

# Proposal to Establish an Office of Dispute Prevention and Resolution

**Alternative Dispute Resolution Advisory Council  
April 27, 2006**

## Executive Summary

The ADR Council established by Governor's Executive Order #2005-047 prepared a comprehensive report based on local and national research that support the following key recommendations:

- Establish an Office of Dispute Prevention and Resolution (ODPR) within the General Services Department with emphasis on loss control and prevention, measurement of those benefits and development of financial incentives for use of ADR.
- Implement ODPR as a five-year pilot project with stable funding that will demonstrate cost savings, organizational efficiencies and program effectiveness from using ADR services.
- This neutral, apolitical Office will promote the use of proven alternative methods of dispute resolution, support emerging agency-based efforts to institutionalize programs and provide local and national leadership through the implementation of innovations in the use of ADR approaches within state government.

This report satisfies the directives in the Governor's Performance Review recommendation "Minimize Litigation Costs: Increase the Use of ADR." The ADR Council stands ready to engage in further study and/or revision of these recommendations, should the Governor deem it appropriate.

### ANTICIPATED RESULTS:

- New Mexico is nationally recognized as an innovator and leader in ADR, general services administration, risk management and loss control.
- Reduced legal costs, including claims.
- Reduction of time and resources spent on internal grievance and complaint processes, including administrative hearings.
- Improved workplace climate and productivity and reduced costs from unresolved conflict including, but not limited to:
  - Less employee replacement
  - More efficient use of managerial time
  - Improved attitudes, less stress-related health and other issues
- Improved customer service
  - More efficient use of government resources
  - Increased public satisfaction with government

Following is a summary of sample targets for the five-year pilot program.



## PILOT PROJECT RECOMMENDATIONS

<b>First Year</b>	Develop strategic plan and performance measures
	Identify loss control (RMD) funding and positions
	Assign initial staffing of three FTE
	Engage in marketing/education
	Brief cabinet and senior management on ADR approaches/uses and ADR office functions
	Conduct additional orientation sessions with key personnel, e.g. HR Council, unions, others
	Prepare outreach/education/marketing strategy
	Design metrics, begin data collection from existing programs
	Develop web site with listserve
	Develop definitions, Code of Ethics, other standards
	Create Governor's Peacemaker Award
	Identify network of ADR practitioners and programs in state government
	Develop ADR templates
	Seek supplemental funding for FY07 and recurring FY08 appropriation in the 2007 Legislature
<b>Second Year</b>	Provide orientation sessions for managers, supervisors and employees in state agencies
	Establish minimum qualifications for mediators/facilitators in state government
	Develop incentives program through Risk Management
	Develop "best practices" policies and promote consistent applications
	Recommend amendments to Government ADR Act, executive order, SPO rules, agency policies
	Identify ongoing funding options
	Partner with other offices: Shared Neutrals, City ADR office, Judicial Courts, UNM Dispute Resolution Center, UNM Institute for Public Law
<b>Third Year</b>	Develop continuing education standards for neutrals
	Implement Quality Assurance standards
	Research possible Ombudsman program initiative
<b>Fourth Year</b>	Evaluate pilot performance through cost savings and other measurables and plan next phase
<b>Fifth Year</b>	Secure appropriate permanent funding
<b>Perennials</b>	Meet with ADR Council
	Deliver annual report to Governor

# Introduction

**ALTERNATIVE DISPUTE RESOLUTION (ADR)**<sup>1</sup> refers to any procedure, designed to identify and reconcile disparate interests, or to address disagreements, disputes or conflicts, in which the parties call upon the services of a neutral person to assist them in addressing their concerns and differences, and attempt to achieve mutual understanding and agreement. By using ADR, the parties can establish and work towards common values, expectations and goals, and can avoid the expense, uncertainty and delay of administrative proceedings and court litigation.

In addition to saving time and resources, ADR also helps to improve communication between the parties. ADR provides a forum for creative solutions to disputes that better meet the needs of the parties and can improve the overall relationship between participants because the focus is largely on the disputants' interests and not on their positions.

**In the human resources setting,** ADR promotes resolution of workplace issues at the earliest opportunity and at the lowest possible level. This reduces unproductive time spent by employees, managers and supervisors in the disciplinary and grievance process. It also helps to maintain a positive work environment that is free from discrimination and that promotes productivity and individual growth. These benefits, in turn, reduce absenteeism and employee turnover.



**In the organizational setting,** ADR is utilized to address agency goals, to reconcile inconsistent or conflicting roles or efforts, and to facilitate collaboration with external persons and groups who are regulated or otherwise affected by agency activities.

By implementing an **Office of Dispute Prevention and Resolution (ODPR)**, New Mexico will ensure continued Executive department/agency innovations in the use of ADR, as well as integration and coordination among state agencies on ADR training, policies and procedures. If made permanent, the Office of Dispute Prevention and Resolution will provide long-term systemic benefits such as dispute prevention, networking coordination among agencies, ongoing program development, thus empowering state employees to take responsibility for and ownership of conflicts within the workplace, facilitating collaboration with affected citizens, and minimizing the time and cost of administrative disputes and litigation.

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<sup>1</sup> Various ADR (and related) terms are defined in the Glossary (**Appendix A**) attached to this Proposal.

<sup>2</sup> Because the Governor has direct control over only the Executive branch, the Council interprets the Executive Order to mandate the development of ADR within this branch. Although liaison and coordination with the other branches of State government, with other governmental entities, and with the private sector may be warranted in the long run, it is not within the immediate scope of this Proposal.

<sup>3</sup> See **Appendix B**, a Recent History of ADR in New Mexico State Government, which explains both past initiatives and the rationales given for them; and **Appendix C**, Discussion of the Governor's Performance Review Recommendations.

# Background and Authority for This Proposal

## AUTHORITY

The Alternative Dispute Resolution (ADR) Advisory Council was established by **Executive Order 2005-047**, issued by Governor Bill Richardson on September 12, 2005. The Council, together with the New Mexico General Services Department, was charged with developing “a preliminary proposal for a statewide approach to implementing ADR programs.”

## HISTORY

Because Executive Order 2005-047 represents the most recent emphasis by the Executive branch<sup>2</sup> on the use of ADR in State government, a history of ADR initiatives is relevant to an understanding of what a “statewide approach to implementing ADR programs” should consist of and how such an approach can best be effectuated. Despite ad hoc efforts in various State agencies to utilize ADR prior to 2000, ADR became a formalized policy of the State with the adoption of the Governmental Dispute Resolution Act (GDRA) in 2000 and the promulgation of Executive Order 2000-08 and implementation of that executive order. The General Services Department, Risk Management Division (GSD/RMD) was charged with coordinating the promotion of ADR policies and procedures throughout

the Executive branch, and with developing and providing conflict management training to state employees. The Governor’s Performance Review (GPR) in 2003 and 2004 contained a specific reference to further use of ADR, and was followed by Governor Richardson’s promulgation of Executive Order 2005-047 which re-established the ADR Advisory Council and reiterated the lead role of the General Services Department, Risk Management Division. A more detailed summary of this recent history of ADR in New Mexico State Government is attached.<sup>3</sup>

## DEVELOPMENT OF THIS PROPOSAL

The ADR Advisory Council formed a Drafting Committee consisting of five members, who reported periodically to the Council. Once written, a rough draft Proposal was posted on the internet for review and comment by the Council and other interested persons. The Council approved the substance of this Proposal at its meeting on April 4, 2006. As the designated lead agency under EO 2005-047, the General Services Department has also reviewed and approved this Proposal before its final approval by the ADR Advisory Council.



The Drafting Committee actively sought out information and documents regarding ADR, facilitation and ombuds programs both within State government, in the public and private sectors within New Mexico, and in the Federal government and sister states. Committee members also interfaced on numerous occasions with persons who were involved in prior ADR and public facilitation initiatives here in New Mexico.

Some of the information gathered from Federal and sister state programs<sup>4</sup> and from a survey of the ADR Coordinators who comprise the Advisory Council<sup>5</sup> is detailed at the end of this Proposal. Also, pursuant to Executive Order, the Council specifically considered the initiatives recommended for review in the Governor’s Performance Review.<sup>6</sup>

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<sup>3</sup> See **Appendix B**, a Recent History of ADR in New Mexico State Government, which explains both past initiatives and the rationales given for them; and **Appendix C**, Discussion of the Governor’s Performance Review Recommendations.

<sup>4</sup> See attached **Appendix C**, Governmental ADR Programs: Federal and State Experiences.

<sup>5</sup> See attached **Appendix D**, ADR Coordinators Survey.

<sup>6</sup> See attached **Appendix E**, Discussion of the Governor’s Performance Review Recommendations.



# Proposal to Establish a Pilot Office of Dispute Prevention and Resolution

Establishing an “Office of Dispute Prevention and Resolution” (ODPR) is a critical step as New Mexico decreases litigation costs and increases the use of ADR as recommended in the Governor’s Performance Review. This office is a necessary tool and resource for both expanding and streamlining current programs and making possible the development of future initiatives.

The Council proposes that the ODPR be established, initially, as a **five-year pilot program**, to be evaluated after five years, at which time a determination can be made regarding its value, cost effectiveness and direction.

