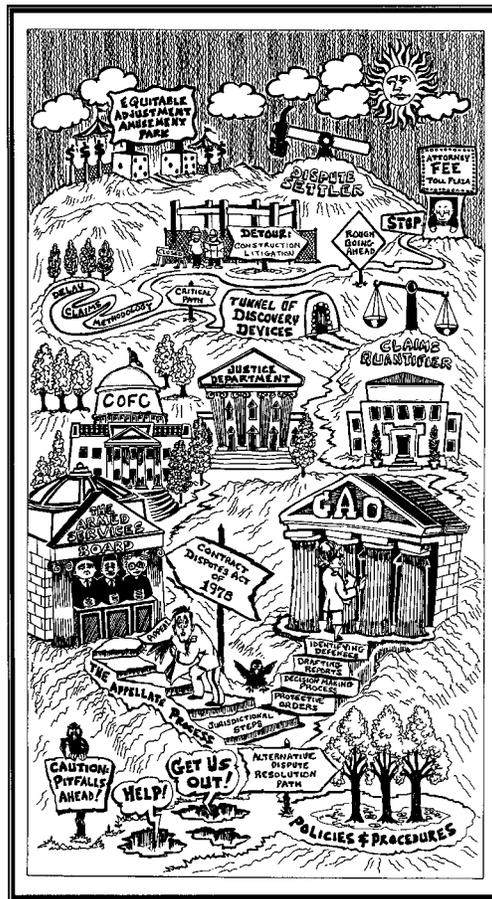


# Chapter 12: Alternative Dispute Resolution: Negotiation



Fourth  
**CONTRACT LITIGATION COURSE**

## **CHAPTER 12**

### **ALTERNATIVE DISPUTE RESOLUTION**

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## CHAPTER 12

### ALTERNATIVE DISPUTE RESOLUTION

#### I. REFERENCES.

- A. Administrative Disputes Resolution Act, 5 U.S.C. §§ 571-84.
- B. Contract Disputes Act, 41 U.S.C. §§ 601-16.
- C. Arbitration, 9 U.S.C. §§ 1 through 14.
- D. FAR Subpart 33.2 - Disputes and Appeals.
- E. Executive Order No. 12988, 65 Fed. Reg. 5 (February 5, 1996)
- F. Executive Order No. 12979, 60 Fed. Reg. 55,171 (October 25, 1995).
- G. DOD Directive No. 5145.5, "Alternative Dispute Resolution."
- H. DoJ guidance, Confidentiality in Federal Alternative Dispute Resolution Programs, 65 Fed. Reg. 83,085 (December 29, 2000).
- I. DoJ Handbook for Federal Agencies, Core Principles for Federal Non-Binding Workplace ADR Programs; Developing Guidance for Binding Arbitration, 65 Fed. Reg. 50,005 (August 8, 2000).
- J. Bernard V. Parrette, The Contract Disputes Act and the Administrative Dispute Resolution Act: A Richness of Remedies, Finally Ready for Trial?, 20 Pub. Con. L.J. 293 (1990).

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- K. Frank Carr, Alternative Dispute Resolution in Construction Claims Deskbook, 451 (John Wiley & Sons, 1996).
- L. John McC. Treanor, ADR in the Federal Government, (Naval Center for Acquisition Training, 1996).

## II. BACKGROUND.

- A. The Contract Disputes Act of 1978 (CDA) was one of the first forms of Alternate Dispute Resolution specifically devised for contract disputes. The CDA requires the Boards of Contract Appeals to “provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes.” 41 U.S.C. § 607(e).
  - 1. The CDA was designed to encourage the resolution of contract disputes by negotiation prior to the onset of formal litigation. S. Rep. No. 95-1118, reprinted in 1978 U.S.C.C.A.N. 5235
  - 2. The CDA favors negotiation between the contractor and the agency at the claim stage, before litigation begins. It is at this stage that the agency is typically represented by the contracting officer, who makes the initial decision on a contractor’s claim. If the dispute cannot be resolved between the contractor and the contracting officer, the CDA requires the contracting officer to issue a final decision. The contractor can then appeal this final decision to either a Board of Contract Appeals or the Court of Federal Claims. 41 U.S.C. § 605; FAR 33.206 and 33.211.
  - 3. Since the enactment of the CDA, it has become clear that Congress’ goal of providing an inexpensive method for contractors to pursue appeals has not been realized. The judicialized rules of practice and procedure followed by the Boards, combined with the complex nature of many contract claims, has resulted in appeals that are as time-consuming as litigation in federal court.
  - 4. The Army Corps of Engineers was one of the first government agencies to seriously consider the use of Alternative Dispute Resolution (ADR). The Engineers developed ADR procedures to resolve contract disputes because of:

