communications may be “provided in confidence” to one another—even with the neutral present—but the intent of the parties is irrelevant, the communications are discoverable.

The ADRA provides some protection to communications that are intended to be confidential, but the exceptions of the ADRA can create both large loopholes and disparate results. The neutral, who has no interest in the outcome, gets more protection than the parties. In fact, the parties get absolutely no protection for confidences shared between

¹¹² *Id.* § 574(b)(6). “[T]he dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award. . . .” *Id.*

¹¹³ *Id.* § 574(b)(7). “[E]xcept for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.” *Id.*

¹¹⁴ *Id.*

¹¹⁵ 5 U.S.C. § 574(b).

themselves. Additionally, the exceptions to disclosure are not artfully drafted. Lastly, the Act is confusing regarding who makes the determination of whether or not an exception to confidentiality exists at all. The ADRA has the potential to provide a greater defense of confidentiality, but it would have to undergo a number of changes to improve the precision of its protections.

VI. Improving Confidence Through Changes in the ADRA

ADR needs confidentiality.¹¹⁶ ADR in Air Force procurement needs confidentiality.¹¹⁷ ADR in Air Force procurement provides a forum for open communication, negotiation, and resolution. The ADR forum can be swirling with admissions, ideas, strategies, and inside information.¹¹⁸ ADR in Air Force procurement is, for the most part, relying upon the protections of Rule 408, the ADRA, restraint, and corporate level agreements, to keep individuals from trying to collect the wealth of information that can be produced during discussions. Despite good intentions, these protections are as effective as securing a bank vault with a screen door; it can stop pests, but it can't keep out those who want access to the treasures inside.

¹¹⁶ See discussion *supra* Part IV.

¹¹⁷ See discussion *supra* Parts II. & IV.

¹¹⁸ Lodge, *supra* note 13, at 1112.

The current legal protections of ADR confidentiality in Air Force procurement can be¹¹⁹ and must be improved. As it stands, parties to ADR and outside third parties can effectively derail ADR confidentiality protections with little effort and without ever having to violate the law.¹²⁰ Rule 408 and its paper tiger protections provide little security during discovery¹²¹ and the ADRA, while incredibly detailed, contains a veritable smorgasbord of exceptions.¹²² If ADR in Air Force procurement, and the players involved in it, seem to be enjoying a honeymoon existence¹²³ then a single indiscretion involving confidentiality could disrupt its bright and seemingly limitless future.

One could argue that the ADRA needs a mechanism so that the protections it does have are enforceable. Currently, the single remedy provided in the ADRA for breached confidentiality is found in subparagraph (c).¹²⁴ It states, “Any dispute resolution communication that is disclosed in violation of subsection (a) or (b), shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.”¹²⁵ This remedy is redundant; Rule 408 already excludes evidence of compromise negotiations. The ADRA doesn’t need any additional enforcement power, it needs expanded protections.

¹¹⁹ Kentra, *supra* note 3, at 756 (“One of the greatest strengths of mediation is its flexibility.”).

¹²⁰ See discussion *supra* Part V.

¹²¹ See discussion *supra* Part IV.A.

¹²² See discussion *supra* Part V.B.

¹²³ White Interview, *supra* note 12.

¹²⁴ 5 U.S.C. § 574(c) (2000).

¹²⁵ *Id.*

An individual, or entity, seeking to breach confidentiality can do it legally right now; they don't need to violate the law in order to effectuate a breach. There's no need to be a law-breaking scoundrel when one merely has to be ruthlessly efficient. An enforcement mechanism might be needed if the ADRA confidentiality rules were being violated on a continuous basis, but since the ADRA already provides a number of well-pronounced exceptions whereby confidences can be properly discovered, there is no need to violate the ADRA.¹²⁶ Accordingly, creating an enforcement mechanism while glaring loopholes exist would be about as useful as adding cufflinks to a hat: ridiculously superfluous. Furthermore, the federal rules of civil procedure already provide an adequate number of civil remedies for violating discovery rules and for party misconduct.¹²⁷ Hence, the best way to improve the confidentiality protections of ADR is to improve the protections of the ADRA itself.

The ADRA serves as the backbone for Air Force procurement ADR.¹²⁸ If the ADRA is strengthened, Air Force procurement ADR will grow stronger as well. The following discussion focuses on various provisions of the ADRA which could pose confidentiality problems for Air Force ADR. Specifically, the discussion identifies flaws in the ADRA and

¹²⁶ There do not appear to be any continuous violations of any particular portion of the ADRA to defend against or enforce against. Senger, *supra* note 15, at 95.