Briefly stated, the ODPR would be:

- A **centralized coordinator** for the Executive branch. A resource to existing programs in various Executive branch departments and agencies. A facilitator in the improvement of those programs as well as development of new programs in agencies whose use of ADR has not yet advanced to the same level.
- A promoter of a **wide range of communication and facilitation methods** in various settings, including
  - personnel/human resources issues
  - organizational effectiveness and conflict management
  - dispute resolution between agencies and their regulated and/or affected publics, other government entities, contractors and citizens
  - facilitation of policy input, dialogue and consensus building
- **Administratively attached to the General Services Department/Risk Management Division**, with emphasis upon loss prevention and control, measurement of those benefits and development of financial incentives for the use of ADR.
- **Neutral and apolitical**, concerned with promoting communication skills and collaborative processes rather than particular outcomes or agendas; and with directing employees and managers to problem-solving mechanisms without fear of retribution for bringing those problems to light.
- An efficient focus for **securing contract services** in training, education, outreach, and **referral** of inter-



ested persons to department/agency programs and to qualified mediators, facilitators and other providers.

- Fostering **common definitions, standards, and approaches** to the use of ADR and facilitation techniques, through development of model policies, procedures, and forms, and minimum standards for mediators and facilitators.
- Ensuring **familiarization of all State employees** with basic principles and uses of mediation and other ADR techniques, so that they can recognize and call upon appropriate resources.
- Ensuring more detailed familiarization of all **supervisors, managers and administrators** with the uses of and resources for collaborative processes, conflict management, alternative dispute resolution and facilitation.
- Ensuring **outreach and training** in the use of facilitation techniques for interactions with the public and interested parties.
- Collaborating with and assisting the **ADR Advisory Council** in interagency cooperation.

## FUNCTIONS

The ODPB office will support all forms of Alternative Dispute Resolution as well as dispute prevention mechanisms, and though the scope is generally limited to Executive Agencies, as dictated by Executive Order, it will, by necessity, provide a much needed resource to all ADR activities within State Government. The Office will be administratively attached to GSD/RMD, and is seen as a loss control function. Prevention of costly hearings and or litigation is chief among its goals. It will promote awareness of and access to processes that allow early resolution of disputes before they rise to the level of formal grievances, appeals, discrimination charges and lawsuits.

Functionally, the Office will help integrate dispute prevention and resolution systems into state government by acting as a resource for and coordinating consultation, guidance and technical assistance to agency ADR Coordinators as they develop ADR plans and programs. In this way New Mexico will build on the foundation we have established over the last several years and broaden the range of options available to employees as they learn to resolve disputes using non-adversarial, collaborative processes.

The Office will seek to leverage resources by administering mechanisms including a shared neutrals program, coordinated training opportunities, and providing best practices and model policies and procedures to govern ADR systems in agencies. The Office will identify both needs and resources, and supply the necessary coordination for agencies to support one another. Improved networking and communication, shared marketing and outreach materials, and access to mentoring and practice opportunities will be economical and efficient.

The Office will serve as a centralized referral agency to all ADR programs, including mediation, facilitation, dialogue and collaborative public policy decision-making.

The Office will perform many functions that will benefit all agencies, relieving the burden on any single agency. This is not only cost effective, but will promote consistency and quality among programs. It will, for instance, identify barriers to the use of ADR and research and suggest ways to overcome them, be a clearinghouse for resources (training opportunities, list of professional neutrals, other information and expertise); host a web site; operate a helpline for referrals; foster the development and maintenance of funding for ADR and collaborative processes in State government, including grant writing; collect and disseminate information assessing and evaluating State efforts; do research; promote innovation and champion ADR. Developing performance and training standards, and provide quality assurance. The Office will bring together employees from various agencies to collaborate on projects that are mutually beneficial to all.

A centralized office will also coordinate reporting, evaluation and planning functions by tracking relevant data for evaluating and making recommendations to improve the applications and usage of ADR in state government. It will prepare reports for the governor detailing ADR activities as needed or requested, including but not limited to: agency utilization, evaluation of effectiveness of various processes, training delivered to agency employees, implementation of any new programs or projects, status of activities proposed or planned and goals for improvement.



The Office will also participate in several mutually beneficial relationships that extend its reach without increasing its budget. It will be a liaison to other entities both in and outside of state government. It will create partnerships with other ADR-focused organizations such as the Federal Executive Board, a council of representatives from local Federal Agencies. This will allow a collaborative relationship with FEB's "Shared Neutrals Program" and provide access to a larger resource pool of trained facilitators and mediators active throughout the State. The Office will work with the ADR Council and assist that body as they work together to further the use of ADR in State agencies. Opportunities for continuing education, mentoring and practice opportunities and access to other shared resources will come from relationships fostered by the Office with State ADR Court Programs, the New Mexico Mediation Association, the State University system and other private and volunteer groups.

## EXPANDING STATE AGENCY ADR INITIATIVES

The ODPR is intended to complement and accelerate the ongoing development of ADR initiatives by State agencies. It is not intended to supplant those efforts.

Past experience (as reflected in the history described in Appendix B) suggests the importance of maintaining the momentum which has developed to date in the use of ADR and collaborative processes.

The **Governor** can reinforce this momentum towards ADR use by Executive agencies by clearly communicating his commitment to the use of ADR. He can direct all **cabinet secretaries and agency heads** to ensure that their agency's policies and procedures incorporate ADR mechanisms at every suitable opportunity and that, in practice, agency management recognizes and encourages the use of ADR. While the ODPR can coordinate marketing and training of ADR methods, there is no substitute for top executive encouragement to motivate agency personnel.

The Council recommends that all **department and agencies**:

- Issue policy directives encouraging employees to utilize ADR methods. (For examples of agency directives, see **Appendix F**.)
- Review their policies and procedures to ensure that ADR methods are mentioned and encouraged as part of informal and formal complaint procedures.
- Establish a full-time ADR Coordinator in larger agencies whose dedicated job is to set up and promote ADR use; and in smaller agencies incorporate ADR functions into the job description and performance objectives of one or more employees.
- Provide work time to employees to obtain training as neutrals and to serve as neutrals or parties in ADR processes, so that such participation is recognized and encouraged by the agency.
- Encourage their managers to utilize collaborative techniques and ADR methods in addressing goal-setting, organizational conflicts and other administrative issues.
- Distribute information to all employees about ADR, including program brochures, frequently asked questions about ADR (with answers), and contact information.

- Encourage or mandate training of agency personnel in ADR, conflict management and other skills and techniques.
- Recognize and reward employees who successfully employ ADR to prevent or resolve conflicts or to work with affected publics.
- Inform agency personnel about the existence and role of the ODPR and encourage involvement with the ODPR.
- Develop public information (written materials, presentations, web site information, etc.) regarding collaborative governance concepts, agency initiatives in ADR and collaborative processes, and contact persons.

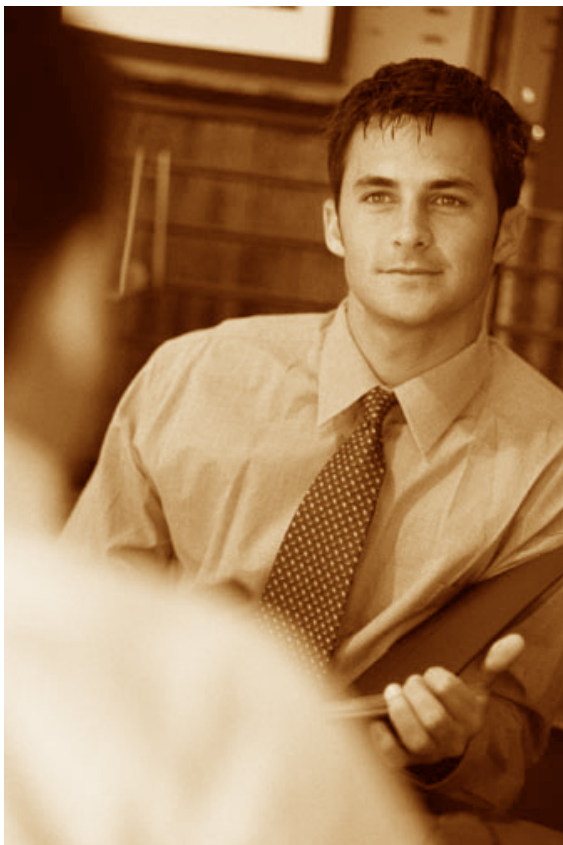
## OUTLINE OF ODPR TASKS

There are numerous issues whose discussion and determination will have to be undertaken by the Office of Dispute Prevention and Resolution. The ADR Advisory Council suggests that the Office take note of them and base its strategic directions and planning on them. The list of issues includes, but is not limited to, the following:

- Defining the methods, definitions, and tools of ADR including, for example, "confidentiality" and "voluntariness."
- Determining methods for program data collection, assessment, and the reporting of costs and benefits.
- Discussing ways to ensure consistency and suggesting models for state agencies, including model agency policies and procedures.
- Establishing buy-in, commitment, usage.
- Establishing a Code of Ethics and Confidentiality Standards.
- Developing a marketing plan.
- Planning for training of practitioners and or trainers including
  - Types of training.
  - Use of other training resources such as University of New Mexico.
- Planning for training in conflict management for all state employees.