- a. the high costs associated with formal litigation;
  - b. the delays in obtaining board decisions; and,
  - c. the disruptions to the agency/management associated with defending against contractor appeals.
- B. Alternative Disputes Resolution Act of 1990. (ADRA). By the end of the 1980s, Congress found that “administrative proceedings had become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes.” ADRA, Pub. L. No. 101-552, § 2(2), 104 Stat. 2738 (1990).
- 1. Congress decided that alternative dispute resolution, used successfully in the private sector, would work in the public sector and would “lead to more creative, efficient and sensible outcomes.” ADRA, Pub. L. No. 101-552, § 2(3) and (4), 104 Stat. 2738 (1990).
  - 2. The ADRA explicitly authorizes federal agencies to use ADR to resolve administrative disputes, including contract disputes. 41 U.S.C. § 605(d).
  - 3. Under the ADRA, ADR means any procedure used to resolve issues in controversy, including: ombuds, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, or any combination of these techniques. 5 U.S.C. § 571(3).
- C. On October 19, 1996, Congress enacted the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat 3870, amending 5 U.S.C. §§ 571-584 (see also Federal Acquisition Circular 97-09, 63 Fed. Reg. 58,586 (Final Rules) (1998), amending the FAR to implement the ADRA). The Act:
- 1. permanently authorized the ADR Act;
  - 2. eliminated the right of federal agencies to opt out of arbitration decisions with which they disagreed;

3. exempted dispute resolution communications relative to ADR from disclosure under the Freedom of Information Act; and
  4. authorized an exception to full and open competition for the purpose of contracting with a “neutral person” for the resolution of any existing or anticipated litigation or dispute.
- D. It is now the government’s express policy to attempt to resolve all contract disputes at the contracting officer level. Agencies are encouraged to use ADR procedures to the maximum extent practicable. FAR 33.204.
1. Agency implementation. The Air Force institutionalized its use of ADR by issuance of a comprehensive policy on dispute resolution entitled “ADR First.” The policy states that ADR would be the first-choice method of resolving contract disputes if traditional negotiations fail, and represents an affirmative determination to avoid the disruption and high cost of litigation. ADR: Air Force Launches New ADR Initiative; Drafts Legislation to Fund ADR Settlements, Fed. Cont. Daily (BNA) (Apr. 28, 1999).
  2. Methods. The methods by which agencies implement ADR use are numerous. Examples include:
    - a. Corporate-level memoranda of agreement (MOAs) between the agency and its contractors that agree in broad terms to the use of ADR. When negotiations at the contracting officer level reach an impasse, the parties agree to use to the maximum extent feasible one or more of the ADR processes contemplated by FAR Part 33.2 to reduce or eliminate the need for litigation.
    - b. Policy initiatives directing all agency major weapon system program managers to set forth in specific terms how they will use ADR to avoid disputes at the program level.

### III. TYPES OF ADR METHODS.

- A. The purpose of any ADR method is to settle the dispute without resorting to costly and time-consuming litigation before the courts and boards. There are a wide variety of ADR methods available, and ADRA authorizes the use of any appropriate method (with some restraints on the use of binding arbitration). ADR methods exist on a continuum, ranging from dispute avoidance to litigation at a contract appeals board.
  