¹²⁷ There are provisions under other federal statutes that offer a litany of enforcement mechanisms.

In a judicial setting, the Federal Rules of Civil Procedure authorize courts to impose sanctions against an attorney or party under Rule 11 for harassing and frivolous conduct in pleadings or representations to the court; under Rule 37 for misconduct in discovery; and under Rule 16 for misconduct or bad faith in the conduct of pretrial conferences and settlement negotiations.

Weston, *supra* note 86, at 607 (citations omitted).

¹²⁸ See discussion *supra* Part II.

recommends particular changes to improve the confidentiality provisions. Additionally, proposed statutory changes to the ADRA are provided in Appendix B. The focus of the following endeavor is to make the ADRA's protections more precise and less susceptible to confusion or abuse.

A. Protect Conduct During ADR from Disclosure (5 U.S.C. § 571)

Subparagraphs (a) and (b) protect dispute resolution communications made to the neutral.¹²⁹ However, under § 571, those dispute resolution communications must be oral or written communications prepared for the purpose of ADR.¹³⁰ Conduct that occurs during ADR is not included within the definition of a dispute resolution communication.¹³¹ Thus, it would appear from subparagraphs (a) and (b) that one could discover, from a neutral or a party, the conduct of a particular party during ADR. Conduct could include outrage (which might demonstrate a lack of bias), acts of accommodation (which might demonstrate the existence of bias), and even a simple admission by silence.¹³² Consider, the following hypothetical cross-examination vignette of the mediator (Mr. Secretz) by counsel for Dojoro Construction wherein the focus is on the conduct exhibited by the contracting officer (Mr. Ko) during the ADR session. Not a single cross-examination question will require the witness to discuss verbal communications.

¹²⁹ 5 U.S.C. § 574(a) & (b).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² MCCORMICK ON EVIDENCE 648-53 (John William Strong, et al. eds., (1992)).

Q: Mr. Secretz were you the mediator between the Air Force and Dojoro Construction?

A: Yes, I was.

Q: Did you have private meetings with each party?

A: Yes, I did.

Q: With whom did you meet first?

A: I met with the president of Dojoro Construction.

Q: Why did you want to meet with him first?

A: I wanted to hear the contractor's side of the story and to find out why he thought he'd been wronged.

Q: How long was this meeting with the president?

A: A few hours.

Q: I don't want to know what was said, but as a result of this meeting, did you feel you understood Dojoro Construction's concerns?

A: Absolutely.

Q: Then you met with the contracting officer?

A: Yes, Mr. Ko was his name.

Q: How long after meeting with the president of the Dojoro Construction was this second meeting held?

A: The next day.

Q: When you met with Mr. Ko who spoke first?

A: I did.

Q: How long did you personally speak for?

A: Roughly twenty to thirty uninterrupted minutes.

Q: I don't want you to tell me what was said but listen to my question. Let's go through this chain of events: after you met with the president of Dojoro Construction, after you sought to learn why he thought he'd been wronged, after you then met with Mr. Ko the following day, after you took the lead, and after you started talking, what did Mr. Ko do during those 20-30 uninterrupted minutes?

A: What did he say?

Q: No, what did he DO while you were talking?

A: Well, after the first five minutes he kinda gasped, his eyes bulged out, his face turned red, and then he sighed and dropped his head. He held his head in his hands for about a minute or two and then he just sat there and nodded as I continued talking.

Q: How would you describe his demeanor?

A: Shaken.

Sometimes actions speak louder than words. In the above scenario, the conduct of the contracting officer (Mr. Ko) illustrates fault with alarming clarity. Unquestionably, counsel for the contractor (Dojoro Construction) will argue that the contracting officer's actions demonstrate a complete admission of fault and he never once had to ask the mediator what the contracting officer said during ADR. The proscriptions of the ADRA were followed, yet confidentiality was trampled.