- Planning for training of identified stakeholders (e.g., bureau heads, human resources staff, and a sample of front line managers) in basic mediation
- Coordinating communication among existing private and public programs.
- Exploring and establishing means of sustaining and funding the program.
- Determining means and models for building conflict resolution capacity within agencies.
- Recommending additional incentives for agencies who implement programs.
- Modeling and recommending best practices.
- Conferring with executive leaders and union officials regarding increased incorporation of ADR into labor-management disputes and collaborations.
- Reviewing past ADR initiatives, notably the Governmental Dispute Resolution Act, Executive Order 2000-08, and Executive Order 2005-047, for possible amendment to make ADR availability and agency ADR programs mandatory.
- Exploring other innovative ways to expand ADR.



## **RATIONALE: SOME BASIC DECISIONS REACHED IN THE PROPOSAL**

**Covered agencies.** The Drafting Committee recognized that the Governor’s Executive Order is capable of mandating action only among Executive agencies. Therefore, it was determined that the ODPR should be responsible, in the first instance, for development of ADR and collaborative processes within the Executive branch.

**Range of ADR processes.** The Committee also determined that both the Governor’s Performance Review and EO 2005-047 encompass traditional ADR methods and broader collaborative processes. A determination was made to include the full range of communication, conflict management and ADR methods within the scope of this Proposal.

**Centralization.** A basic question was whether to have a central office, or to merely create some support for expansion of the past decentralized development of ADR and facilitation. It was determined that the greatest efficiency and effectiveness could be achieved by establishing a central office to assist existing programs and encourage and foster new programs among the various agencies, while permitting each agency to develop and use programs in a way which best fits its needs. The resulting Proposal emphasizes a coordinating and facilitative role for the ODPR.

**Ombuds functions.** One of the recommendations in the Governor’s Performance Review was consideration of ombudsman functions. The Committee considered the dual nature of ombudsmen. Many ombudsmen serve as independent investigators who may accept either internal or external complaints of wrongdoing, inefficiencies, morale problems and other issues. They commonly monitor long-term organizational trends and make recommendations to the chief executive in ways to address problems. At the same time, ombudsmen may refer complainants to existing grievance procedures or to ADR resources and sometimes facilitate communication and/or mediation themselves. Thus, ombudsmen can complement and benefit from the development of ADR and collaborative processes by the ODPR.

Notably, the literature emphasizes the importance of an ombudsman’s reporting to the chief executive or someone else “near the top” of the organization; and the need for an ombudsman to be familiar with the corporate culture, policies and procedures, complaint and grievance procedures of the organization. The Committee felt that the central command control aspect of the ombuds function would be inconsistent with the assistive, coordinating function



envisioned for the ODPR. Moreover, the size of the State executive branch probably precludes a single, centralized ombuds function that would enjoy the necessary familiarity with multiple agencies' diverse cultures, policies, procedures, and needs.

Accordingly, we are not recommending inclusion of an Ombudsman under this current initiative. However, recognizing the value of ombudsmen, we would encourage the Governor and/or individual agencies to consider a separate initiative to develop that capacity throughout the Executive branch. In addition, the ODPR should be tasked with researching and making a recommendation concerning such an initiative. In the interim, ODPR should assist agencies in identifying and working with any existing ombudsmen, ensuring cross-referrals between ombudsmen and ADR programs, and fostering development of joint ADR-ombuds mechanisms.

**Organization.** Another issue discussed at length was where the ODPR should be housed. The Committee felt that it is important to insulate the proposed function from political considerations, so that it serves a facilitative and coordinating function that encourages and fosters the use of ADR/collaborative processes. This is particularly important given the voluntary and confidential nature of many ADR processes. We also reviewed the role of GSD in both EO 2000-08 and EO 2005-047, and the emphasis in the Governor's Performance Review upon cost savings and reduction of litigation.

Feedback from other states' experiences further suggested the value of building an ADR function into a government agency whose long-term mission would be served by—and would in turn promote—ADR and collaborative processes. These factors

combined to produce our recommendation that the ODPR be housed in the Risk Management Division of the General Services Department.

GSD/RMD has as one of its primary missions the prevention and reduction of litigation claims and losses. While fully recognizing the many intangible benefits of ADR and collaborative processes, those processes prominently feature the promise of avoidance of claims and minimization of litigation costs. In addition, GSD/RMD is probably in the best position to introduce incentives in the form of premium savings to agencies based upon their rate of training in and use of ADR/collaborative processes; and to develop ways of measuring the costs saved thereby.

To our knowledge, placing ADR under a risk management umbrella is a **unique initiative**, and a move that was praised by other state programs during our survey of sister states.

Because the emphasis in this Proposal is upon capacity building in the various Executive agencies, and facilitating the growth and utilization of ADR and collaborative processes, the Committee also recommends that the ODPR be considered a provisional effort to be evaluated after a reasonable time. Therefore, the Proposal calls for ODPR to be a pilot program with a duration of five years. At the end of the five years, the ODPR should be evaluated and, at that time, it could be made a permanent function of State government, modified, or abandoned.

**Mandatory vs. Voluntary.** This Proposal emphasizes coordination and facilitation rather than control of various State agency programs. At the same time, the Council believes there needs to be some degree of standardization (definitions of types of ADR used, qualifications for practitioners)

and training (familiarization of State employees and managers regarding ADR uses and resources) that should be mandated for all Executive branch agencies.

### **STAFFING**

This Proposal emphasizes the ODPR's role in planning, marketing, development of consistent models and standards for ADR and collaborative processes, coordination and facilitation of agency programs, and assessment of program effectiveness, costs and cost savings—as opposed to providing direct ADR/facilitation services to State agencies. Accordingly, emphasis should be placed upon staffing the ODPR with persons who can deliver such services. Therefore, we are recommending that the Office staff include experts in strategic planning, public relations/marketing, and management analysis. There should also be someone in-house who has specific expertise and credibility in ADR/collaborative processes, to serve as a consultant, to interface with subject matter experts in State government and contractors, and to help facilitate training. A director or coordinator will be needed who is (or who becomes) familiar with State government laws, regulations, policies and procedures and organizational culture. Finally, some level of administrative and clerical support will have to be provided. It is assumed that most training and actual ADR/collaborative process work will be performed by outside contractors and/or by volunteers.

## FUNDING

The Council has identified four possible sources of funding for an ODPR and for training and other related costs: Money appropriated from general tax revenues, money generated from premiums paid by State agencies pursuant to the General Liability Fund (and/or other insurance programs) administered by GSD, other assessments upon or user fees paid by the respective government agencies, and private grant money. Of these, private grant money is extremely limited, if not unavailable, at this time for ADR initiatives. Moreover, grant money is non-recurring and cannot be relied upon for permanent viability. Based upon study of other states' past and present ADR initiatives, there is grounds for concern about the long-term viability of an Office of Dispute Prevention and Resolution (ODPR) or similar office which coordinates and/or directs the development and use of ADR and collaborative processes within State government. The experience of other states demonstrates that offices may be established and may function effectively under one administration or under a series of administrations, only to be eliminated as non-essential during a subsequent period of budget tightening or as a result of changes in a newer administration's priorities. In fact, stand-alone offices (not built into a given department's ongoing mission) are probably the most vulnerable to such a reversal of fortune. Offices placed directly under a Governor or chief executive appear to be similarly vulnerable to political fortunes.

The recommendation in this Proposal for housing of an ODPR in the Risk Management Division of the General Services Department (GSD/RMD)

is partly a result of this recognition. (It is also based upon the considerable congruence of the loss control mission of GSD/RMD and the loss prevention and cost savings which can be realized by increased use of ADR and collaborative processes.) At the same time, a decision to house the ODPR at GSD/RMD could provide a basis for the long-term funding of the ODPR.

The use of RMD premium-based funds would create a recurring source of money. Moreover, connecting an ODPR to premium dollars would dovetail nicely with the Governor's emphasis (in EO 05-074) upon development of insurance premium incentives for participating entities. However, governing statutes appear to restrict the use of premium moneys to those risks which are covered by the given insurance fund. For example, worker's compensation moneys must be limited to the administration of worker's compensation claims, safety measures, and other directly related expenses; and similarly, General Liability Fund moneys must be spent only on matters pertaining to actual or potential tort and civil rights claims.

The scope of the ODPR, as envisioned in this Proposal, is considerably broader than those specific areas. Thus, although mediation can and should be promoted as a means of avoiding and resolving workplace claims of unlawful discrimination and retaliation (which, if they include damages claims, often are partly or wholly covered by the General Liability Fund), mediation is equally appropriate to prevent or resolve employee grievances, State Personnel Board appeals, unfair labor practice charges, and other disputes which do



not involve compensatory damages claims. More broadly, group mediations and organizational facilitations can increase workplace morale, efficiency and effectiveness—important ends but without any appreciable connection to reducing or eliminating damages claims. And the use of even broader collaborative processes by State government—while having clear benefits for both public administration and customer satisfaction—are wholly divorced from the specific statutory mission of GSD/RMD.