- B. There are four elements essential to successful use of ADR (FAR 33.214):
  - 1. existence of an issue in controversy;
  - 2. a voluntary election by both parties to participate in the ADR process;
  - 3. an agreement on the type of alternative procedures and terms to be used in lieu of formal litigation;
  - 4. participation in the process by officials of both parties who have authority to resolve the issue in controversy; and,
  
- C. Dispute Avoidance (Partnering).
  - 1. Partnering has been described as “attitude adjustment.” It is a process by which the contracting parties form a relationship of teamwork, cooperation, and good faith performance. It requires the parties to look beyond the strict bounds of the contract to develop solutions which promote the parties’ overriding common goals. Thus, it is a long term commitment between two or more parties for the purpose of achieving mutually beneficial goals.
    - a. The concept has been likened to a three-legged race. The parties must communicate continuously, and be able to foresee where problems are likely to develop, then work together to avoid or resolve them.

- b. Partnering fosters communication and agreement on common goals and methods of performance. It seeks to develop a “we” attitude toward contract performance, rather than an “us and them” attitude. Examples of common goals are:
  - (1) the use of ADR and elimination of litigation;
  - (2) timely project completion;
  - (3) high quality work;
  - (4) safe workplace;
  - (5) cost control;
  - (6) value engineering;
  - (7) reasonable profit;
  - (8) paperwork reduction.

2. Partnering is not:

- a. Mandatory. It is not a contractual requirement and does not give either party legal rights. The parties must voluntarily agree to the process, because it is a commitment to an on-going relationship. If either party harbors an adversarial attitude, the process will not work.
- b. A “Cure-All.” Reasonable differences will still occur, but one of the benefits of partnering is it ensures the differences are honest and in good faith.

3. Implementing Partnering. Although voluntary, partnering is typically implemented through formal, specific methods which the parties agree upon. An initial workshop, which includes all key players, is followed by subsequent workshops to evaluate and reinforce performance.
  - a. Requires commitment of top management officials of all parties.
  - b. Parties need to agree to a joint mission statement or formal charter, which lays out general and specific overriding mutual goals.
  - c. Parties need to establish clear lines of communication and responsibility, and agree to ADR methods for resolving legitimate disagreements.
  - d. Partnering can begin before the contract is signed. By getting the parties to work together during proposal preparation, the proposals can be more accurate, less costly, and more workable.

#### D. Unassisted Negotiation.

1. In an unassisted negotiation, the parties attempt to reach a settlement without involvement of outside parties.
2. Elements of Successful Negotiation:
  - a. Parties identify issues upon which they differ.
  - b. Parties disclose their respective needs and interests.
  - c. Parties identify possible settlement options.
  - d. Parties negotiate terms and conditions of agreement.
3. Goal: Each party should be in a better position than if they had not negotiated.

E. Third-Party Assistance.

1. Mediation. Mediation is helpful when the parties are not making progress negotiating between themselves. Mediation is simply negotiation with the assistance of a third party neutral who is an expert in helping people negotiate. See Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts, Abrahamson, 64 N.Y. St. B.J. 48.
  - a. The mediator should be neutral, impartial, acceptable to both parties, and should not have any decision making power.
  - b. A professional mediator will normally approach a dispute with a formal strategy, consisting of a method of analysis, an opening statement, recognized stages of mediation and a variety of mediation tools for breaking impasses and bringing about a resolution.
  - c. There are a large number of skilled mediators available in the US, and a federal agency, the Federal Mediation and Conciliation Service (FMCS), is available to assist with mediation.
  - d. Mediators (as well as arbitrators and other neutrals) may be retained without full and open competition. FAR 6.302-3(a)(2)(iii) and (b)(3). Moreover, adjudicatory functions (like mediating and arbitrating) in ADR methods are not inherently governmental functions for which agencies may not contract. See FAR 7.503(c)(2).
  - e. Section 7 of the 1996 ADRA requires the President to designate an agency or establish an interagency committee to facilitate and encourage the use of ADR.
  - f. Mediation can also take place after appeal, with a neutral judge acting as the mediator. Integrated Systems Group, Inc. v. Department of Energy, GSBICA No. 12176-C, 93-3 BCA ¶ 25,950.