The drafters of subsection (a) and (b) have created an avenue through which ADR confidences can be breached. Rule 408 specifically excludes statements and conduct made in compromise negotiations;¹³³ the ADRA should mirror Rule 408 on this issue, and should include a similar sweeping provision. The ADRA definition of "dispute resolution

¹³³ FED. R. EVID. 408.

communication”¹³⁴ should be expanded to exclude statements as well as conduct; consequently, it will be a more effective second line of defense for confidentiality.¹³⁵

B. Protect Unauthorized Disclosure of Matters That Have Already Been Made Public (5 U.S.C. § 574(a)(2) and (b)(2))

The second exception to subsection (a) and the third exception to subsection (b) address communications that have already been disclosed to the public.¹³⁶ Specifically, they permit communications that have “already been made public” to be released.¹³⁷ The rule has a logical premise: there’s no need to protect matters that have already been made the subject of common knowledge. It’s a simple concept that permits potentially secret matters to remain protected while allowing shared information to continue to be shared. The problem with the exception is that it unwittingly encourages repeated violations of confidentiality. Subsection (a)(2) and (b)(3) provide that once a communication has been made public—intentionally or unintentionally, advertently or inadvertently—confidentiality may be breached.¹³⁸ If, for example, a party to ADR mistakenly or purposefully releases confidential materials to the public then those matters lose all future protection because they have “already been made public.”¹³⁹ Consider the following fictional cross-examination of the

¹³⁴ 5 U.S.C. § 571.

¹³⁵ *See infra* Appendix B.

¹³⁶ 5 U.S.C. § 574(a)(2) & (b)(3).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

contracting officer (Mr. Ko) by counsel for Dojoro Construction wherein confidential matters are accidentally made public.

Q: Mr. Ko you are a contracting officer for the Air Force?

A: Yes, I am indeed.

Q: And you were engaged in ADR with Dojoro Construction a few months ago?

A: That's correct.

Q: And in preparation for that ADR, you put together a report that you planned to share with the mediator, Mr. Secretz?

A: I'm not at liberty to discuss that, those matters are confidential.

Q: I see. Mr. Smith did you lose a briefcase a few months ago?

A: Why yes, at the very time I was engaged in ADR with Dojoro.

Q: Did you get it back?

A: No.

Q: Did you expect to get it back?

A: Sure. Anyone looking inside the briefcase would have found my name and address?

Q: So obviously you expected someone to have read through the papers in your briefcase?

A: ...um, well, they wouldn't have to read everything in the briefcase.

Q: Do you see where we're going?

A: Yeah, and I don't think I wanna go there.

Q: I'm showing you an exhibit and I'd like to ask you if it looks anything like the ADR report you had in your briefcase a few months ago?

A: That's confidential; it was prepared for the mediator's eyes only!

Q: You do understand that by losing your briefcase, you forced folks to look inside of it for identification, and as a result, this report was, shall we say, “made public”?

A: I didn’t tell them to read my case files.

Q: No, but you were foolish enough to make them public weren’t you?

Confidential matters can be made public through many different means that are inadvertent or unintentional (and advertent and intentional as well). Regardless, the exceptions, as written, do not allow anyone to “unring the bell” once any matter has been made public. Reports prepared for ADR can be left behind on planes or lunchrooms. Private conversations about confidential communications can be overheard at a golf course or in a gym locker room. Any imaginable accidental release of private communications can cause a communication to be made public and thereby legally eliminate, permanently, confidential protections under the ADRA. Subsections (a)(2) and (b)(3) need to be amended to maintain confidentiality despite unauthorized releases.¹⁴⁰

C. Create Confidentiality for Disclosures Between Parties (5 U.S.C. § 574(b)(7))

As discussed above, subsection (b)(7) limits confidentiality between parties; in fact, confidentiality doesn’t exist at all under the ADRA.¹⁴¹ As a result, parties who engage in direct or indirect communication cannot expect any confidentiality.¹⁴² Even discussions

¹⁴⁰ See *infra* Appendix B.

¹⁴¹ See discussion *supra* Part V.B.1.

¹⁴² 5 U.S.C. § 574(b)(7).

between parties during a joint session are unprotected.¹⁴³ On the other hand, virtually everything the neutral discusses during the joint session is automatically protected.¹⁴⁴ Parties who desire to avoid a litigated dispute can't communicate with each other for fear that any information discussed may be disclosed. ADR involves an exchange of ideas. "The parties haggle, talk, and listen, proposing any idea that comes to mind until a workable resolution begins to gel. For that to happen, all parties must share information openly."¹⁴⁵ It is no wonder the Administrative Conference of the United States—which evaluated ADR in government before the reauthorization of the ADRA—reported to Congress that subsection (b)(7) should be eliminated.¹⁴⁶ Subsection (b)(7) certainly does not promote ADR.