For those reasons, the ODPR cannot be wholly funded from insurance premiums. The extent to which such funds can be used would depend upon careful analysis of the respective functions of the office and apportionment of the costs relating to each function. Such detailed analysis would probably be possible only after initial startup and strategic planning.

Therefore, some use of general fund dollars will be needed both over the short term (initial startup costs) and over the long term (subsidizing the broader functions of the Office). Whether such general fund dollars come from direct appropriation, or from some pro rata or other assessment against the respective agencies, it would ultimately require legislative support.<sup>7</sup>

<sup>7</sup> A budget request for ODPR startup costs was prepared by the Advisory Council's Budget Committee and submitted by GSD to the State Legislature in the 2006 legislative session, but was not approved.

## ANTICIPATED BENEFITS

The Council expects benefits will consist of loss avoidance (monetary savings) and improved communication and effectiveness of State agencies.

**Loss Avoidance.** The Governor's Performance Review recommendation "Minimize Litigation Costs: Expand Use of Conflict Resolution" summarized the experience of numerous public sector agencies with ADR. It cited:

- The U.S. Postal Service's REDRESS program, which had resulted in a 25 percent decline in EEO claims filed over a four-year period, as well as an accompanying alteration in the culture of how workplace conflicts were handled within the agency. The Postal Service reported estimated savings of \$10,000 per case in avoided administrative costs.
- The U.S. Equal Employment Opportunity Commission's program to make ADR services (primarily mediation) available at both the pre-complaint and complaint stages and increase the use of trained counselors to help resolve complaints before they are formalized, resulting in a two-year drop of 10.6 percent in EEOC complaints.
- The Florida Conflict Resolution Consortium's report of over \$3 million saved by using mediation in 35 administrative dispute resolution pilot cases.
- An Oregon Department of Justice study finding an average cost of resolution through litigation of \$60,557 versus \$9,537 to resolve a comparable case through mediation.
- The Florida Department of Environmental Protection reported estimated savings of \$75,000 per party, \$150,000 per case for mediated environmental enforcement cases.
- Total documented savings of \$4.3 million in FY02 and FY03 (as against \$600,000 in costs) from GSD/RMD-sponsored civil rights and mediation training within State government .
- Reported FY03 savings by the Regulation and Licensing Department (RLD) between \$24,180 and \$50,180 due to mediation in 13 cases between a licensing authority and a licensee. (This was based upon an estimated \$2,000-\$4,000 administrative cost per administrative hearing versus an average \$140 cost for a mediation.)



- RLD's 100 percent successful resolution of employee disputes through Safe Conversations and employee mediations, at an estimated cost of \$200 per dispute versus an average estimated cost of \$1,050 for processing of a formal employee grievance.

The U.S. General Services Administration produced a study in 1998 assessing the savings associated with the Air Force ADR Program. That study considered the average historical costs of EEO and other complaints. It found that litigated EEO claims can cost between \$162,390 and \$310,390; unfair labor practice disputes \$79,003; tort claims \$20,484; and contract disputes \$22,497. The study reported that ADR successfully resolved 84 percent of cases completely and almost 90 percent partially.

Arizona's Department of Transportation approximates a \$35 million cost savings over a 13-year timeframe with the use of ADR.

No doubt other statistics will be gathered in coming years; and the ODPB will be collecting and evaluating data concerning New Mexico's own cost-benefit experience.



**Other Benefits.** Equally important, the GSA study (cited above) also considered the “intangible” benefits of ADR, including “trust, respect, cooperation, good will, pleasant working environment, efficiency and productivity, satisfaction, desire to work with the government again, and good public reputation/image.” Another “intangible” reported was the overwhelmingly high approval rating given ADR by participants after the fact (well over 90 percent indicating they would try ADR again). A third “intangible” was the “unique ability” of ADR “to resolve disputes whose greatest obstacles proved to be personalities, egos, and ill will between entrenched people.” As stated in the report:

*“Unlike its formal process strict litigative counterparts, ADR tailors the general process to meet the individual needs of the parties in conflict. In so doing, the ADR approach has proven to be one of the rare methods capable of overcoming the human emotional or [sic] obstinance that stood in the way*

*of progress and resolution. In such instances ... ADR has succeeded where the traditional procedures and processes remained at an impasse .... Simply stated, not every disagreement has at its core an issue of law or a dollar amount due. In such instances, ADR has bridged the gap.”*

The State of New Mexico can expect to enjoy both the loss-avoidance benefits that have accompanied the use of collaborative and ADR processes by other governmental entities, as well as the intangible benefits cited in the GSA study.

One of the tasks that will be given to the ODPR is monitoring and analysis of ADR and collaborative process use, success rates, costs saved and costs consumed. However, as noted in EO 05-047 and in the GSA report, there are substantial benefits to dispute prevention and resolution which will never be measurable in dollars and cents.





# APPENDIX A

## Glossary

The Council offers the following definitions of terms utilized in this report, including both terms incorporated into the Proposal itself and other terms discussed but not incorporated into the actual Proposal.

<b>ADR</b>	Means Alternative Dispute Resolution and is defined in the Governmental Dispute Resolution Act as follows: <i>Alternative dispute resolution means a process other than litigation used to resolve disputes, including mediation, facilitation, regulatory negotiation, fact-finding, conciliation, early neutral evaluation and policy dialogues.</i>
<b>Arbitration (binding)</b>	Means a quasi-judicial process in which a third party (Arbitrator) hears both sides of a dispute and makes a decision. Arbitration is not in the scope of this Proposal.
<b>Arbitration (non-binding)</b>	Means a quasi-judicial process in which a third party (Arbitrator) hears both sides and gives an advisory decision. Arbitration is not in the scope of this Proposal.
<b>Consensus Building</b>	Consensus building is a process of seeking unanimous agreement. It involves a good-faith effort to meet the interests of all stakeholders. Consensus has been reached when, after every effort has been made to meet the interests of all stakeholding parties, everyone agrees they can live with what is proposed.
<b>Dispute Prevention and Loss Control</b>	Means any managerial system or systems intended to identify potential or actual loss situations and the implementation of a strategy or strategies to prevent or manage losses. Typical ADR strategies would include training in communication skills and in sensitivity to individual and group interests, early intervention, and setting up participatory decision making groups.
<b>Facilitation</b>	Facilitation is a skill employed by an objective third party to help individuals and groups work together to accomplish decision making, planning, problem solving or other functions.
<b>Litigation</b>	Means a legal process in which a suit (dispute/claim) is filed with the court system and ends with the dismissal of the suit or enforcement of a judgement. Parties are typically represented by attorneys.
<b>Mediation</b>	Means a dispute resolution process in which an independent third party (“neutral”) assists the parties by managing a confidential process for communication and problem solving to settle their difference but does not advise them of his/her own opinion as to the issues and merits of the disputes.”
<b>Negotiation</b>	Means a process of working out an agreement by direct communication among two or more individuals for the purpose of addressing and dispute, usually without a neutral third party.
<b>Neutral</b>	Means a person who provides services as a mediator, facilitator, fact-finder or conciliator or who otherwise aids parties to resolve disputes.
<b>Ombudsman</b>	Means a person who is an independent and impartial neutral and who has been designated by an organization to investigate complains, either within the organization or against the organization. An Ombudsman also provides resources and information to help parties identify options available as a means to prevent or resolve disputes.
<b>Policy Dialogue</b>	Means a collaborative process in which both internal and external stakeholders are afforded opportunities to become aware of, participate in, and influence state agency decision making that may affect their interests.
<b>Regulatory Negotiation (Reg-Neg)</b>	Means a process that brings together regulators, those affected by a proposed regulation, and other interested parties to develop a regulation from the beginning through negotiation.
<b>Safe Conversion</b>	Means an informal, confidential and voluntary process using co-mediators to resolve a dispute in a safe environment.
<b>Settlement Facilitation</b>	Means a process in which an independent, neutral third party communicates individually with disputants using “shuttle diplomacy” in order to identify common concerns and potential conflict resolution options. A neutral may, if necessary, deliver his/her opinion as to the merits of the dispute.

## APPENDIX B

### Recent History of ADR in New Mexico State Government

#### Pre-2000 Efforts

Prior to 2000, a few State departments and agencies utilized mediation, facilitation and other forms of alternative dispute resolution through a variety of agency-based programs, rules or regulations, or on an ad hoc basis.<sup>8</sup> However, many agencies made no use of ADR methods in conducting their business. There was no statewide coordination of such efforts, monitoring, promotion or standardization of ADR programs.