2. Mini-Trials. The term mini-trial is a misnomer. It is not a shortened judicial proceeding. In a mini-trial, the parties present either their whole case, or specific issues, to a special panel in an abbreviated hearing. An advantage of the mini-trial is it forces the parties to focus on a dispute and settle it early.
  - a. Mini-trials have been used by the Army Corps of Engineers in several cases. The first was the Tennessee Tombigbee Construction, Inc. in 1985. In that case, Professor Ralph Nash served as the neutral advisor, and a \$17.25 million settlement was worked out between the government and the contractor. See 44 Federal Contracts Reporter (BNA) 502 (1985).
  - b. Participants in a mini-trial include the principals, the parties' attorneys, and witnesses. The principals may choose to employ a neutral advisor.
  - c. In a mini-trial, the attorneys engage in a brief discovery process and then present their case to a specially constituted panel. The panel consists of party principals, and the neutral advisor if desired.
    - (1) Each party selects a principal to represent it on the panel. The principal should have sufficient authority to allow her to make unilateral decisions regarding the dispute, and she should not have been personally or closely involved in the dispute.
    - (2) The parties should jointly select the neutral advisor, and share his expenses. The neutral advisor should possess negotiation and legal skills, and if the issues are highly technical, a technical expert is desirable.
      - (a) The neutral advisor may perform a number of functions, including answering questions from the principals, questioning witnesses and counsel to clarify facts and legal theories, acting as a mediator and facilitator during negotiations, and generally presiding over the mini-trial to keep the parties on schedule.

- (b) If the case is already before a Board of Contract Appeals or the Court of Federal Claims, the neutral advisor will likely be a judge other than the presiding judge. See Denro, Inc. v. Department of Transportation and Dep't of Defense, GSBCA No. 11906-C, May 27, 1993, 1993 GSBCA Lexis 288.
- d. After hearing the case (which may take about two or three days) the principals try to negotiate a settlement. If they reach an impasse, the neutral advisor may try to mediate a solution. If the advisor is a judge, he may discuss the likely outcome if the case were to go to court or the board.
- e. Mini-trials are most appropriate for factual disputes.
- f. Because they are more structured than direct negotiation, the parties may incur more legal costs because of discovery and preparation.
- g. For further discussion of mini-trials, see Page and Lees, 18 Pub. Cont. L.J. 54; Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts; and Abrahamson, 64 N.Y. St. B.J. 48.

F. Adjudicated Methods for Resolving Disputes.

- 1. Arbitration. In the civil context, arbitration may be binding or non-binding. In the government contracts context, there has been uncertainty concerning the government's authority to agree to, and participate in, binding arbitration. The government's long-established position that its participation in such arbitration is unconstitutional has changed. Indeed, the 1996 ADRA expressly authorized agencies to use binding arbitration with prescribed constraints.
  - a. Non-Binding Arbitration. This form of arbitration aids the parties in making their own settlement. It is best used when senior managers do not have time to sit through a mini-trial and when disputes are highly technical.

- (1) Normally an informal presentation of the case, done by counsel with client input.
  - (2) Evidence is presented by document, deposition, and affidavit.
  - (3) Few live witnesses.
  - (4) Arbitration panel consists of one to three arbitrators, who serve to control the proceeding, but do not take an active role in the case presentation.
  - (5) The arbitrator's decision or opinion, sometimes called an award, serves to further settlement discussions. The parties get an idea of how the case may be decided by a court or board.
  - (6) The arbitrator may also evolve into the role of a mediator after a decision is issued.
- b. Binding Arbitration. This form of arbitration results in an award, enforceable in courts.
- (1) Normally a formal presentation of the case, much like a trial, though not necessarily done in a courtroom. Strict rules of evidence may not be followed.
  - (2) Evidence is presented by document, deposition, affidavit, and live witnesses, with full cross-examination.
  - (3) Arbitration panel consists of one to three arbitrators, who serve to control the proceeding, but do not take an active role in the case presentation.