A practical review of the confidentiality weaknesses created by (b)(7) reveals disturbing results. If, for example, after ADR discussions began, a conscientious contractor seeking quick resolution, unilaterally prepares a report detailing which of his concerns he was prepared to forfeit and which were non-negotiable and he gives one copy of the report to the neutral and a second copy to the opposing party, the ADRA would force two entirely different confidentiality outcomes. The first copy to the neutral receives confidential protections, but the second copy to the opposing party receives none. Moreover, if the neutral hands the first copy of the report over to the opposing party, the first copy remains

¹⁴³ *Id.*

¹⁴⁴ *Id.* § 574(a).

¹⁴⁵ Lodge, *supra* note 13 at 1112.

¹⁴⁶ ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, REPORT ON AGENCY IMPLEMENTATION OF THE ADMINISTRATIVE DISPUTE RESOLUTION ACT, SUBJECT: TOWARD IMPROVED AGENCY DISPUTE RESOLUTION: IMPLEMENTING THE ADR ACT (Feb. 1995)[hereinafter ADMINISTRATIVE CONFERENCE REPORT].

confidential while the second copy still has no confidentiality—even though they are both with the same individual. As strange as it sounds, subsection (b)(7) allows a neutral to apply his or her “Midas touch” to the report and it suddenly becomes confidential. The rule makes no sense because it is nonsense.

The confusion becomes almost becomes maddening when you add the exception of subsection (a)(2)¹⁴⁷ to the exception in (b)(7). Imagine the same scenario wherein a contractor provides a copy of an ADR report to a neutral and a second copy to the opposing party; however, now an outsider enters the scenario and demands that the neutral turn over the first copy of the ADR report. Naturally, the neutral will want to deny the discovery request, but since the second copy of the report has already been provided to the opposing party under (b)(7), it has now been “made public” under (a)(2) and it loses its confidentiality protections.¹⁴⁸ In short, the unprotected nature of the second report causes the first—seemingly protected—report to lose its confidential protections. The neutral will be hard pressed to legally deny the discovery request under the ADRA. The recommendation of the Administrative Conference of the United States should be implemented and (b)(7) should be eliminated.¹⁴⁹

¹⁴⁷ The exception of 5 U.S.C. § 574(a)(2) eliminates confidentiality if “the dispute resolution has already been made public.” *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ ADMINISTRATIVE CONFERENCE REPORT *supra* note 146. *See infra* Appendix B (5 U.S.C. § 574(j) would have to be expanded to make confidential communications between the parties exempt from FOIA).

D. Establish a Disclosure Process for Parties (5 U.S.C. § 574(e))

The provisions of the ADRA provide a limited process whereby a participant can make a disclosure of confidential information. Disclosure may occur if a court determines that communications must be provided to prevent manifest injustice, establish a crime, or prevent harm to the public health or safety.¹⁵⁰ Additionally, disclosure may occur if a neutral gives proper notice to the parties involved. Unfortunately, the ADRA is silent on the processes or procedures that must be followed if a party wants to, or needs to make a proper disclosure.

There are times when the disclosure of confidential matters is proper. For instance, exception (h) permits the disclosure of dispute resolution communications if the requestor is gathering the information for research or governmental purposes.¹⁵¹ The problem is there are no consistent guidelines establishing how disclosure should occur. If the educational request is presented to a neutral, the neutral must notify the participating parties before release; however, if the request is presented to a party, there are no notification procedures required at all.¹⁵² There is no rhyme or reason to explain the disparity in release procedures.

¹⁵⁰ 5 U.S.C. § 574 (a)(4), (b)(5) (2000).

¹⁵¹ *Id.* § 574(h). “Subsections (a) and (b) shall not prevent the gathering of information for research or educational purposes, in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the parties and the specific issues in controversy are not identifiable.” *Id.*

¹⁵² *Id.* § 574(e).

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a neutral regarding a dispute resolution communication, the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants of the demand. Any party or affected nonparty participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.

Id.

As a result, parties are left to determine on their own whether or not an opposing party has an objection to the release of confidential matters. Moreover, it is entirely up to the parties to determine whether or not they even want to notify the opposing party that an outsider is seeking confidential matters. Failure to provide consistent guidance on how parties can or cannot release confidential information provides more fertile ground for confusion and/or abuse. The ADRA should be amended to provide parties with the same disclosure procedures that neutrals currently have to follow; the amendment would be simple and helpful.¹⁵³

VII. Improving Confidence Through Changes in the FAR

Practically speaking, it does not appear as if the ADRA will be amended anytime soon, but the Air Force is not helpless. Expeditious amendments to confidentiality protections are available through an alternate means. Confidentiality protections can be improved through contract provisions. In fact, federal guidance even recommends the use of a contract to protect confidentiality between parties.