#### Governmental Dispute Resolution Act

The Governmental Dispute Resolution Act (GDRA), enacted in 2000, was the first official State government endorsement of ADR. It authorized, but did not mandate, state agencies (not limited to the Executive branch) to use ADR procedures “to resolve any dispute, issue or controversy” involving agency operations, programs or functions, “including formal and informal adjudications, rulemakings, enforcement actions, permitting, certifications, licensing, policy development and contract administration.” §12-8A-3.A NMSA 1978. The Act further authorized agencies to designate an employee as the alternative dispute resolution coordinator for that agency, §12-8A-3.D; to enter into contracts with other agencies or with private entities to provide services necessary to achieve the objectives of the Act, §12-8A-4.B; and to take fiscal actions, and pay for costs incurred, in conjunction with such efforts, including costs of “training, policy review, system design, evaluation and the use of impartial third parties,” §12-8A-4.A. The Act defined “alternative dispute resolution” as “a process other than litigation used to resolve disputes, including mediation, facilitation, regulatory negotiation, fact-finding, conciliation, early neutral evaluation and policy dialogues.” §12-8A-2.B. It expressly excluded binding arbitration from those mechanisms authorized by the Act. §12-8A-5.E.

As noted, the GDRA is permissive rather than mandatory. It permits agencies to implement measures and to expend money to utilize ADR mechanisms as defined by the Act; however, it does not require that any agency do so.

#### Executive Order 2000-08

Executive Order 2000-08, issued by Governor Gary Johnson, mandated actions by Executive agencies “to achieve full implementation” of the GDRA. Every Executive agency was required to designate an ADR Coordinator who was, in turn, responsible for developing an ADR plan for the agency’s use of ADR and training of its managers and staff

in the forms and uses of ADR. The Order also established an ADR Advisory Council charged with coordinating agency efforts; developing templates for agency ADR plans; collecting and evaluating data regarding ADR use and its costs and benefits; ensuring economy of scale in the implementation of training and ADR services; and identifying uses and applications for ADR throughout State government. The General Services Department (GSD) was designated by the Governor as the lead agency to work with the other Executive agencies and with the Advisory Council in implementing the Executive Order.

The Executive Order noted that “traditional adjudicatory processes have become increasingly costly, time consuming and contentious” whereas “ADR and collaborative processes in general” represent “more efficient, less expensive and more satisfying methods of resolving disputes.” It recognized that “increased use of ADR by Executive Agencies will enhance the operation of State Government and better serve the public.” These are the same policy considerations which were later emphasized in Governor Richardson’s Performance Review and in his Executive Order 2005-047.

Pursuant to Executive Order 2000-08, most Executive agencies drafted ADR plans that made ADR available in one or more of the agency’s internal processes. Common components of such plans were:

- Training of employees in mediation skills (primarily through GSD)
- Awareness training for potential users of mediation and facilitation (often through GSD)
- Referring of employee grievances and complaints to mediation (often set up through GSD)
- “Safe conversation” between or among employees
- Providing facilitators for group meetings to promote communication, understanding and consensus.

Some agency plans incorporated mediation, facilitation, and other ADR mechanisms into their handling of employee requests for reasonable accommodation, into regulatory mechanisms involving regulatory boards/officials and licensees, into the rulemaking process, public policy development, and interactions with permit holders and affected publics. In addition, some agencies developed inter-agency cooperation with others in providing mediators and facilitators.

The General Services Department, through the Loss

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<sup>8</sup> Agencies emphasizing the use of ADR include the Children, Youth and Families Department, which has offered mediation, facilitated discussion for employees, facilitated discussion for strategic planning and group facilitations; the Energy, Minerals & Game & Fish Department, which has made widespread use of public facilitation in developing regulations and dealing with regulatory conflicts; the Department of Labor’s Human Rights Division, which offers mediation to charging parties and respondents; the Regulation & Licensing Department, which introduced and offered mediation in regulatory board/licensee issues as well as in internal personnel issues; and the Worker’s Compensation Administration, which has long utilized mandatory settlement facilitation as part of its adjudication process.

Control Bureau of its Risk Management Division (RMD), undertook several initiatives to help fulfill its charge under Executive Order 2000-08, including:

- Training (through contract trainers) in excess of 200 State employees in mediation skills (basic, intermediate and advanced), and providing continuing education opportunities
- Establishing a pool of trained peer mediators from among those who received the aforementioned training and providing a mediation request and referral mechanism for use by agency employees and/or supervisors
- Awareness training for supervisors and managers in ADR processes and conflict management skills
- Promoting education and awareness initiatives for State employees, management and cabinet members
- Facilitating and coordinating the identification of respective agency ADR coordinators, the drafting of agency ADR programs, policies and procedures
- Providing ongoing training and development support to ADR coordinators
- Facilitating meetings of the ADR Advisory Council and establishing networking mechanisms for sharing of expertise and resources among agencies.

However, most agencies (including GSD) assigned ADR duties to personnel whose primary job did not involve ADR. Moreover, the Executive Order did not mandate any particular level of participation or progress; nor did it create any financing mechanism or financial incentives to support ADR. The Advisory Council itself suffered from different and sometimes competing visions of where and how ADR should be further developed; and the Executive Order did not establish a central office or person with the responsibility and authority for moving ADR forward in the Executive branch.

Consequently, despite considerable energy and effort devoted to implementing the Executive Order, momentum dissipated. Agencies reverted to varying degrees of involvement in the use (and even awareness) of ADR, and the Advisory Council ceased to meet.

### **State Personnel Board Rule for ADR Use**

In July 2001, the State Personnel Board amended its rule governing discipline of classified employees in the Executive branch to provide that “Agencies shall utilize alternative methods to resolve conflicts or improve employee performance or behavior whenever appropriate.” 1.7.11.8(C). NMAC. This puts ADR on equal footing with the concept of progressive discipline (which likewise “shall be used whenever appropriate” pursuant to 1.7.11.8(B) NMAC) in the administration of discipline. Discipline itself, according to the Rule, has as its primary purpose “to correct performance or behavior ... in a constructive manner that promotes employee responsibility.” 1.7.11.8(A) NMAC.

In early 2006, the State Personnel Board introduced settlement facilitation as a specific step of the formal disciplinary appeal procedure, providing both the appealing

employee and management the opportunity to voluntarily participate in mediation of the dispute.

### **Public Facilitation Initiatives**

As with ADR, public facilitation techniques have been employed by several different Executive agencies on an ad hoc basis for many years. In January 2002, an Office of Public Facilitation was established in the Administrative Office of the Courts through a private grant. That office moved to the New Mexico Environment Department after about six months. It aims to promote the use of collaborative techniques by state agencies. It is utilized by that department for public input and collaborative decision making. It also provides assistance to other State agencies in several areas including:

- Facilitating processes by which agencies, interested publics and business or industry representatives meet to resolve community issues, e.g., issues of water, natural resource management, environmental health, or public health
- Facilitating agency, industry and “targeted public” meetings in which people with specific knowledge meet to address and resolve complex issues of public policy
- Setting direction internally within an agency
- Facilitating licensing, permitting and credentialing functions
- Providing training for agency staff in facilitative process techniques and procedures

At the same time, other agencies have continued to develop their own capacity for and use of public and/or regulatory facilitation. Notably, the Game & Fish Department has developed concerted program for public input and problem solving groups representative of affected interests in areas such as wildlife management and allocation of distribution of permits, and negotiating with stakeholders in developing regulations and statutes.

However, as with ADR, the potential for use of facilitative processes far exceeds agency awareness of those processes and use of facilitation techniques. There remains a lack of centralization, coordination, training and marketing of facilitation in many areas of the Executive branch.

### **Governor Richardson's Performance Review**

In August 2003, Governor Bill Richardson issued a Report from the New Mexico Performance Review, entitled “Moving New Mexico Forward”. That Report set out a vision for saving money, improving customer service, and promoting a State government “as effective and efficient—as *good*—as we are.” A second “Moving New Mexico Forward” report, entitled “Further Along”, was issued in August 2004. It was “based on the premise that longer-term reforms are needed throughout the state bureaucracy” in order to turn state government into “a cost-effective tool for helping New Mexicans lay the groundwork to provide for our ongoing basic needs as a society, find the most effective answers to a wide range of questions, and achieve, in community, what we cannot

as individuals” and to ensure that “state government is as good as the people of New Mexico.”

The development of the Executive branch’s capacity for and use of ADR was among the initiatives set forth in the Performance Review. That recommendation (further detailed below) was entitled “**Minimize Litigation Costs: Expand Use of Conflict Resolution**” and was included in the section of the 2004 Report aimed at “Saving Taxpayers Money.” However, it is important to note that the dispute prevention and resolution proposals contained in that recommendation equally could have been placed in other sections of the Performance Review, and are consistent with both cost savings and other overarching themes articulated in the Performance Review.

The 2003 Executive Summary correctly noted that many of the Report’s recommendations fall under one, two or even three of its general objectives: making New Mexico better, putting customers first, and saving taxpayers money.

For example, a recommendation for increased use of conflict prevention and resolution could just as easily have been placed in Chapter VI of the 2003 Report, “Improving State Government Management.” In that chapter, the Report emphasized the importance of improving the working conditions and training opportunities of state employees and thereby increasing their effectiveness. Recommendation HR8 specifically called for improvements in state government human resource services. Key findings of a state employee online survey set forth in the 2003 Report included:

- A majority (69 percent) viewed internal communication within Executive agencies as only fair or poor.
- As many as 70 percent of employees viewed “overly bureaucratic processes and procedures” as a problem.
- Low employee morale and resultant potentially significant employee turnover posed a challenge to State government.
- State agencies appeared to be willing to try “new and better ways of doing things” and were receptive to “innovative and problem solving ideas.”