- (4) Private conversations between the parties and the arbitrators are forbidden. This is much different than mediation, during which private conversations between a party and the mediator are not uncommon.
  - (5) The arbitrator has full responsibility for rendering justice under the facts and law.
  - (6) The arbitrator's award is binding, so the arbitrator must be more careful about controlling the parties' case presentation and the reliability of the evidence presented.
- c. Arbitration proceedings and the arbitrator's qualifications, authority, and award are carefully spelled out under ADRA. See 5 U.S.C. §§ 575-80.
2. Summary Hearings. In practice before the Boards of Contract Appeals, a summary hearing results in a binding decision. The parties try the case informally before a board judge on an expedited, abbreviated basis. There is no appeal from the judge's decision.
  3. Board Neutrals/Settlement Judge. The presiding judge refers the case for ADR to the Chief Judge or Clerk for assignment to a neutral or settlement judge. This judge then hears a brief presentation of the case and provides feedback to the parties, as an aid to settlement negotiations. In this case, if ADR is unsuccessful, the case is sent back to the presiding judge for trial. See Westinghouse Electric Corp. v. Department of Transportation and Dep't of Defense, GSBCA No. 11907, 93-3 BCA ¶ 26,203 (successful use of board neutral); see also, Court of Federal Claims General Order # 13 (encouraging ADR).

#### IV. TIME PERIODS FOR USING ADR.

##### A. Before Appeal or Protest.

1. Greatest latitude and flexibility for settlement exists at this stage. However, the contracting officer's ability to settle may be subject to agency approval, and oversight by GAO, the IG and Congress. Brittin, 19 Pub. Cont. L.J. at 217.
2. Appeals. ADRA provides clear and unambiguous government authority for contracting officers to voluntarily use any form of ADR during the period before an appeal is filed. 5 U.S.C. § 572(a); FAR 33.214(c). See also Parrette, 20 Pub. Con. L.J. at 300-01. Ultimately, the use of ADR is up to the contracting officer and the contractor, who may or may not favor an ADR proceeding.
3. Protests. The FAR has long provided authority for agencies to hear protests. FAR 33.103 implements Executive Order 12979 and requires agencies to:
  - a. Emphasize that the parties shall use their best efforts to resolve the matter with the contracting officer prior to filing a protest, FAR 33.103(b);
  - b. Provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests, using ADR techniques where appropriate, FAR 33.103(c);
  - c. Allow for review of the protest at "a level above the contracting officer" either initially or as an internal appeal, FAR 33.103(d)(4) and,
  - d. Withhold award or suspend performance if the protest is received within 10 days of award or 5 days after debriefing. FAR 33.103(f)(1)-(3). But an agency protest will not extend the period within which to obtain a stay at GAO, although the agency may voluntarily stay performance. FAR 33.103(f)(4).

**B. After Appeal or Protest.**

1. Once an appeal is filed, jurisdiction passes to the BCA, and the BCA can urge the parties to try ADR if they have not done so already.
2. When an appeal is filed, the Board gives notice suggesting the parties pursue the possibility of using ADR, including mediation, mini-trials, and summary hearings with binding decisions. At this stage, however, the parties are more entrenched in their positions, and settlement may be less likely.
1. The ASBCA has made aggressive use of ADR services in contract appeals disputes.
2. Parties who file appeals with the Court of Federal Claims will also be informed of voluntary ADR methods available through the court. In 2001 the Court began an ADR pilot program, in which some cases are assigned simultaneously to an ADR judge. The goal of the pilot is to determine whether early neutral evaluation by a settlement judge will help parties understand their differences and their prospects for settlement.
3. When a bid protest is filed with the General Accounting Office (GAO), the parties may utilize a GAO “outcome prediction” ADR conference, which involves use of a GAO staff attorney who advises the parties as to the perceived merits of the protest in light of the case facts and prior GAO decisions.

**V. APPROPRIATENESS OF ADR.**

- A. When is it Appropriate to Use ADR? Agencies “may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding.” 5 U.S.C. § 572(a). Also, government attorneys are to “make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial.” Exec. Order No. 12988, § 1(c).