The Council does recognize that these provisions could hinder a party's candor in a joint session, and therefore the Guidance suggests that parties address this issue through the use of a contract. Confidentiality agreements are a standard practice in many ADR contexts, and their use is encouraged in

¹⁵³ See *infra* Appendix B.

Federal dispute resolution processes where confidentiality of party-to-party communication is desired.¹⁵⁴

Contract language can be drafted to close a number of the loopholes created by Rule 408¹⁵⁵ and the ADRA.¹⁵⁶ As discussed above, some major contractors already sign ADR agreements with the Air Force,¹⁵⁷ but these agreements don't apply universally. Contract language that strengthens confidentiality could apply to all contractors who deal with the Air Force through the use of a supplemented FAR, DFAR or AFFAR provision.

The use of a contract clause to make the ADRA more effective is entirely consistent with the proscriptions of the ADRA.

The ADRA provides that parties may agree to alternative confidential procedures for disclosures by a neutral. While there is no parallel provision for parties, the exclusive wording of this subsection should not be construed as limiting parties' ability to agree to alternative confidentiality procedures. Parties have a general right to sign confidentiality agreements and there is no reason this should change in a mediation context.¹⁵⁸

¹⁵⁴ Confidentiality in Federal Alternative Dispute Resolution Programs, 65 Fed. Reg. 83,085-87 (Dec. 29, 2000) (Guidance).

¹⁵⁵ See discussion *supra* Part V.A.

¹⁵⁶ See discussion *supra* Part V.B.

¹⁵⁷ See discussion *supra* Part III.B.

¹⁵⁸ Confidentiality in Federal Alternative Dispute Resolution Programs, 65 Fed. Reg. 83,085, 83093 (Dec. 29, 2000) (Guidance).

The format for separate confidentiality agreements is extremely flexible. “Parties may agree to more, or less, confidentiality for disclosure by the neutral or themselves than is provided for in the Act.”¹⁵⁹

Alternative dispute resolution and confidentiality are not foreign concepts to the FAR. The FAR provides—like the ADRA—for the use of ADR and for the use of supplemental ADR procedures in Part 33.214.¹⁶⁰ Under FAR Part 33.214 there are four essential elements for ADR:

- (1) Existence of an issue in controversy;
- (2) A voluntary election by both parties to participate in the ADR process;
- (3) An agreement on alternative procedures and terms to be used in lieu of formal litigation; and
- (4) Participation in the process by officials of both parties who have the authority to resolve the issue in controversy.¹⁶¹

Said clause also considers confidentiality; specifically, it states, “[t]he confidentiality of ADR proceedings shall be protected consistent with 5 U.S.C. 574 [the ADRA].”¹⁶² The FAR even defines a neutral.¹⁶³ The FAR definition of a neutral is important because it provides the contracting parties with the basis for supplementing ADR procedures. The definition states that a neutral “may be used to facilitate resolution of the issue in controversy using the

¹⁵⁹ *Id.*

¹⁶⁰ FAR, *supra* note 5, at 33.214.

¹⁶¹ *Id.*

¹⁶² FAR, *supra* note 5, at 33.214(e).

¹⁶³ FAR, *supra* note 5, at 33.214(d).

procedures chosen by the parties (emphasis added).”¹⁶⁴ The ADRA needs to be supplemented and FAR Part 33.214 is written to help meet that need; it authorizes supplemental procedures to accomplish that task.

An amended FAR clause (i.e. FAR Part 33.214) improving confidentiality should address the same ADRA weaknesses identified in the above section.¹⁶⁵ The supplementing FAR clause would be brief, direct, and effective. Moreover, it would follow the same framework as the ADRA.¹⁶⁶ Understandably, any contract provisions affecting confidentiality could only be enforceable against contract signatories. Confidentiality contract provisions would not apply to third parties attempting to discover ADR negotiations, but such a limitation should not prevent the strengthening of ADR confidentiality through the FAR. Confidentiality contract provisions would still improve confidentiality between the participants and allow protections to progress beyond their current, limited status. When embarking on a journey, a half a tank of gas is better than no gas; likewise, some improvement is better than no improvement. ADR is a dynamic process; it is spreading and developing.¹⁶⁷ Confidentiality must also be dynamic; it too needs to develop and the use of confidentiality contract provision can promote that development.

¹⁶⁴ *Id.* “When appropriate, a neutral person may be used to facilitate resolution of the issue in controversy using the procedures chosen by the parties.” *Id.*

¹⁶⁵ See discussion *supra* Parts VI.A.-E.