Recommendation HR8 also noted the need for increased standardization and consistency across agencies, and called for a single-point-of-contact system for communication, coordination, and information dissemination regarding human resources management.

In addition to being an important cost-savings tool and an important component in improving human resource management in State government, ADR was also recognized by the Performance Review as playing a role in resolv-

ing broader issues. For example, the 2003 Report cited to negotiated settlement of water rights as a “more promising and cost-effective approach” than litigation.

The recommendation to “Minimize Litigation Costs: Expand Use of Conflict Resolution” discussed two principle aspects of dispute prevention and resolution: (1) Employment disputes (2) Policy and Administration disputes. As developed below, the present Proposal incorporates these two distinct but related areas of dispute resolution and prevention, identifying **human resources/employment issues, administrative conflict management, and public policy facilitation** as three areas of dispute prevention and resolution which can and should be jointly developed through a single Office of Dispute Prevention and Resolution. The Governor’s Performance Review contained specific recommendations for further consideration, which are reviewed in Appendix C. Overall, this Proposal is consistent with the recommendation in the Governor’s Performance Review for “**a centralized office for ADR, public policy facilitation, and internal conflict management.**”

#### **Executive Order 2005-047**

Executive Order 2005-047 (EO 05-047) was promulgated on September 12, 2005. It supersedes previous orders, proclamations, or directives which are “in conflict.”

In EO 05-047, Governor Richardson reiterates the value of ADR and collaborative processes as ways to resolve disputes more quickly, less expensively, and with more satisfying results; and recognizes that their increased use by State agencies will enhance governmental operations and better serve the public. The Executive Order specifically cites to the Governmental Dispute Resolution Act and the Governor’s Performance Review.

EO 05-047 is comprised of three initiatives.

1. It invests the **General Services Department, Risk Management Division (GSD/RMD)** as the lead Executive agency charged with investigating and promoting the use of ADR among RMD-insured entities.<sup>9</sup>
2. It re-institutes an **ADR Advisory Council** consisting of ADR Coordinators from each of 23 named Executive branch departments and agencies as well as such other State agencies as may wish to participate in the Council. The Council is designated as “an advisory body that makes recommendations to the Governor” and is to meet at least quarterly and to provide the Governor with an annual report starting with October 2006. GSD/RMD is to chair the Council and to provide administrative support to the Council.
3. The Council is initially charged with developing “**a preliminary proposal for a statewide approach**”

<sup>9</sup> RMD is charged by statute with providing insurance coverage for State agencies, including all of the “branches, agencies, departments, boards, instrumentalities or institutions” of State government. RMD collects premiums from covered entities and is responsible for indemnifying and defending those entities and their officials and employees against claims for damages based upon tort or upon violation of civil rights. (The scope of public entities/employees’ liability is limited by the New Mexico Tort Claims Act, §41-4-1 et seq. NMSA 1978.) RMD is also authorized to undertake loss control initiatives and to require its insured entities to develop loss control policies and procedures in order to prevent and/or reduce claims. §15-7-3(A)(8)-(10) NMSA 1978; §1.6.4.1 et seq. NMAC (2004).



**to implementing ADR programs.”** In fulfilling that charge, the Council is to “identify innovative uses and applications for ADR throughout state government, develop procedures for marketing information and resource sharing, [and] identify best practices.” The deadline for submission of the preliminary proposal is to be April 28, 2006.

Over the longer term, GSD is called upon to investigate staff requirements necessary to achieve the proposed recommendations of the ADR Advisory Council, and to investigate best practices and cost considerations for implementing the Advisory Council’s recommendations to the Governor, including the possible establishment of a permanent location for a centralized office dedicated to statewide ADR program management and administration and the possible establishment of an ombudsman program.<sup>10</sup>

### **ADR Advisory Council**

The ADR Advisory Council met for the first time on October 26, 2005 and established two committees required by the EO 05-04, a Drafting Committee and a Budget Committee. The Drafting Committee was charged with developing the Council’s Preliminary Proposal to the Governor, first met on November 21, 2005. The Budget Committee prepared a proposal for budgeted staff support and funding of other costs associated with the work of the Council and the “centralized office” contemplated by the Executive Order. In addition, standing committees have been formed, including a committee on ADR training and a committee to discuss marketing of ADR in State government.

The Advisory Council met again on January 11, March 1, April 4 and April 26, 2006, to share information about ADR initiatives in State government, to hear reports from Drafting, Budget and Training committees, and to review and approve this Proposal. The Council members also had the opportunity to review the draft sections of this Proposal and to comment on them through an online forum established by the Drafting Committee.

The Council intends to continue to meet quarterly, or more often as appropriate, and to make use of standing committees to discuss, coordinate and plan expanded use of ADR and collaborative processes in State government; and to serve such role as the Governor may envision in the implementation of this Proposal.

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<sup>10</sup> GSD/RMD also is to identify, collect and disseminate data on ADR use and the costs and benefits of ADR; initiate and maintain professional service contracts and relationship with ADR training and service providers (both internal and external); ensure economy of scale in the implementation of training and ADR services; and develop insurance premium incentives for participating entities and improved loss experience (subject to other cost development factors and fiscal considerations).

## APPENDIX C

### Governmental ADR Programs: Federal and State Experiences

The Drafting Committee reviewed “best practices” from national, state and local ADR programs and professional ADR organizations. This included review of historical documentation concerning previous efforts to facilitate ADR in state and local governments in New Mexico, and interviews with various persons who were involved in those previous efforts. The Committee identified lessons and resources, including:

**Organization:** There is significant activity and interest in state governments throughout the country to develop and establish ADR programs that provide both internally and externally focused ADR services. In most states, these programs were championed by formal leaders (Governors and state legislators), while other programs were created through grassroots efforts championed by state employees who were using ADR approaches within their agencies. Several agencies noted the importance of highly-placed champions, with the cautionary note given below.

Several states (Colorado, Florida, Massachusetts, Oregon) established independent ADR offices that were attached to the Governor’s office or a politically appointed Board or Commission. In the specific state governments examples cited above, each state program experienced difficulty in sustaining state budget funding to operate as an independent office. In situations where the Governor championed the creation of the ADR Office, the transition from one administration to the next often resulted in reduced support for the ADR Office and its programs and services.

Based on interviews with states experiencing this situation, a key recommendation received from current and former ADR Office Directors focused on locating the New Mexico ADR office and its programs and services within a well-established agency with a related or complimentary programs and services where it could receive administrative and organizational support and be more resistant to administration changes. In some states, the ADR Office migrated to administrative services agencies with state government or public universities, with mixed outcomes. For example, the Florida Consortium is administratively attached to Florida State University and provides public policy facilitation services for state agencies at a cost to state agencies. The program receives some general fund monies and generates revenue on a fee for service with state and local governments. In Massachusetts, moving the office to UMass provides some shelter from the diminishing funding they experienced. In Michigan, the court-annexed program collects fees from all court filings, to defray the cost of the ADR office, as well as to provide additional funding to community ADR centers statewide.

Most states surveyed report established ADR programs within their local and/or circuit court systems. In many

states, the court systems were the first government agencies to establish ADR/mediation programs as an opportunity to resolve civil, family, and victim-offender disputes. Several state governments have strategically partnered with these court programs to receive mediation and facilitator training and to recruit a qualified pool of mediators and facilitators.

**Training:** Most state government ADR programs report that training is a critical success factor that has tremendous impact on reputation and requests for additional services. In several states including Colorado and California, the centralized personnel office provides free training for state employees interested in becoming certified mediators/facilitators. After receiving their initial training, the new mediator/facilitator is required to serve as an apprentice mediator for up to ten mediations/facilitations within a year of the initial training program, and then serve as a lead mediator/facilitator for ten mediations in the second year. The US Postal Service REDRESS program uses a similar model but recruits mediators from local communities who possess both formal mediation training and practical experience applying their ADR skills.

In New Mexico, the US Postal Service tried internal mediators at first, but they were not trusted, so the program now uses only contract mediators. The Post Office provides contract mediators with Transformative Mediation training and an orientation to the postal system. The program is quite successful. The REDRESS program also requires external and internal mediators to attend an orientation process that explains the US Postal Service approach to ADR in responding to workplace conflicts and public discussions. In some states surveyed, a common concern focused on keeping newly trained mediators actively involved. One approach to sustain the momentum of new and veteran mediators focused on providing ongoing education to mediators through monthly/quarterly training workshops and a list serve where agency ADR Coordinators and ADR practitioners can exchange ideas, share experiences, and post training and practice opportunities.

One theme consistent in interviews with several state ADR programs focuses on building a common vocabulary and use of terms and definitions regarding ADR approaches. In a decentralized state government, the same term or word is often used differently resulting in several mindsets about ADR and how it works. The Virginia state government centralized ADR office uses its web site to create alignment across state government on ADR terms and definitions. State of Virginia conducts training for mediators using internal mediators to promote a common ADR approach and process that also acknowledges that each mediator/facilitator may have ADR training experiences and have practical experiences using ADR techniques different than those

encouraged by their program. Virginia also builds mediator capacity by utilizing *pro bono* private roster mediators who work with the State mediators to share experience.