- B. When is it Inappropriate to Use ADR? An agency should consider not using ADR when:
1. A definitive or authoritative resolution of the matter is required for precedential value, and an ADR proceeding is not likely to be accepted generally as an authoritative precedent. 5 U.S.C. § 572(b)(1);
  2. The matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and an ADR proceeding would not likely serve to develop a recommended policy for the agency. 5 U.S.C. § 572(b)(2);
  3. Maintaining established policies is of special importance, so that variations among individual decisions are not increased and an ADR proceeding would not likely reach consistent results among individual decisions. 5 U.S.C. § 572(b)(3);
  4. The matter significantly affects persons or organizations who are not parties to the proceeding. 5 U.S.C. § 572(b)(4);
  5. A full public record of the proceeding is important, and an ADR proceeding cannot provide such a record. 5 U.S.C. § 572(b)(5); or,
  6. The agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in light of changed circumstance, and an ADR proceeding would interfere with the agency's ability to fulfill that requirement. 5 U.S.C. § 572(b)(6).

## **VI. STATUTORY REQUIREMENTS AND LIMITATIONS.**

- A. Voluntariness. ADR methods authorized by the ADRA are voluntary, and supplement rather than limit other available agency dispute resolution techniques. 5 U.S.C. § 572(c).
- B. Limitations Applicable to Using Arbitration.

1. Arbitration may be used by the consent of the parties either before or after a controversy arises. The arbitration agreement shall be:
  - a. in writing,
  - b. submitted to the arbitrator,
  - c. specify a maximum award and any other conditions limiting the possible outcomes. 5 U.S.C. § 575(c)(1) and (2).
2. The Government representative agreeing to arbitration must have express authority to bind the Government. 5 U.S.C. § 575(b).
3. Before using binding arbitration, the agency head, after consulting with the Attorney General, must issue guidance on the appropriate use of binding arbitration. 5 U.S.C. § 575(c); see also DFARS Case 97-D304.
4. An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit. 5 U.S.C. § 575(a)(3).
5. If a contractor rejects an agency request to use ADR, the contractor must notify the agency in writing of the reasons. FAR 33.214(b).
6. Once the parties reach a written arbitration agreement, however, the agreement is enforceable in Federal District Court. 5 U.S.C. § 576; 9 U.S.C. § 4.
7. An arbitration award does not become final until 30 days after it is served on all parties. The agency may extend this 30 day period for another 30 days by serving notice on all other parties. 5 U.S.C. § 580(b)(2).
8. A final award is binding on the parties, including the United States, and an action to enforce an award cannot be dismissed on sovereign immunity grounds. 5 U.S.C. § 580(c).

- a. This provision, enacted as part of the 1996 ADRA, put to rest for the time being a long standing dispute as to whether an agency can submit to binding arbitration.
  - b. DOJ's Historical Policy. The Justice Department had long opined that the Appointments Clause of Article II provides the exclusive means by which the United States may appoint its officers. DOJ's opinion was that only officers could bind the United States to an action or payment. Because arbitrators are virtually never appointed as officers under the Appointments clause, the government was not allowed to participate in binding arbitration.
  - c. DOJ's Present Position. However, DOJ has now opined that there is no constitutional bar against the government participating in binding arbitration if:
    - (1) the arbitration agreement preserves Article III review of constitutional issues; and
    - (2) the agreement permits Article III review of arbitrators' determinations for fraud, misconduct, or misrepresentation. DOJ also points out that the arbitration agreement should describe the scope and nature of the remedy that may be imposed and that care should be taken to ensure that statutory authority exists to effect the potential remedy.
  - d. Judicial Interpretation. The Court of Federal Claims has found DOJ's memorandum persuasive and agreed that no constitutional impediment precludes an agency from submitting to binding arbitration. Tenaska Washington Partners II v. United States, 34 Fed. Cl. 434 (1995). Of course, if DOJ's original position is correct, the ADRA of 1996 is unconstitutional.
- C. Judicial Review Prohibited. Generally, an agency's decision to use or not use ADR is within the agency's discretion, and shall not be subject to judicial review. 5 U.S.C. § 581(b)(1).
- 1. However, arbitration awards are subject to judicial review under 9 U.S.C. § 10(b).

2. Section 10(b) authorizes district courts to vacate an arbitration award upon application of any party where the arbitrator was either partial, corrupt, or both.

## **VII. CONCLUSION.**