¹⁶⁶ See *infra* Appendix C.

¹⁶⁷ See discussion *supra* Part III.A.

VIII. Conclusion

The Air Force has recognized that litigation carries with it too many challenges; it is expensive,¹⁶⁸ risky,¹⁶⁹ and time-consuming;¹⁷⁰ on the other hand, ADR provides a more “palatable environment for parties to resolve their differences.”¹⁷¹ The Air Force has embraced ADR and promoted it with much vigor and fanfare.¹⁷² Its early successes have resulted in its use being ordered to the maximum extent practicable.¹⁷³ The fruits of Air Force ADR labors have been bountiful in the world of procurement.¹⁷⁴ Cases are resolved quicker and billions of dollars have been saved.¹⁷⁵ Alternative dispute resolution has a bright future in Air Force procurement.

Nonetheless, litigation has not gone away. Litigation may never go away. Some cases are not right for ADR and litigation may be the only means to resolve them.¹⁷⁶ Effective litigators endeavor to win and they have the ability to recognize strengths and weaknesses.

¹⁶⁸ Marksteiner, *supra* note 71, at 91-92.

¹⁶⁹ Senger, *supra* note 15, at 90.

¹⁷⁰ Kentra, *supra* note 3, at 721.

¹⁷¹ Weston, *supra* note 86, at 594.

¹⁷² *See* discussion *supra* Part III.A.

¹⁷³ AF ADR Policy Letter, *supra* note 37.

¹⁷⁴ *See* discussion *supra* Part III.A.

¹⁷⁵ AF ADR Policy Letter, *supra* note 37.

¹⁷⁶ 5 Year Plan, *supra* note 61, at 1; Senger, *supra* note 15, at 93 (“While we do not argue that ADR is appropriate in every case, situations where we recommend against it are rare, such as when the government needs a court ruling for a public sanction or a legal precedent.”) (citation omitted).

They can capitalize on strengths and concomitantly exploit weaknesses. Alternative dispute resolution's most significant weakness is its limited confidentiality protections.¹⁷⁷

A litigator—or a contractor with a litigation mindset—can exploit ADR's confidentiality's weaknesses. When there is a lot of money at issue, there can be a great temptation to seek ADR information.¹⁷⁸ A litigator can certainly be lured into trying to gain an advantage by piercing the confidentiality of ADR.¹⁷⁹ They may have a weak case, they may suspect wrongdoing, or they may just desire victory; after all, there is no shame in representing a client zealously. Regardless, under Rule 408 and the ADRA, a litigator can discover confidential matters through numerous means.¹⁸⁰

Alternative dispute resolution is successful because litigation can be extraordinarily taxing on the parties.¹⁸¹ Nonetheless, you don't have to be Nostradamus to predict what will happen to confidence in ADR if confidentiality is breached even a single time.¹⁸² Alternative dispute resolution's popularity will undoubtedly diminish if litigators are able to use it as a discovery vehicle. Some parties will be less forthcoming in their negotiations and others

¹⁷⁷ See discussion *supra* Part IV.

¹⁷⁸ *Id.*

¹⁷⁹ Weston, *supra* note 86, at 595.

¹⁸⁰ See discussion *supra* Part V.

¹⁸¹ Marksteiner, *supra* note 71, at 91-92; Senger, *supra* note 15, at 90, Kentra, *supra* note 3, at 721; Weston, *supra* note 86, at 594.

¹⁸² Pou, *supra* note 7, at 76.

may stay away from it entirely.¹⁸³ If parties have no confidence in confidentiality, they will have little or no confidence in the use ADR.¹⁸⁴ In this regard, the future of ADR is contingent upon the effectiveness of ADR's confidentiality protections, and those protections are not particularly effective.¹⁸⁵

Confidentiality must be improved. Consequently, the ADRA must be amended, or in the alternative, a contract clause should be developed and added, to protect the confidentiality of ADR communications between participants and allow them to engage in a collegial exchange of ideas without worrying about who generated the discussion and who can legally discover the contents of the discussion.¹⁸⁶ There's no good reason not to protect confidentiality in a procurement contract, but there's an awfully good reason to protect it: to ensure confidence in confidentiality and encourage a successful future for ADR.