**Marketing and Program Development:** The ADR Office should consider the following approaches to marketing used by other programs to build interest in ADR programs and services and secure funding for the Office. The US Post Office REDRESS program established an effective marketing program to encourage employees to resolve workplace conflicts through ADR approaches. The REDRESS program requires that REDRESS posters be placed in the same location as other federal and state employment laws (FLSA, minimum wage, etc.). The REDRESS program maintains an internal intranet site describing what an employee can expect from mediation and an easy-to-understand description of what happens in a mediation. Both the REDRESS posters and intranet site provide anonymous testimonials from employees who have positive experiences to report. Several states have used the federal REDRESS and resulting “shared neutrals” models.

Listed below are other notable marketing approaches from state programs:

- The State of Ohio uses Memorandums of Understanding across state agencies to share trained state employees across agencies and allowing these employees time away from their respective agencies to use their skills in other agencies.
- The State of Virginia reports that storytelling regarding ADR successes is a proven marketing approach.
- The State of Virginia also conducts training for all new managers in the grievance management process including the use of ADR approaches
- The State of Montana indicates that maintaining high visibility with their state legislature and Cabinet officials is critical to the support for their ADR program.
- Several states report that providing education within agencies through senior management teams, HR professional groups, special niche groups with a need for ADR services (environment, child welfare, agriculture, vocational rehabilitation, wildlife) is effective in growing ADR supporters.
- As part of the marketing effort, it is critical to educate state government stakeholders that ADR does not indicate any type of failure or is a last-resort process. This is an opportunity to dispel ADR myths or preconceptions.

**Funding:** Several state programs receive funding from various funding streams to avoid total dependence on state general funds. As described in the marketing section of this report, several states have found legislative champions among state legislators who become ADR practitioners

and advocates. A cautionary note was expressed by several states about the risk associated with one time funding for an ADR program. Because of the politics associated with a change in Governor’s administrations, stabilizing funding and protecting programs for the shifting political winds is challenging for many existing ADR programs. A major concern in stabilizing funding and protecting programs from shifting political winds; the only guarantee is that there are not guarantees. A new program ideally needs recurring funding for at least five years to establish itself within state government. A successful approach used by many new state offices focuses on implementation as a pilot project over several years with a comprehensive evaluation at a three to five year milestone. The Office of Public Facilitation housed within the State of New Mexico’s Environment Department collects fees for some services, in addition to state funding. Several state programs have achieved program growth by using a fee for service approach.

**Measuring Results:** The most common measurements associated with ADR programs focus on the quantity of services provided (i.e., number of mediations or facilitations, etc.). Several court programs are diligent in the efforts to also track agreement/settlement rates. Additionally, the use of customer satisfaction surveys regarding the satisfaction with the ADR process, regardless of the final agreement/settlement outcome, is also a common measurement approach.

The US Postal Services REDRESS model approach uses an independent survey firm that conducts confidential evaluations of the mediator by the parties in a mediation. The State of Virginia uses immediate and six-month followup evaluations to monitor the durability of agreements.

**Workplace Mediation and Other Mediation Services:**

The box below describes additional best practice approaches used by state ADR programs:

- Use of an Advice Line available for state employees to call to discuss if their conflict situation is appropriate for mediation and to discuss approaches for de-escalating their conflict independently. See State of Virginia model.
- Use of a shared mediator pool across state agencies and government agencies (local, state, judicial, federal). Similar to the federal “Shared Neutrals” program.
- Integrate state ADR practitioners with private/community mediators, as experienced providers as an opportunity to develop expertise and share approaches.
- Maintain a web site of state ADR professionals and their specialties. See State of Colorado web site.
- Establish universal forms for workplace mediation (i.e., agreements to mediate, mediation agreements)

**Facilitation:** While most of the best practices discussed throughout this section of the report apply to the entire continuum of ADR practices including the use of facilitation approaches, there are some specific best practices relating to facilitation. In addressing public policy issues, one national center has established guidelines for using ADR in public policy administration. This model focuses on partici-

pative government. The impetus for facilitation programs often occurs consistent with the need for public policy discussion in a specific government industry (i.e., wildlife, environment, family services, etc.) By developing a core facilitation model that can be adjusted for the industry-type, the base of support for the use of ADR approaches, specifically facilitation services, broadens.

## APPENDIX D

### ADR Coordinators Survey

The Committee also distributed a survey to all ADR Coordinators on the ADR Advisory Council regarding their respective agencies' experience with ADR and facilitation, needs in making use of such tools, and what function they would like to see performed by an ADR office. Twenty-one of the 32 agencies contacted returned completed surveys. Highlights of the survey responses are set forth below:

- Support for the use of ADR is high among the responding agencies. Over 80 percent of the agencies use ADR in some form (e.g., mediation, facilitation, safe conversation, use of settlement conferences), and about 85 percent have some form of organized ADR program. These programs include use of peer mediator and outside mediators/facilitators.
  - Agencies consider ADR useful in avoiding conflicts, reaching compromises and finding resolution.
  - Major impediments to the use of ADR and collaborative processes are a lack of trained providers, lack of trust in ADR by some employees and/or managers, employee unfamiliarity with how these processes can be used, lack of confidence in the neutrality of mediators, staff time to participate in ADR, lack of financial resources to pay for use of ADR, questions about the enforceability of mediation agreements, confidentiality, concerns that employees might take advantage of the process; a belief that ADR might interfere with management discretion and prerogatives; concern about technical knowledge necessary for a mediator to understand an agency problem or process; and fear of giving up power.
  - While various agencies have various degrees of expertise in ADR and collaborative processes, they share a desire for more widespread training of their agency personnel in the forms of ADR and facilitation, and the development of consistent policies and procedures emanating from a central ADR office.
- Agencies have a strong interest in a statewide roster of available and trained mediators, facilitators and other practitioners that can be drawn upon by their agencies. For employees trained in mediation/facilitation, there should be more opportunities for them to practice those skills.
  - A central ADR office could also benefit agencies by promoting awareness of ADR/collaborative methods; creating incentives for change; providing training; serving as a clearinghouse with information and technical assistance on structuring ADR programs; providing sample policies and procedures and templates; providing money for training and travel; helping to schedule (time and location) mediations and collaborative efforts; providing opportunities for inter-agency meetings to discuss problems and progress; tracking and maintaining statistical data; and evaluating the effectiveness of ADR and collaborative processes.
  - There is a need for support from all levels of State government, from the Governor on down, and education of executives and managers on the benefits of ADR.



# APPENDIX E

## Governor’s Performance Review Recommendations

*Executive Order 05-047 establishing the ADR Advisory Council directs the Council to develop a preliminary proposal for a statewide approach for ADR program implementation; that proposal “shall include an assessment as to whether to adopt the recommendations contained in the Governor’s Performance Review.” The Review’s recommendations and the Council’s assessment are discussed below.*

### Issue A-6: Minimizing Litigation Costs: Expand Use of Conflict Resolution

*Issue Summary: State government should increase use of Alternative Dispute Resolution and other facilitation techniques to prevent or resolve legal complaints.*

Recommendation	Assessment/Action
Use program design resources from MACRO, PCI and key stakeholders in all branches of government to design and implement an effective dispute resolution system in NM	Reviewed MACRO, PCI and key stakeholder program designs; assess for best practices and incorporate applicable components into proposed NM plan.  Assess program designs of NM programs (i.e., UNM Faculty Dispute Resolution Program, SM57 study group findings, State Bar recommendations, etc.); assess for best practices and incorporate applicable components into proposed state plan.
Centralize state office (attached administratively to GSD) for: <ul style="list-style-type: none"> <li>• ADR</li> <li>• public policy facilitation</li> <li>• internal conflict management</li> <li>• basic training to state employees</li> </ul>	Requires new Executive Order mandating Centralized state office, to be attached administratively to GSD; to provide referral and coordination (though not necessarily the services themselves) in ADR processes, including public policy facilitation and internal conflict management; to coordinate basic training functions, including employee, management, public and stakeholder orientations.  Upgrade communication and web-based information system to enhance ADR program capabilities and access. Create clearinghouse for mediator contact info database, training information, etc.
Statewide employee ombudsmen system	A small number of ombudsmen exist in state government, but only for specific cases, like Workers’ Comp. ADR and existing ombuds functions should be coordinated. But at this time, establishment of statewide ombudsman system/function is beyond scope of proposed plan.
Mandatory referrals	Develop statewide (SPO, GSD, etc.) rules and programs to mandate referrals to “least evaluative” ADR process as first approach to conflict resolution. Will require new Executive Order to mandate establishment and compliance.
Mandatory training in conflict management for all state employees including awareness of cultural differences and effective listening skills	Develop orientation program in mediation and other dispute resolution skills and program awareness for all state employees. Research train-the-trainer, web-based training, and other methods of delivery for effectiveness and cost-efficiency. Mandate training through Executive Order.
Training for managers and supervisors through a tiered plan	After mandatory orientation, mandate sup/mgr class for all existing and new supervisor managers as part of standard management training.
Train volunteer mediators and facilitators to handle internal mediations and meeting facilitations	Continue training and continuing education of identified state employees (minimum of 40-hour Beginning Mediation class; additional training includes intermediate and advanced skills, and program development training). Maintain and regularly disseminate roster to agency ADR Coordinators, HR Depts., EEO Coordinators, etc. Make access to information as easy as possible through web site, e-mail distribution, mandatory postings, etc.
Train identified stakeholders	Identify stakeholders and mandate comprehensive training in use and purpose of ADR (probably needs to be mandated by new Executive Order).
Develop incentives to agencies to comply with new program	Currently, no incentives exist. RMD can develop insurance premium incentives for participating entities, upon demonstrated compliance with the ADR Act, ExecOrder, and improved loss experience, subject to other cost development factors and fiscal considerations.

Develop detailed plans for program evaluation and measurement of impact on the operations of state government	Develop data gathering criteria and benchmarks in data management systems (ATS, ProLaw and ad hoc reports). Develop quality assurance measures.
Expand UNM conflict management academic program for public servants	Continue to partner with UNM program manager. Develop new programs for other colleges, universities and schools in NM; include UNM-trained mediators in state pool.
Revive ADR Advisory Council	Continue ADR Advisory Council per new Executive Order mandating Council's structure and functions, the designation of working ADR Coordinators, and requirements for individual agency programs, reporting, and structure.
Adopt "best practices" of existing programs at the Dept. of Env. OPF and RLD's ADR program	Continue collaborative working relationship with Env. Dept. and RLD; compile their best practices and incorporate into proposed ADR plan.

## **APPENDIX F**

### **Sample Policy Directives**

*See following four pages.*

## General Policy Statements

Although (agency) hopes that employment disputes with its employees will not occur, (agency) believes that when these disputes do arise, it is in the mutual interest of all concerned to handle them promptly and with a minimum of disturbance to the operations of (agency's) business and the lives of its employees.

(Agency) is committed to providing the best possible working conditions for its employees. Part of this commitment is encouraging an open and frank atmosphere in which any problem, complaint, suggestion or question receives a timely response.

It is the policy of (agency) to manage disputes between employees fairly and equitably through an internal process. Expedient processing and resolution of disputes is in the best interest of the State of NM, its employees, and (agency).

The (agency) recognizes the value of constructive conflict resolution. It promotes alternative dispute resolution as an opportunity for growth for all employees. Employees are encouraged to seek an appropriate resolution to conflict within their organization through discussion with those persons involved. If this does not resolve the conflict, the parties may seek assistance of the informal mechanisms described in this policy.

The (agency) offers Alternative Dispute Resolution to resolve selected personnel practice complaints. ADR, used in appropriate circumstances, can yield results that are faster, less expensive, and less contentious than traditional complaint processing. The (agency) primarily uses mediation to provide parties the opportunity to resolve an (agency) complaint without the need for lengthy investigation or costly litigation.

All (agency) employees have unhindered access to Alternative Dispute Resolution. This means they have the right to report problems, concerns, or grievances regarding any aspect of their employment to (HR, Employee Relations, ADR Coordinator).

An agency may use an ADR procedure to resolve any dispute, issue or controversy involving any of the agency's operations, programs, or functions, including formal and informal adjudications, rule-makings, enforcement actions, permitting, certifications, licensing policy development, and contract administration. Alternative dispute resolution procedures are voluntary and may be used at the discretion of the agency or at the request of an interested party to a dispute. 12-8A-3 A NMSA 1978.

(Agency) supports employees resolving many workplace differences through relatively informal procedures. (Agency) endorses the establishment of a mediation program to serve as an alternative dispute resolution process. This policy addresses the procedures to be followed by employees wishing to pursue the mediation of an employment-related dispute.

The purpose of this policy is to encourage supervisors and managers to work together to resolve their differences. The (agency) values open communication between supervisors and employees, and through the mediation process the (agency) provides a forum in which employees can freely talk while addressing mutual concerns.



STATE OF NEW MEXICO

REGULATION & LICENSING DEPARTMENT
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Construction Industries Division (505) 476-4700
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Manufactured Housing Division (505) 476-4770
Securities Division (505) 476-4580

Bill Richardson
GOVERNOR

Edward J. Lopez, Jr.
SUPERINTENDENT

MEMORANDUM

TO: All Division Directors and Supervisors
FROM: Edward J. Lopez, Jr.
DATE: February 22, 2006
RE: Alternative Dispute Resolution

The Office of the Superintendent remains committed to ensuring that the Department utilizes Alternative Dispute Resolution Services as a method of resolving disputes and encourages participation of all RLD staff through the following directives:

- 1. Subject to the needs and priorities of the business, RLD staff (employees) shall be permitted a reasonable period of time during work hours to take advantage of training opportunities to acquire and enhance ADR skills (i.e. mediation, facilitation, conciliations, hearing officer, etc.).
2. Subject to the needs and priorities of the business, RLD staff (employees) shall be permitted a reasonable period of time (up to a maximum of eight (8) hours per month) during work hours to participate in ADR events sponsored by RLD ADR Services that serve to utilize or enhance their ADR skills (i.e. ADR Group meetings and activities, mediations, facilitations, administrative hearings, etc.)
3. Subject to the needs and priorities of the business, staff members shall confer with and secure prior approval of supervisors to ensure that time devoted to participation in ADR events and training does not materially impact the productivity of their RLD subdivision.

Please free to discuss any supervisory questions or concerns that might arise, from time to time, relative to situations that are within the subject matter of this directive with RLD's ADR Coordinator (JJ Walker).

Thank you for your cooperation and participation.





**BILL RICHARDSON**  
GOVERNOR

**PHIL EWING**  
CHAIR

**New Mexico**  
**State Personnel Board**  
**State Personnel Office**

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**SANDRA K. PEREZ**  
DIRECTOR

**EVANGELINE J. TINAJERO**  
DEPUTY DIRECTOR

**GARY L. J. GIRON**  
DEPUTY DIRECTOR

**TO:** CABINET SECRETARIES AND AGENCY DIRECTORS  
**FROM:** SANDI PEREZ, STATE PERSONNEL OFFICE DIRECTOR  
**SUBJECT:** ADR in SPO Adjudications  
**DATE:** March 7, 2006

Beginning on January 1, 2006, classified employees who have been disciplined (suspended, demoted or dismissed) and who appeal to the State Personnel Board have the option of choosing ALTERNATIVE DISPUTE RESOLUTION (ADR) in an attempt to resolve the issues involved prior to the onset of an administrative hearing.

The State Personnel Office (SPO) implemented the ADR option to afford the parties an opportunity to reach a fair, timely and cost effective resolution of a dispute between the employee and agency. The use of ADR in the appeals process is consistent with Executive Order 05-047. So far, 3 of 11 appeals filed in 2006 have requested ADR services.

The use of ADR at SPO is dependant upon use of voluntary settlement facilitators from various state agencies whose offices are spread throughout the state. To date, the Office of Cultural Affairs, CYFD, and the Department of Transportation have graciously allowed their trained settlement facilitators to assist sister agencies and their employees in resolving disciplinary actions.

The success or failure of this ADR program depends on state agencies helping each other by allowing their respective employees to act as settlement facilitators. The level of cooperation required should take into account a reasonable amount of time a few instances each year to observe ADR sessions, conduct ADR sessions, and attend ADR training. It is anticipated that each settlement facilitator will be called on only a few times each calendar year.

SPO encourages each state agency to identify and make available on a reasonable basis select employees to participate in this innovative and effective tool for the resolution of disciplinary appeals. If the program is successful, there will be tremendous cost savings and increased productivity across state agencies.

# COPY



BILL RICHARDSON  
GOVERNOR

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RON CURRY  
SECRETARY

DERRITH WATCHMAN-MOORE  
DEPUTY SECRETARY

April 6, 2006

Secretary Arturo L. Jaramillo  
General Services Department  
P.O. Drawer 26110  
Santa Fe, NM 87502


RE: New Mexico Environment Department Support of Executive Order 05-047

Dear Secretary Jaramillo:

In support of the Governor's Executive Order 05-047, the New Mexico Environment Department proposes and offers to promote facilitation as an effective way to work on selected environmental public policy issues. We offer to take action on the following, including offering staffing support:

1. Support a program in the Governor's Office to convene groups on a specified topic when requested by a state agency or other government official. We believe the Oregon Solutions model is an effective program which could be modified to meet New Mexico's needs;
2. Create an NMED policy manual on facilitation options to assist our agency in deciding whether/ when to use a facilitated process. We are willing to share this resource with other interested agencies;
3. Provide/ support training opportunities for managers to learn about leadership and advanced trainings on facilitation;
4. Assist GSD in issuing a global RFP for facilitators and mediators to be placed on contract/ price agreements; and
5. Collect information on successful facilitated processes at NMED and other agencies.

Thank you for all of the efforts of your staff at GSD to move forward on this Executive Order. Your staff has done an excellent job of putting together a comprehensive report to the Governor on alternative dispute resolution and prevention.

Sincerely,  
  
Cindy Padilla  
Interim Deputy Secretary