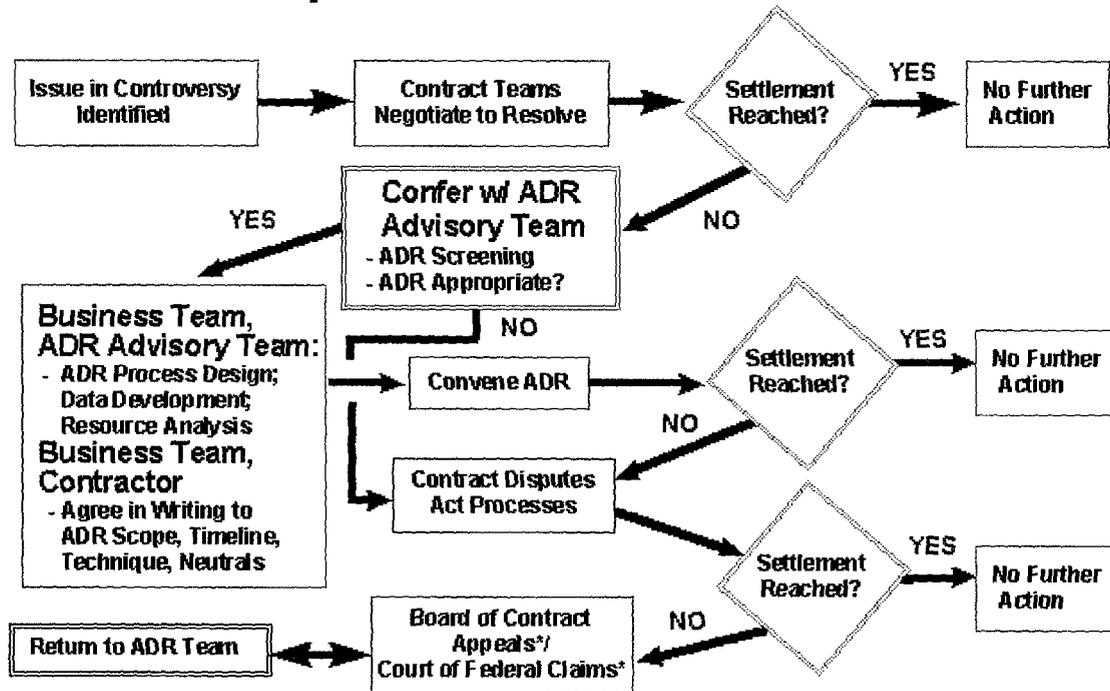
¹⁸³ See discussion *supra* Part IV.

¹⁸⁴ *Id.*

¹⁸⁵ See discussion *supra* Part V.

¹⁸⁶ Confidentiality in Federal Alternative Dispute Resolution Programs, 65 Fed. Reg. 83,085 (Dec. 29, 2000) (Guidance).

Alternative Dispute Resolution Model



¹⁸⁷ 5 Year Plan, *supra* note 61.

Appendix B

Proposed Changes to the ADRA¹⁸⁸

§ 571. Definitions

For the purposes of this subchapter [5 USCS §§ 571 et seq.], the term--

- (1) "agency" has the same meaning as in section 551(1) of this title;
- (2) "administrative program" includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation, as those terms are used in subchapter II of this chapter [5 USCS §§ 551 et seq.];
- (3) "alternative means of dispute resolution" means any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, factfinding, minitrials, arbitration, and use of ombuds, or any combination thereof;
- (4) "award" means any decision by an arbitrator resolving the issues in controversy;
- (5) "dispute resolution communication" means any oral or written communication prepared for the purposes of, *or conduct made in*, a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication;
- (6) "dispute resolution proceeding" means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate;
- (7) "in confidence" means, with respect to information, that the information is provided--
 - (A) with the expressed intent of the source that it not be disclosed; or
 - (B) under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed;
- (8) "issue in controversy" means an issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement--
 - (A) between an agency and persons who would be substantially affected by the decision;or
 - (B) between persons who would be substantially affected by the decision;
- (9) "neutral" means an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy;
- (10) "party" means--
 - (A) for a proceeding with named parties, the same as in section 551(3) of this title; and
 - (B) for a proceeding without named parties, a person who will be significantly affected by the decision in the proceeding and who participates in the proceeding;
- (11) "person" has the same meaning as in section 551(2) of this title; and

¹⁸⁸ Proposed additions to the ADRA appear in bold italics (e.g. *proposed addition*). Proposed deletions from the ADRA appear in strikethrough (e.g. ~~proposed deletions~~).

(12) "roster" means a list of persons qualified to provide services as neutrals.

§ 574. Confidentiality

(a) Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral, unless--

(1) all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;

(2) the dispute resolution communication has already been *intentionally or advertently* made public;

(3) the dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or

(4) a court determines that such testimony or disclosure is necessary to--

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

(b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication *or any communication provided in confidence to the party*, unless--

(1) the communication was prepared by the party seeking disclosure;

(2) all parties to the dispute resolution proceeding consent in writing;

(3) the dispute resolution communication has already been *intentionally or advertently* made public;

(4) the dispute resolution communication is required by statute to be made public;

(5) a court determines that such testimony or disclosure is necessary to--

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health and safety,

of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential;

(6) the dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; ~~or~~

~~—(7) except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.~~

(c) Any dispute resolution communication that is disclosed in violation of subsection (a) or (b), shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.

(d) (1) The parties may agree to alternative confidential procedures for disclosures by a neutral. Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding. If the parties do not so inform the neutral, subsection (a) shall apply.

(2) To qualify for the exemption established under subsection (j), an alternative confidential procedure under this subsection may not provide for less disclosure than the confidential procedures otherwise provided under this section.

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a neutral *or party* regarding a dispute resolution communication, the neutral *or party* shall make reasonable efforts to notify the parties and any affected nonparty participants of the demand. Any party or affected nonparty participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral *or party* to disclose the requested information shall have waived any objection to such disclosure.

(f) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.

(g) Subsections (a) and (b) shall have no effect on the information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.

(h) Subsections (a) and (b) shall not prevent the gathering of information for research or educational purposes, in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the parties and the specific issues in controversy are not identifiable.

(i) Subsections (a) and (b) shall not prevent use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a party to or participant in such proceeding, so long as such dispute resolution communication is disclosed only to the extent necessary to resolve such dispute.

(j) A dispute resolution communication which is between a neutral and a party, *or between a party and a party*, and which may not be disclosed under this section shall also be exempt from disclosure under section 552(b)(3).

Proposed Changes to FAR Part 33.214

a) The objective of using ADR procedures is to increase the opportunity for relatively inexpensive and expeditious resolution of issues in controversy. Essential elements of ADR include --

- (1) Existence of an issue in controversy;
- (2) A voluntary election by both parties to participate in the ADR process;
- (3) An agreement on alternative procedures and terms to be used in lieu of formal litigation; and
- (4) Participation in the process by officials of both parties who have the authority to resolve the issue in controversy.

(b) If the contracting officer rejects a contractor's request for ADR proceedings, the contracting officer shall provide the contractor a written explanation citing one or more of the conditions in 5 U.S.C. 572(b) or such other specific reasons that ADR procedures are inappropriate for the resolution of the dispute. In any case where a contractor rejects a request of an agency for ADR proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

(c) ADR procedures may be used at any time that the contracting officer has authority to resolve the issue in controversy. If a claim has been submitted, ADR procedures may be applied to all or a portion of the claim. When ADR procedures are used subsequent to the issuance of a contracting officer's final decision, their use does not alter any of the time limitations or procedural requirements for filing an appeal of the contracting officer's final decision and does not constitute a reconsideration of the final decision.

(d) When appropriate, a neutral person may be used to facilitate resolution of the issue in controversy using the procedures chosen by the parties.

(e) The confidentiality of ADR proceedings shall be protected consistent with 5 U.S.C. §§ 571, 574 **except to the extent it is amended or supplemented by the following provisions.**

¹⁸⁹ Proposed additions to the FAR appear in bold (e.g. **proposed addition**). Proposed additions to the FAR that are also additions to the ADRA appear in bold, underlined italics (e.g. ***proposed addition to the FAR which is also an addition to the ADRA***).

§ 571. Definitions

For the purposes of this subchapter [5 USCS §§ 571 et seq.], the term--

(5) "dispute resolution communication" means any oral or written communication prepared for the purposes of or conduct made in, a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication;

§ 574. Confidentiality

(a) Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral, unless--

(2) the dispute resolution communication has already been intentionally or advertently made public;

(b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the party, unless--

(3) the dispute resolution communication has already been intentionally or advertently made public;

(6) the dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a neutral or party regarding a dispute resolution communication, the neutral or party shall make reasonable efforts to notify the parties and any affected nonparty participants of the demand. Any party or affected nonparty participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral or party to disclose the requested information shall have waived any objection to such disclosure.¹⁹⁰

¹⁹⁰ The parties can agree to expand the rules of confidentiality but they cannot contractually agree to ignore the proscriptions of FOIA. Accordingly, 5 U.S.C. § 574(j) and its amending language, found in Appendix B *supra*, could not be added to a potential FAR clause.